

## ACCOUNTING FOR DEMOCRACY AND THE RULE OF LAW IN THE QUEBEC SECESSION REFERENCE

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*Cet article ainsi que celui qui le succède ont été commissionnés par l'ABC pour élaborer sur certaines questions présentement posées dans la Constitution canadienne devant la Cour suprême du Canada.*

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### Introduction

In the fall of 1997, the Supreme Court of Canada will hear argument on a *Reference Concerning Certain Questions Relating to the Secession of Quebec from Canada*.<sup>1</sup> The juridical stakes surrounding the *Reference* are high. The political stakes are higher still. The Government of Quebec has refused to take part, protesting that the issues are political and for the people of Quebec alone to decide. Neither was the *Reference* the preferred option of the federal government, whose "Plan A" focusses on persuading Quebecers of the positive value of remaining in Canada.

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<sup>1</sup> Supreme Court File No. 25506. The *Reference* was initiated by Order-in-Council P.C. 1996-1497, dated September 30, 1996.

As unwillingly the parties or the Court may regard the *Reference*, none can doubt its significance. The Court is being asked to establish a new benchmark in debates about Quebec's possible secession from Canada. It is remarkable, after three decades of preoccupation with Quebec independence, that the legal criteria and process for secession are so fundamentally contested, and untested. It is even more remarkable that the Quebec government takes the position that these are not legal questions. Indeed, the very fact of asking the questions draws an indignant reaction; Premier Lucien Bouchard has already said that the decision «will be a political ruling and will be null and void and we will ignore it.»<sup>2</sup>

Ultimately, the *Secession Reference* will be a test of the Supreme Court's diplomatic skills: how to say enough — but not too much — about the legal doctrines applicable to a potential secession, and how to say it in a way that enables rather than distracts from the political process that will ultimately determine whether or how Quebec secedes from Canada. Premier Bouchard is right that the underlying questions are political. However, a sane and effective political process requires a legal framework, both constitutional and international. That is particularly true for such potentially traumatic legal events as secession from a long-standing federation. There must be a legal framework — a rule of law. And there must be a mutual willingness to respect it.

Ironically, the principal reason why Quebec secession continues to be such a live issue is that our rules for making constitutional change in Canada are so complex, and so favouring of the status quo, that it has been almost impossible to make formal amendments, either specifically to include Quebec's aspirations or to meet a more comprehensive agenda for change.<sup>3</sup> The interveners in the *Secession Reference* contend that these same amending rules should govern the terms and process for secession; some interveners go further and argue for additional conventional requirements of inclusion and consent before secession

<sup>2</sup> Ottawa plots new betrayal: Bouchard» *The Gazette* (13 May 1997) A11. See also: "Un 'jugement politique' que le Québec ignorera" *Le Droit* (13 mai 1997) 19; "Un gouvernement du PQ fera outrage à la Cour suprême" *Le Devoir* (13 mai 1997) A10; "Québec ne tiendra aucun compte du jugement de la Cour suprême" *La Presse* (13 mai 1997) B4; "Nul et non avvenu: Bouchard rejette tout 'jugement politique' de la Cour suprême" *Le Soleil* (13 mai 1997) A7.

<sup>3</sup> For a review of events leading to and surrounding the Meech Lake and Charlottetown processes, see: P.W. Hogg, "Amending the Constitution of Canada" (1993) O.H.L.J. 41; J.Y. Morin and J. Woehrling, *Les Constitutions du Canada et du Québec: Du régime français à nos jours*, 2e éd., (Montréal: Éditions Thémis, 1994). See also: J. Webber, *Reimagining Canada: Language, Culture, Community and the Canadian Constitution* (Kingston & Montreal: McGill-Queen's, 1994); P. Fournier, *A Meech Lake Post-Mortem* (Kingston & Montreal: McGill-Queen's, 1991); L.A. Pal and F.L. Seidle, "Constitutional Politics 1990-92: The Paradox of Participation", in S.D. Phillips (ed.), *How Ottawa Spends: A More Democratic Canada...? 1993-94* (Ottawa: Carleton University Press, 1993) 143-202; M. Dunsmuir, *Constitutional Activity from Patriation to Charlottetown* (Ottawa: Library of parliament, 1995); *Le Québec et la Restructuration du Canada, 1980-1992*. Eds. L. Balthazar, G. LaForest et V. Lemieux (Sillery, Que.: Septentrion, 1991); R. Breton, *Why Meech Failed: Lessons for Canadian Constitutionmaking* (Toronto: C.D. Howe Institute, 1992).

could take effect. As for international law, it too is resistant to change, favouring territorial integrity and the unity of states.

Underlying the *Reference* is a realization that there will be dramatically different agendas in the event of a vote for Quebec independence. The Quebec government will be anxious to proceed while the referendum or electoral mandate, whatever its amplitude, holds. The constitution's amending formulae and processes do not favour speed. They are not conceived to deal with breakup, but to reflect the deliberation and equilibrium of a complex, pluralistic federal state. Likewise for international law; state recognition is not a decision that other international actors will reach in haste, especially where it involves the breakup of a nation state that, by any international standard, would be considered a success story. So, the rule of law requires time and deliberation. Democracy, on the other hand, at least as we have practiced it in Canada, requires speed. Timing is everything — especially for dramatic change where the "middle" is fragile.

A Quebec vote in favour of secession will present a delicate interface of politics and law. That interface will not be resolved solely on either «rule of law» grounds or on «democratic» grounds, at least not so long as the rule of law gets you stalemate and democracy gets you juridical chaos. It will require a large measure of statecraft, consensus building, willingness to respect the positions of others, rigorous analysis of facts, and openness to change. Above all, it will require leadership that respects both democracy and the rule of law, and that sees the two as necessarily interrelated. That insight, or that vision, should not be expected to emerge wholesale from the *Secession Reference*. Nor should it have to. In an ideal world, the political-legal dynamics around secession would already be well understood. However, since various players have been in states of denial, either about the relevance of law or about the political prospects of independence, those understandings are not well settled. At the very least, the Supreme Court *Reference* is an opportunity to relocate — or restart — the dialogue somewhere between chaos and impasse.

### *The Background*

There are many historical points that could be identified as background for this *Reference*: the *Quebec Act* of 1774, the 1867 *Constitution Act*, the 1980 Quebec Referendum, the 1982 constitutional patriation, or the failed Meech Lake or Charlottetown Accords. In the interest of economy, we can begin with the draft bill, *An Act respecting the sovereignty of Quebec*, presented to the Quebec National Assembly on December 6, 1994.<sup>4</sup> The explanatory notes indicate that the purpose of the draft bill was to lay out the political program of the Quebec

<sup>4</sup> National Assembly, 1st Sess., 35th Leg., Dec. 6, 1994. See D. Turp, *L'Avant-projet de loi sur la souveraineté du Québec: Texte annoté* (Cowansville: Yvon Blais, 1995).

government to achieve a sovereign country, comprising the following six steps: (i) publication of the draft bill; (ii) a period of public information and consultation, including the drafting of a «Declaration of Sovereignty»; (iii) discussion and adoption of the draft bill by the National Assembly; (iv) popular approval of the law by means of a referendum; (v) a period of discussion with the rest of Canada on transitional measures, notably dealing with shared property and debt, which period would also serve to prepare Quebec's new constitution; and, (vi) accession of Quebec to sovereignty.

The sixteen articles of the draft bill set out the terms of sovereignty, beginning with the s.1 declaration: «Quebec is a sovereign country.» The bill provides a monetary regime (Quebec would keep the Canadian dollar), judicial transitions, citizenship, continuity of laws, and international obligations (Quebec would assume obligations and rights currently appertaining to Canada under international treaties). Provision is made authorizing the Quebec government to conclude agreements with Canada relative to division of public debt and public property, and regarding any other matter likely to facilitate accession sovereignty. Finally, the law would come into force after one year from the Referendum, with or without agreements between Quebec and Canada.

The draft bill was the subject of a mass public consultation across Quebec, through a series of Regional Commissions on the Future of Quebec, which in turn led to the preparation of a report by a National Commission consisting of the Presidents of the regional commissions.<sup>5</sup> The National Commission made forty recommendations, including an affirmation of sovereignty as the only option apt to respond to the collective aspirations of Quebecers.<sup>6</sup> The next major event was a June 1995 tripartite accord among the three sovereigntist political parties of Quebec, which envisaged making an offer to establish a new economic partnership with Canada, in the event of a positive Referendum vote. Should such negotiations prove unsuccessful, within a maximum period of one year, the Accord anticipated that the National Assembly would make a declaration of sovereignty.<sup>7</sup>

On August 10, 1995, Quebec City lawyer Guy Bertrand commenced proceedings in Superior Court contesting the constitutionality of the draft bill and the Quebec government's program for accession to sovereignty. Mr. Bertrand claimed numerous constitutional infirmities, mainly infringements on his rights and freedoms under the *Charter*, as the basis for thirty requested

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<sup>5</sup> *Commission nationale sur l'avenir du Québec — Rapport* (Québec: Publications Québec, 1995). The process was boycotted by the Official Opposition in the National Assembly, the Liberal Party of Quebec, as well as by the Liberal and Progressive Conservative parties of Canada.

<sup>6</sup> *Ibid.* at 78.

<sup>7</sup> *Entente tripartite entre le Parti québécois, le Bloc québécois et l'Action démocratique* (June 12, 1995). Journals of the Assemblée Nationale in September of 1995, as an attachment to Bill 1.

declarations and twenty requests for injunctive relief. The main thrust of the remedies sought was to declare the draft bill unconstitutional and to prevent the referendum.

On August 24, 1995, Quebec Justice Minister Paul Bégin moved to quash the Bertrand litigation in interlocutory proceedings on the ground that the remedies sought would interfere with the privileges of the National Assembly and would interfere with the democratic process in a manner inappropriate for judicial action. Justice Robert Lesage rejected the motions to quash, holding that the issues raised by Mr. Bertrand were serious and that the course of action intended by the government of Quebec was «patently unlawful». In the words of Justice Lesage:

All of the actions taken by the Quebec government, and the procedure described in the draft bill, indicate that the government, through the Prime Minister and other Cabinet ministers, has undertaken, on behalf of Quebec, to proceed with a unilateral declaration of independence and to obtain Quebec's recognition as a distinct state from Canada.

It is manifest, if not expressly stated, that the Quebec government has no intention of resorting to the amending formula in the Constitution to accomplish the secession of Quebec. In this regard, the Quebec government is giving itself a mandate that the Constitution of Canada does not confer on it.

The actions taken by the Government of Quebec in view of the secession of Quebec are a repudiation of the Constitution of Canada.<sup>8</sup>

On the issue of whether the issues raised by Mr. Bertrand were appropriate for judicial determination, Justice Lesage took a strong view on the role of the judiciary as guardians of the rule of law:

The legal system is a manifestation of state sovereignty which must pass muster with the judiciary. In societies that recognize the supremacy of the law, the judiciary exists to enforce the rule of law and, pre-eminently, the laws enacted by the legislature. In a federal system, the legal system includes some rules that govern the distribution of powers between the central state and the federated states. These rules are enforceable by the courts.<sup>9</sup>

In the result, Justice Lesage acknowledged that it would be inappropriate to grant an injunction against the holding of the referendum. Instead, he issued a declaration that the draft bill was a «serious threat» to Mr. Bertrand's rights and freedoms guaranteed by the *Charter*, in particular because it granted the Quebec National Assembly power to proclaim Quebec a sovereign country without following the amending procedure of the Constitution. Costs in the interlocutory proceeding were awarded against Justice Minister Bégin and Premier Parizeau in their respective capacities. The following day, the Quebec government announced that it would not participate in subsequent stages of the Bertrand litigation.

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<sup>8</sup> *Bertrand v. Quebec (Procureur General)* (1995), 127 D.L.R. (4th) 408 at 428 (Translation). Also reported as *Bertrand c. Bégin* (1995), R.J.Q. 2500 (C.S.).

<sup>9</sup> *Ibid.* at 424-25.

On September 7, 1995, Premier Parizeau introduced in the National Assembly *An Act respecting the future of Quebec*. Bill No.1 incorporated the principal elements of the December 1994 draft bill, and affirmed the commitment to become a sovereign country through a referendum vote and the formal offer of economic and political partnership with Canada. The tripartite agreement among the sovereigntist parties was appended as a schedule, and the revised Referendum question introduced.<sup>10</sup> The October 30 Referendum produced a cliff-hanger outcome, with 50.58 % voting "No", and 49.42% voting "Yes". It was clear in the statements of Premier Parizeau and other political leaders that there would be another referendum.

Mr. Bertrand amended his proceedings in April of 1996 and renewed efforts to obtain the permanent and interlocutory injunctions as well as the declaration of nullity. The Quebec Minister of Justice again sought to quash the proceedings on an interlocutory basis. This time, the Attorney General of Canada participated, after having decided against doing so in August of 1995. Justice Minister Alan Rock justified the federal appearance (the government of Canada was named as a third party by Mr. Bertrand) on the basis that the Attorney General has «a duty to protect the integrity of the Constitution and to uphold the role of the courts as the prime defenders of the Constitution and the rule of law.» Justice Robert Pidgeon, like Justice Lesage, rejected the Quebec Attorney General's motion to dismiss, concluding that the plaintiff had raised important questions that should be fully heard and left for a trial judge to determine.<sup>11</sup>

On September 4, 1996, the Quebec Minister of Justice held a press conference to announce that the Quebec government would not participate further in the Bertrand proceedings, reaffirming the government's position that it was for the people of Quebec to determine their future: «We submit that the only judge and the only jury of the future of the Quebec people will be the people of Quebec themselves.» Mr. Bégin protested that the position of the federal government meant that the opposition of Prince Edward Island would be sufficient to block a democratic decision by the Quebec people. The Justice Minister also noted that the process had already cost the Quebec government more than \$100,000, and reiterated the Quebec view that the question was political and not appropriate for judicial decision.<sup>12</sup>

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<sup>10</sup> Bill 1, 1st Sess., 35th Leg., Quebec, 1995. The text of the Referendum question was as follows:

Do you agree that Quebec should become sovereign, after having made a formal offer to Canada for a new Economic and Political Partnership, within the scope of the Bill respecting the future of Quebec and of the agreement signed on June 12, 1995?

<sup>11</sup> *Bertrand v. Bégin et al.*, CS no. 200-05-002117-955, August 30, 1996

<sup>12</sup> In *Roopnarine Singh et al. v. Attorney General of Quebec*, filed Oct. 23, 1995 (S.C. 500 05 11275 593), the applicants sought a declaration that Bill 1 was not within the authority of the Quebec National Assembly. They expressly did not seek to prevent the holding of the Referendum. On April 30, 1996, the Attorney General moved to quash. The matter is still pending.

*The Reference*

On September 26, 1996, Justice Minister Alan Rock announced the intention of the Canadian government to initiate a reference to the Supreme Court of Canada. Mr. Rock emphasized that the federal government was not intending to argue against the legitimacy of a consultative referendum. Rather, the purpose was to avoid the risk that a unilateral declaration of independence would undermine political stability, and to determine in advance of a future referendum the appropriate legal framework for Quebec secession. The Justice Minister's statement to the House of Commons commented at length on the value of the Rule of Law, pointing out that it «permits democracy to flourish because it establishes a stable framework within which the democratic process can work.»<sup>13</sup> The Minister expressed concern that the claim by the Government of Quebec to be entitled to make a declaration of independence, in the event of a majority referendum vote, was “contrary to Canadian law, unsupported in international law and deeply threatening to the orderly governance of our nation.”<sup>14</sup> The Minister announced that the federal government would refer the following three questions to the Supreme Court:

1. Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally?
2. Does international law give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?
3. In the event of a conflict between domestic and international law on the right of the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally, which would take precedence in Canada?

In response to a notification of provincial and territorial Attorneys-General, Manitoba, Saskatchewan, Yukon and the Northwest Territories filed interventions. Interventions were also filed by the Makivik Corporation (representing the Inuit of Nunavik — Northern Quebec), the Grand Council of the Crees (Eeyou Estchee), the Chiefs of Ontario, the Algonquin First Nation Kitigan Zibi Anishnabeg, the Mi'gmaq Nation — Gespegawagi District, the Minority Advocacy and Rights Council, and the Ad Hoc Committee of Women on the Constitution. Individual interventions were received from Guy Bertrand and from Roopnarine Singh *et al.*, whose separate actions in Quebec Superior Court sparked the Reference; and, from Vincent Pouliot, leader of the Libertarian Party of Canada, and Yves Michaud, a former Quebec MNA, Delegate General to France, civil servant and affirmed sovereigntist. With no party expressly representing the position of Quebec, the Supreme Court announced in May of

<sup>13</sup> House of Commons, September 26, 1996, below.

<sup>14</sup> *Ibid.* at 4707. *House of Commons Debates* (26 September 1997) at 4709.

1997 its intentions to appoint an *amicus curiae* to present the legal analysis from that perspective.<sup>15</sup>

### *The Appropriateness of the Reference*

A Supreme Court reference on the legal parameters for Quebec secession was obviously not the federal government's preferred course of action. The government decided against appearing in the first round of the *Bertrand* litigation, in August of 1995, even though named as a third party.<sup>16</sup> The federal strategy through the summer and fall of 1995 was to downplay the likelihood of a vote in favour of separation, and to concentrate instead on the positive case for Quebecers remaining in Canada. The federal government was also concerned that participation in the *Bertrand* litigation could be characterized as anti-democratic and as an attempt to frustrate the referendum process. Perhaps the overriding consideration behind "Plan A" in the summer of 1995 was the federal government's confident expectation that the referendum result would reject the sovereigntist option, and their desire not to do anything to jeopardize that expected outcome.

On May 14, 1996, four days after the announcement that the federal government would intervene in the renewed *Bertrand* litigation, Premier Bouchard moved for an emergency debate in the National Assembly on a motion affirming the right of the Quebec people to determine their own political status.<sup>17</sup> The Premier criticized the federal government for «throwing oil on the fire», for attempting to prevent Quebecers from choosing their own destiny, and

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<sup>15</sup> In mid-July, it was announced that Quebec City lawyer André Joli-Coeur would serve as *amicus*. "La Cour suprême désigne un ami de Parizeau pour défendre le Québec" *La Presse* (15 juillet 1997) A1; "Court role goes to PQ stalwart" *The Globe and Mail* (15 July 1997) A1. For Premier Bouchard's reaction to the announcement that the Supreme Court would appoint an *amicus*, see the reports, at *supra* footnote 2. Also, "Landry vitupère la décision de la Cour suprême" *Le Devoir* (13 mai 1997); Quebec Justice Minister Paul Bégin commented: "Notre réponse demeure la même. C'est une question politique, et non judiciaire, qui va se décider par voie de référendum, point à la ligne." "La Cour suprême désigne un avocat pour représenter le Québec" *Le Soleil* (10 mai 1997) A23.

<sup>16</sup> In August of 1995, both Prime Minister Chrétien and Justice Minister Rock wrote Mr. Bertrand, declining his urging that the federal government intervene in the litigation. The Prime Minister's letter reiterated the federal government's commitment at that time to pursue what is popularly known as «Plan A»:

Je considère que la question centrale est la volonté des Québécois de faire partie du Canada. Nous ne devons pas nous laisser entraîner à examiner comment la séparation pourrait se faire où débattre de la légalité d'une approche par rapport à une autre. J'ai la ferme conviction que la meilleure stratégie face aux tenants de la séparation du Québec est d'insister qu'ils fassent la démonstration que la séparation est dans les meilleurs intérêts des Québécois et d'exiger qu'ils posent une question sans équivoque.

<sup>17</sup> The text of the motion reads as follows: "Que l'Assemblée nationale réaffirme que le peuple du Québec est libre d'assumer son propre destin, de déterminer sans entrave son statut politique et d'assurer son développement économique, social et culturel." Assemblée Nationale, *Journal des débats*, 2e sess., 35e Lég., 22 mai 1996, pp. 1244-68. The Official

for relying on the 1982 *Constitution Act* to do so.<sup>18</sup> In September of 1996, on the day the federal government announced the reference, Quebec Justice Minister Paul Bégin called a press conference to denounce the decision to ask the Supreme Court to «pronounce on the future of the Quebec people», and for turning the Court into a political actor.

The anti-*Reference* stance of the Quebec government apparently touches a popular vein. In May 1997, SOM-*La Presse* conducted a survey of 1002 Quebecers to ask their views on the *Reference*. The survey also asked whether the federal government should have a say in the drafting of a future referendum question. 47% of respondents indicated that they disagreed with the federal decision to refer the issue to the Supreme Court, while 38% were in agreement.<sup>19</sup> Even among those who indicated that they would vote «NO» in a further referendum, 43% were in disagreement with the Supreme Court reference. It is perhaps most striking that only 16% of respondents had no opinion or did not wish to respond. The strength of feeling against turning to the courts to resolve legal issues surrounding secession is further amplified by the contrast with views of Quebecers regarding a prospective federal role in drafting the next referendum question: 52 % of respondents favoured a federal role, while 39% were opposed.

The finding that Quebecers are open to a federal role in drafting a future referendum question but opposed to the Supreme Court *Reference* suggests an underlying suspicion of legality: that the Quebec government has succeeded in juxtaposing the political versus legal characterization of secession, even among those opposed to independence. Or, it may come down to how the question is framed: “The federal government has asked the Supreme Court of Canada to determine whether Quebec can declare unilaterally its sovereignty under the Canadian constitution. Do you agree?” The question includes a number of sensitive points: (i) the Canadian constitution, particularly the 1982 patriation, imposed on Quebec, resisted by a unanimous resolution of the National Assembly, still without an official French language version; (ii) the Supreme Court of Canada, appointed by Ottawa, based in Ottawa;<sup>20</sup> (iii) the federal government, always open to being accused of interfering in Quebec affairs. But the underlying sensitivity may be the constitutional amending process itself.

Opposition in the Assembly opposed the motion on the ground that the government had not taken sufficient account of the October 30 Referendum results, and on the ground that the resolving the legal issues posed to the Court would not affect the capacity of Quebecers to decide their future.

18 *Ibid.* at 1245.

19 «Ottawa n’aurait pas dû s’adresser à la Cour suprême» *La Presse* (24 mai 1997)

B1. The text of the question posed in the SOM-*La Presse* survey is as follows:

Le gouvernement fédéral a demandé à la Cour suprême du Canada de déterminer si le Québec peut déclarer unilatéralement sa souveraineté en vertu de la Constitution canadienne. Diriez-vous que vous êtes (tout à fait d’accord..., plutôt d’accord..., plutôt en désaccord..., tout à fait en désaccord...) avec cette démarche du gouvernement fédéral devant la Cour suprême?

20 «Court decision attacked» *The Gazette* (11 May 1997) A1.

Never far from the surface is the imagery of the Meech Lake Accord's demise, and the risk of an unreasonable, or even an anti-Quebec, holdout. Memories of the Meech Lake "humiliation" continue to play a prominent role in Quebec's constitutional discourse.<sup>21</sup> At a September 26, 1996 press conference responding to federal Justice Minister Rock's announcement, Quebec Justice Minister Paul Bégin said the effective federal strategy behind the *Reference* was: "que le gouvernement fédéral espère qu"advenant un Oui lors du prochain référendum au Québec, M. Frank McKenna, Terre-Neuve ou tout autre groupe serait en mesure de s'opposer aux résultats d'un référendum tenu démocratiquement.» Premier Bouchard has saved his greatest indignation for the move by the Court to appoint an *amicus curiae*; in a Montreal speech, he accused federalists of wanting to «put Quebec's elected leaders into trusteeship»<sup>22</sup> It is the fear of being legally boxed in, after thirty years of struggling to find the political resolve within Quebec, that ultimately explains the appeal of unilateral secession.<sup>23</sup> And it is against this backdrop that the federal government moved so gingerly to seek a more sharply defined legal position in preparation for a future referendum and the possibility of a unilateral declaration of independence.

However gingerly it may have approached the decision, the federal government had little choice but to initiate the *Reference*. The Bertrand litigation was about to enter a new phase, bringing forward a much more wide-ranging set of legal issues and remedies than are implicated by the *Reference*. Moreover, the Quebec government has proceeded on the view, shared by the Bélanger-Campeau Commission, that a majority vote in a referendum would, by itself, be sufficient basis upon which to seek international recognition for Quebec as a sovereign country.<sup>24</sup> The longest period allowed for discussion of

<sup>21</sup> In the National Assembly debates on the May 1996 resolution, Premier Bouchard said: (p. 1247) "Selon M. Chrétien, les hommes et les femmes du Québec peuvent bien discuter, réfléchir, se réunir, manifester ou même voter, mais, à la fin, ce ne sont pas les Québécois qui décident: à la fin, ce sont les juges, les premiers ministres de l'Ouest ou de l'Est, qui ont le dernier mot sur l'avenir des Québécois." Assemblée nationale, *Journal des débats*, 2e Sess., 35e Leg., 22 mai 1996, Vol.35, No.24, p. 1247.

<sup>22</sup> «Ottawa plots new betrayal: Bouchard» *The Gazette* (13 May 1997) A11. Bouchard said the same evening: The court's ruling «will be a political judgment and will be null and void and we will ignore it.» See also, "Un gouvernement du PQ fera outrage à la Cour suprême" *Le Devoir* (13 mai 1997) A10 "...je pense que ce jugement, puisqu'il s'agira d'un jugement politique, sera nul et non avenu. Et nous n'en tiendra aucun compte.... On assiste à une tentative de mise en tutelle des élus du Québec à l'Assemblée nationale par le gouvernement fédéral."

<sup>23</sup> See J. Woehrling, "Les aspects juridiques d'une éventuelle sécession du Québec" (1995), 74 Can. Bar Rev. 293 at 313-14, for an analysis of the difficulties experienced and the assessment of the slim likelihood of gaining the agreement of the rest of Canada under the Part V amending formulae.

<sup>24</sup> The Bélanger-Campeau Commission deals with the process by which Quebec would accede to independence in the following manner:

La Constitution canadienne ne fait pas mention du droit pour une province de faire sécession, c'est-à-dire de se retirer de la Fédération. L'expression démocratique d'une volonté claire de la population québécoise de se constituer en État indépendant, associée à l'engagement du Québec de respecter les principes de l'ordre juridique

transitions would be the one-year period contemplated by the *Loi sur la souveraineté du Québec*. And, it has been the intention of the Quebec government to use that period to seek a bilateral accord with the federal government, not to participate in a multi-lateral negotiation with sufficient players to satisfy the 7/50 amending formula, or the unanimity requirement. The legal criteria applicable to secession, and the right of Quebec to secede unilaterally, are the very questions to be argued before the Supreme Court in the *Reference*. These are questions on which there is genuine juridical debate and on which Quebec's position deserves to be effectively presented.

Other statements by Quebec leaders, notably Deputy Premier Bernard Landry<sup>25</sup> and former-Premier Jacques Parizeau, suggest a time frame much shorter than one year before moving to seek international recognition.<sup>26</sup> Premier Parizeau's revelation of his intention to move quickly to achieve recognition from France by making a declaration of sovereignty "with a very brief delay" following a referendum victory prompted an outraged reaction in Quebec. Premier Bouchard learned of the plan "with stupefaction".<sup>27</sup> That there could be such misunderstandings among the leaders of the sovereigntist referendum team underscores the need for clarification of post-referendum scenarios, including legal constraints and expectations. The advice from former French President Giscard d'Estaing that Quebec should seek recognition within a week or ten days following a referendum is difficult to reconcile with international law and practice. If such a hasty declaration were the intended

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internationale, fonderaient la légitimité politique d'une démarche du Québec vers l'accession à la souveraineté.

Si les autres membres de la Fédération y consentaient, l'accession du Québec au statut d'État indépendant pourrait se faire par accord. Les modifications constitutionnelles requises pourraient être préparées et les divers arrangements de transitions négociés préalablement à la prise d'effet du changement du statut.

M. Bélanger, J. Campeau, *Rapport de la Commission sur l'Avenir Politique et Constitutionnel du Québec/Report of the Commission on the Political and Constitutional Future of Quebec* (Québec: La Commission, 1991).

<sup>25</sup> On the day of the October 30 Referendum, Deputy Premier Landry wrote to representatives of various foreign countries, outlining the process leading up to the referendum and asking their countries to take note of the referendum results:

Une fois le résultat connu, il apparaîtra opportun que la communauté internationale, et plus particulièrement le pays que vous représentez, prenne acte publiquement de la volonté que les Québécoises et les Québécois auront démocratiquement exprimée relativement à leur avenir.

Puis, lorsque l'Assemblée nationale du Québec aura proclamé la souveraineté du nouvel État, le moment sera venu de le reconnaître, sans que ce geste mette en péril de bons rapports avec le reste du Canada.

<sup>26</sup> See "La stratégie secrète de Jacques Parizeau: L'ancien premier ministre affirme ne jamais s'être engagé à ne pas faire de déclaration unilatérale de souveraineté" *La Presse* (8 mai 1997) B3. M. Vastel, "Parizeau aurait agi tout de suite" *Le Soleil* (7 mai 1997) A1.

<sup>27</sup> "Parizeau répudié par tous" *La Presse* (8 mai 1997) B1; "Jacques Parizeau, l'arnaquer" *La Presse*, éditorial (8 mai 1997).

course of the Quebec government, it seems prudent to have those issues settled prior to making a sovereignty declaration, and to have the advice of the Supreme Court in advance, rather than to be making plans based on clandestine conversations with a former French President.

Against this backdrop, then, and with the prospect of a further referendum looming, the federal government initiated the *Reference* to clarify the legal criteria and process for secession. As Justice Minister Alan Rock explained in his September 26, 1996 statement to the House of Commons: "To leave this issue unresolved would pose a serious threat to orderly government in Quebec and the rest of Canada."<sup>28</sup> There will be no luxury of time to debate the relevant legal criteria or processes following a referendum vote in favour of separation. International financial markets will discount Canadian and Quebec offerings until the situation is made clear. There will be questions of institutional legitimacy; and there will not be time to settle those questions on the editorial pages or through public opinion surveys. There will be occasional mutterings about the use of force. There will be talk of partition. There will be debates about self-determination for aboriginal peoples. And there will be new questions about provincial boundaries and inter-provincial borders. In this climate, it will at least be useful to know whether a majority vote in favour of sovereignty is a starting point, or an end point.

As we consider the likely scenarios in the event of a vote in favour of sovereignty, two observations surge forward. And they both involve the rule of law. First, Canadians, inside and outside Quebec, do not fully appreciate the security and the stability we enjoy under international law. Second, we take for granted one hundred and thirty years of continuous governance under the 1867 Constitution. They are really the same observation, about the value of the rule of law. With the luxury of these two stable legal regimes, we can engage in fundamental debates about the future and the value of the country, as if transitions to another regime should be cost-free and without trauma. There is a down-side to the rule of law's stability and preference for the status quo: those who are not convinced of the need for reform can cling to the status quo, or put off constitutional change in expectation of another, more perfect, round of negotiations.

There will be costs, and there will be traumas, in the event of a vote for independence. And what can be most firmly predicted is that Canadians, whether they are devout separatists, staunch proponents of the status quo, or bored with the whole debate, will not like what happens when we pass from these stable legal regimes to conditions of instability. Neither will the international community like the instability; but at least their reaction is foreseeable. The

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<sup>28</sup> *Supra* footnote 14 at 4707. This position has been confirmed by Justice Minister Anne McLellan: "Justice Minister defends stance on separation" *Ottawa Citizen* (27 June 1997) A-6. Jacques Brassard, Quebec's Minister of Intergovernmental Affairs, called the Justice Minister's comments "provocative and insulting".

international political and economic community will favour stability, and will await evidence that Canadians have worked it out among ourselves. The reaction within Canada is less foreseeable, but it will take more civic grace than we managed to show in debates about either the Meech Lake or Charlottetown Accords. The *Secession Reference* is an important opportunity to set the terms for a more graceful civic dialogue.

### *The Issues in the Reference*

The *Secession Reference* is not an invitation to define all of the criteria and process for a juridically smooth secession by Quebec from Canada. Neither is it a brusque attempt to “put Quebec in its place”. Rather, it is a request to the Supreme Court for an opinion that will be a definitive reference point for any future dialogue about Quebec secession. In particular, it presents an opportunity to move the Québec government away from the line that secession is entirely a political question, while at the same time prompting other parties to reflect on how they expect to respond to a democratic mandate for sovereignty. After all, that is the main premise of the *Reference*: that there *could* be a popular mandate in Quebec in favour of sovereignty, and that the political and legal mechanisms should be ready to respond. Ideally, the Supreme Court’s opinion will be a catalyst for clearer thinking, and will be a reference point for political and legal processes that keep us from plunging into complete chaos.

The federal government has been careful to “scope” the *Reference* so as to keep the debate within minimalist parameters. It seeks to settle the international and Canadian constitutional law starting points. There are, in effect, two issues submitted to the Court: (i) does Canadian constitutional law permit unilateral secession?; and, (ii) does international law permit unilateral secession? A third question is added for good measure: what happens in the event of a conflict between international and domestic law? The more interesting issue underlying the third question is not which legal order trumps in the event of a conflict, but whether there may be a synergistic interplay between international law and domestic constitutional law.

There are many issues deliberately not raised by the *Reference*, including what majority would be adequate to establish a democratic mandate for secession; whether partition or a redrawing of borders would be permitted and on what terms; what ratification process would be appropriate for a secession pact, should one be agreed between Quebec and the rest of Canada; or, what constitutional recuperation process should the rest of Canada have in view in the event of Quebec secession. The federal government argues that the *Reference* can be decided without determining which constitutional amendment formula or formulae would pertain to secession. In the view of the federal government, it would be sufficient for the Supreme Court to decide that the Quebec does not have a right to unilaterally declare independence.

### *Question 1: Canadian Constitutional Law*

1. Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally?

The simple response is that the *Constitution Act* makes no provision for secession, unilateral or otherwise. Neither is there a constitutional convention to govern a legally smooth withdrawal. The more complex response is that a federal union, particularly one that has lasted one hundred and thirty years, is a solemn and multi-faceted series of engagements and common commitments. For Quebec and for Canada, the most noteworthy of these commitments include relationships with Aboriginal peoples; the delineation and extension over time of interprovincial and international boundaries; the expectations of citizenship and free movement of peoples who have families spread across provincial borders, or who have immigrated to Canada, or who have professional, business or personal identifications across Canada; debts jointly incurred and public policies and infrastructure (including a public service) jointly developed; and, international undertakings entered into as a federal nation. This is only a summary list of the many ways in which a federal state becomes more than the sum of its parts, and more than a confederated set of political integers. The fact of entering into a federal union, by itself, involves important mutual commitments. This point was made by the Imperial Government in response to a Nova Scotia petition seeking to be released from Confederation in 1868.<sup>29</sup> As the Colonial Secretary wrote to Lord Monck (the Governor General of Canada):

The neighbouring province of New Brunswick has entered into the union in reliance on having with it the sister province of Nova Scotia; and vast obligations, political and commercial, have already been contracted on the faith of a measure so long discussed and so solemnly adopted.....I trust that the Assembly and the people of Nova Scotia will not be surprised that the Queen's government feel that they would not be warranted in advising the reversal of a great measure of state, attended by so many extensive consequences already in operation...<sup>30</sup>

It is in recognition of these complex relationships, and the vast mutual obligations implicit in union itself, that federal constitutions rarely contemplate a procedure for secession. Among those that have provided for secession, the two most notable are the USSR and Czechoslovakia, neither of which exists as a federation today.<sup>31</sup> Constitutions generally view federations as indestructible,

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<sup>29</sup> See D.A. Muise, "Forging the Bonds of Union", in E.R. Forbes and D.A. Muise (eds.) *The Atlantic Provinces in Confederation* (Toronto: University of Toronto Press and Fredericton: Acadiensis Press, 1993) at 29-46.

<sup>30</sup> *Journals of the Legislative Council of Nova Scotia, 1868*, Appendix 9. For an account of the attempted secession by the state of Western Australia, see G. Craven, *Secession: The Ultimate States Right* (Melbourne: Melbourne University Press, 1986).

<sup>31</sup> See P.J. Monahan and M.J. Bryant, with N. Côté, *Coming to Terms with Plan B: Ten Principles Governing Secession*, C.D. Howe Institute *Commentary* (Toronto: C.D. Howe Institute, 1996) at 7. Of 89 federal constitutions studied by Monahan, Bryant and Côté, 82 made no provision for secession or expressly provided against it (22). In addition to Czechoslovakia and the U.S.S.R., the federations making legal provision for secession were Austria, Ethiopia, France, Singapore and St. Christopher and Nevis (see Table 1 at 10-11).

or at least prefer to avoid the prospect of breakup. This inadvertence to breakup should not be interpreted as naive optimism, but as the opposite: a recognition of the tentative political character of such unions and of their vast mutual risks and obligations. Canada's confederation was probably never so fragile as in its first twelve months. Nova Scotian anti-confederates won eighteen of nineteen federal seats and thirty-four of thirty-six seats in the provincial legislature. New Brunswick had a strong pro-secession movement and Prince Edward Island chose not to join. In the same period, the Supreme Court of the United States considered an argument that Texas had a right to secede, and rejected it in the following terms:

When, therefore, Texas became one of the United States, she entered into an indissoluble relation. All of the obligations of perpetual union, and all of the guaranties of the republican government in the union, attached at once to the State. The act which consummated her admission to the Union was something more than a compact; it was the incorporation of a new member into a political body. And it was as complete, as perpetual, and as indissoluble as the union between the original States. There was no place for reconsideration, or revocation, except through revolution, or through consent of the States.<sup>32</sup>

As Canada has moved beyond the initial match-making and risk-taking of the time of Confederation, we have become more confident of our place in the world and more active as a leader among international states; more sophisticated in the complexity and scale of national public policy and infrastructure; and, more extensive in our geographic scope, including in marine areas. In addition, we have become more fiscally indebted, although there is evidence that the growth curve on public debt has been reversed. And, we have spelled out rules for constitutional amendment processes that take us well beyond the colonial stage to that of a modern complex federation, with many expectations of elaborate process and consultation. Indeed, with each step toward formalizing the amendment process, we have moved closer to a requirement of unanimity, or at least to a requirement of a significant voice from all regions. We have also made more express provision for aboriginal peoples to take part in constitutional processes, and have adopted more popular ratification or approval processes. Quebec has been a lead player in setting these high standards of inclusive and participatory constitution-making.

The fact is that a negotiated secession would require many, many points of agreement. It is generally assumed that such agreements would have to be formalized by the constitutional amending procedures of Part V of the *Constitution Act, 1982*,<sup>33</sup> which provides for five scenarios:

- the s.38/s.42 general amendment procedure ("7/50") requiring the assent of the legislative assemblies of two-thirds of the provinces representing 50% of the population of the provinces, in addition to the assent of the House of Commons (the Senate has a six-month suspensive veto);

<sup>32</sup> *Texas v. White* (1868), 7 Wallace 700 at 726. Chief Justice Chase spoke of an "indestructible Union, composed of indestructible States." (at 725).

<sup>33</sup> *Canada Act 1982* (U.K.), 1982, c.11.

- the s.41 requirement of unanimity among the legislative assemblies of the provinces in addition to the assent of the House of Commons (Senate suspensive veto);
- the s.43 “bilateral” procedure requiring the assent of the House of Commons (Senate suspensive veto) and the legislative assemblies of those provinces affected by the amendments;
- the s.44 federal “unilateral” procedure, permitting amendments by Parliament alone;
- the s.45 provincial “unilateral” procedure, permitting amendments by a provincial legislative assembly alone.

### *The positions of the federal government and interveners*

In its *Reference* submission, the federal government urges the Supreme Court to stop at deciding that secession is beyond the scope of the s.45 provincial “unilateral” procedure, that being a sufficient basis for concluding that unilateral secession is not permitted by the Canadian constitution. While the overwhelming majority of the interveners agree with the federal position on the limited scope of s.45, and argue that the first *Reference* question should be answered in the negative, many of the parties urge the Court to go further than the federal submission.

Manitoba argues that the rule of law and the principle of federalism should govern the Court’s approach to the *Reference*. In particular, secession would affect the federation as a whole, and amendments affecting the distribution of powers would not be covered by s.45. Manitoba also points out that secession would likely alter or abolish the office of the Lieutenant Governor of Quebec, and that this is one of the subject matters specifically excluded from s.45 and subjected to the s.41 unanimity requirement.

Saskatchewan argues that unilateral secession is not a matter to be dealt with by Quebec alone, or by Quebec and the federal Parliament. In addition to the “federal” principle, Saskatchewan makes the case for the “nation” principle, and contends that any lawful secession would require a “double majority” comprising the Houses of the Parliament speaking for the federal order and the requisite number of provincial legislatures speaking for “the provincial order of the federation”. The Saskatchewan intervention expressly opposes a bilateral amendment between Quebec and the federal government.

The Yukon Attorney General joins in opposing s.45 as a sufficient basis for unilateral secession, and goes on to say that, should the Court wish to consider which of the amending procedures would apply to secession, the general “7/50” procedure should govern secession. The submission points out the logical symmetry with the requirement of “7/50” for the admission of new provinces, and applies a purposive approach to oppose a requirement of unanimity for any aspect of secession, including changes to the office of the Lieutenant Governor or to the composition of the Supreme Court of Canada.

The Northwest Territories submission opens up the question of Quebec's borders, in particular suggestions that Quebec secession might include claims to coastal islands in Hudson Bay, James Bay, Hudson Strait and Ungava Bay, and even to a sectoral extension into the Arctic.<sup>34</sup> The NWT argues that any such readjustment of its boundary with Quebec would require approval through the "7/50" amending formula of s.42(1)(e), which deals with the extension of existing provinces into territories.

The intervention of Makivik Corporation, representing Inuit of Nunavik (a large area of Northern Quebec), points out that the Inuit of Nunavik have territorial claims over the islands and Maritime areas off Quebec and Labrador. It also points out that the Nunavik Inuit have on four occasions, in four separate referenda, overwhelmingly expressed their desire to remain part of Canada and not to be separated from Canada by unilateral Quebec secession. Makivik argues that the rights of aboriginal peoples are pre-existing and independent, and points out that Nunavik Inuit have treaty relations with both Quebec and Canada through the James Bay and Northern Quebec Agreement. It also emphasizes the fiduciary relationship between the federal government and aboriginal peoples. In view of these various relationships and obligations, Nunavik Inuit argue that, with respect to their homeland, secession is not possible under constitutional or international law without their consent. The Grand Council of the Crees also argue that unilateral secession would violate a number of constitutional rights and obligations, including the *Royal Proclamation of 1763*, the aboriginal and treaty rights under the *Constitution Act, 1982*, undertakings of Parliament pertaining to the *Ruperti's Land and North-Western Territories Order*, and fiduciary obligations of a constitutional nature. They argue that there is now a constitutional convention that any amendments altering the rights of Aboriginal peoples require their participation and consent. In addition, they argue that a requirement of Cree consent to Quebec secession derives from the *James Bay and Northern Quebec Agreement* and from fiduciary obligations.

Kitigan Zibi Anishinabeg is an Algonquin First Nation whose lands, both ancestral and those reserved for them, are located mostly in the territory of the Province of Quebec. Their submission traces relations with the Crown to pre-Confederation times, notably to the *Treaty of Paris* and the *Royal Proclamation*

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<sup>34</sup> The NWT submission makes reference to the 1978 *Official Program of the Parti Québécois*, Chapter 2 "Achieving Independence", as well as to consultations of the National Commission on the Future of Quebec and to the Commission's Report (at 254 and 291), and to a background study prepared for the Commission d'étude des questions afférentes à l'accession du Québec à la souveraineté by Professor Jonathan Charney of Vanderbilt University: *The Maritime Boundaries of Quebec*. The NWT also points out that section 4 of the Draft Bill *An Act respecting the sovereignty of Quebec* reads as follows:

Quebec shall retain the boundaries in has within the Canadian Confederation at the time section 1 comes into force. It shall exercise its jurisdiction over the maritime areas and the territories adjoining its coastline in accordance with the terms and conditions provided by the rules of international law.

of 1763. It is argued that Aboriginal peoples have a specific constitutional character (“un particularisme constitutionnel autochtone”), incorporating these rights as well as rights integral to the 1867 Confederation, and the *Constitution Act, 1982*. The effect of this constitutional specificity means that aboriginal rights surpass legislative competence and are protected from modifications that could alter their nature or reduce their scope. It is argued that Aboriginal Peoples have a right to participate in the amending process required for secession, and to withhold consent. The Chiefs of Ontario argue that the constitution does not permit unilateral secession, and that consensual withdrawal would require a s.35.1 conference, because such withdrawal would fundamentally affect the constitutional position of First Nations in relation to Canada and Quebec. In their submission, Part V of the *Constitution Act* is flexible enough to permit negotiated secession, with primary emphasis on sections 38 and 41, requiring the consent of the federal Parliament and at least seven of the provincial legislatures. The Chiefs of Ontario submit that First Nations should be at the secession bargaining table, in particular to reassert their territorial rights and terms of treaties.

Guy Bertrand, whose litigation in Quebec Superior Court prompted the federal government to initiate the *Reference*, takes the hardest line of any of the interveners. He agrees with the federal government that the first question should be answered in the negative, and that s.45 does not pertain to unilateral provincial secession. He calls for the Supreme Court to determine which amending formula applies, and argues that four of the subject matters identified by the s.41 unanimity formula would be affected by secession: the role of the Lieutenant Governor, the right to provincial minimum representation in the House of Commons, the usage of English or French, and the composition of the Supreme Court of Canada. Amendments required to remove references to Quebec in relation to federal institutions would attract the general “7/50” amending formula, with an additional “bilateral” amendment to deal with Quebec’s borders with Newfoundland, New Brunswick and Ontario. Mr. Bertrand goes further to suggest that the only alternative to formal amendments would be revolution, and invites the Court to address the federal government’s obligation to defend the Canadian Constitution in such an event. Mr. Bertrand suggests that he or any other citizen would have the right to seek remedies through the courts to halt any actions by the federal and Quebec governments to achieve secession other than by the requisite constitutional amending procedures, including seeking to prevent the holding of a further referendum. Mr. Bertrand acknowledges that, in certain limited circumstances, the federal government could appeal to the defence of constitutional “necessity” to maintain the rule of law.

Dr. Roopnarine Singh, whose action in Quebec Superior Court together with six other plaintiffs paralleled that of Mr. Bertrand, argues that every aspect of Quebec’s juridical existence is determined by the Canadian Constitution. Accordingly, the constitutionally-prescribed amending procedures are the only lawful means by which secession could be achieved. Dr. Singh et al. make the

further point that this juridical situation was not newly imposed by the *Constitution Act, 1982*; that Quebec would not have enjoyed a unilateral right of secession at any point in its existence, going back to the time of the French colonial regime.

The Ad Hoc Committee of Canadian Women on the Constitution is a "national grassroots movement" founded in 1981 to advocate for a more explicit addressing of women's concerns in the 1981-82 constitutional amendment process. The Committee's *raison d'être* is "to make every effort to ensure that women are present at the discussion and decision-making tables around which constitutional change is made, to ensure that the interests of women in Canada are fully, fairly and substantively taken into account." The Ad Hoc Committee argues, first, that Part V of the *Constitution Act* does not presently deal with provincial secession, and may therefore have to be amended to provide such a procedure — which amendment would be subject to the unanimity requirement. Whether secession can be achieved by the general "7/50" amending formula of s.38, or by an amended Part V, the Ad Hoc Committee submits there is a constitutional convention requiring that any change must maintain or enhance the constitutional rights which address the disadvantage of women in all of Canada, notably s.15 equality rights.

The Minority Advocacy and Rights Council intervenes to argue that Quebec secession would repudiate the "deep bicultural and multicultural foundations of Canada", and could, in particular, affect *Charter* rights protective of vulnerable groups. The Council argues that the proper procedure under Part V of the *Constitution Act, 1982* would involve the unanimity requirement of s.41, or alternatively the s.38 general amendment procedure.

Three interveners take what, in the context of the *Reference*, might be called more agnostic positions. Vincent Pouliot of the Libertarian Party of Canada argues that the people of any province should be able to revoke the mandate given to their provincial representatives to federate under the constitution of Canada. Yves Michaud argues that the Supreme Court lacks jurisdiction to deal with what is uniquely a Quebec political matter. And, the Mi'gmaq Nation — Gespeqwagi District argues that the Supreme Court does not have jurisdiction under either constitutional or international law with respect to parts of the territory of Quebec that have not expressly been acquired from Aboriginal peoples from the Crown.

### *Commentary*

There are several points on which most interveners and the Attorney General of Canada are in agreement: (i) that Quebec does not have the capacity to secede unilaterally, under the terms of the Constitution of Canada; (ii) that any legal action by Quebec to secede would have to be negotiated in accordance with the Constitution; and, (iii) that Part V of the *Constitution Act, 1982* contains a comprehensive code for amending procedures; and, (iv) that the "government"

of Quebec does not have the capacity to effect the secession of Quebec from Canada, or to effect any other constitutional change; that capacity belongs to the Legislative Assembly of Quebec, as is the case for all provinces.

This represents a substantial measure of consensus among the parties to the *Reference*. And it could leave the Supreme Court a relatively easy task. The Court could, as urged by the Attorney General of Canada, choose not to go beyond a minimalist answer, indicating simply that Quebec cannot secede unilaterally under the terms of the Constitution. It could choose not to deal with the points raised by some interveners: (i) whether the unanimity procedure or the general "7/50" amending formula would apply to certain aspects of secession; (ii) whether there are additional constitutional conventions, over and above the Part V procedures, that would pertain; (iii) what ratification procedures might be adopted to confirm a secession package of amendments; (iv) whether certain communities in Quebec would have the option of remaining as part of Canada; and, (v) whether Quebec might secede with more extensive or more limited territory than it presently has as a Canadian province. The Attorney General prefers a fastidious approach, on the ground that there are many parties, including Quebec and seven other provinces, who are not participating in the *Reference*. The unspoken concern of the Attorney General is that an opinion that goes too far in prescribing secession scenarios could backfire in Quebec. It would certainly be understandable if the Court chose to avoid some of the thornier issues. There are political processes that will need to take a lead from the Court's opinion. There is no great advantage in the Court getting out too far ahead of those who will ultimately have to come to terms with the legal implications of secession.

In the context of such a high degree of consensus among the parties participating in the *Reference*, two features stand out. First, and most obvious, Quebec is not represented. While the Attorney General of Canada and fourteen interveners bring powerful legal skills and resources before the Supreme Court to argue for the rule of law, Quebec — the most affected party — stays away because it claims this is not about law, but about politics. The interveners who make the effort to present the "without jurisdiction" or agnostic perspective do not make a compelling case; if anything they may weaken the point. It would be difficult to imagine a more appropriate case for an *amicus curiae*, a friend of the Court, to counter-balance an overwhelmingly one-sided presentation. The *amicus* is not a counsel forced on Quebec, making it appear against its will, but a friend of the Court. If the rule of law means anything, it is that the Court should decide with the benefit of having heard all sides of the argument. If Quebec's first point is non-justiciability, that argument should be presented to the Court, ideally by the Attorney General of Quebec. But the Attorney General does not have the option of deciding the question of justiciability by boycotting the process. For the government to go further and actively discourage lawyers from accepting the *amicus* brief goes well beyond conduct compatible with respect for the rule of law or respect for judicial institutions. In any event, the issues are justiciable and the Court is entitled to have the case fully

presented.<sup>35</sup> While there may be an academic debate about the timeliness of the *Reference*, Quebec's position on the ultimate relevance of legal analysis proves the need to have the issues addressed now.

The second striking feature of the parties' response to Question 1 is the general view that secession should be treated like any other constitutional event, subject to the same procedures and legal requirements as an amendment in the normal course. There is, of course, good legal reason for taking this position. S.52(3) of the *Constitution Act, 1982* stipulates that: "Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada." In the 1982-*Quebec Veto Reference*, the Supreme Court concluded that the constitutional amending procedure provided by the *Constitution Act, 1982* "entirely replaces the old one in its legal as well as in its conventional aspects."<sup>36</sup> But, does Part V of the *Constitution Act, 1982* not make an assumption of continuity? Could it not be argued that secession is of a different order. Why does there need to be unanimous approval for Quebec to give up its places on the Supreme Court of Canada, or to have fewer MP's than it is allowed Senators, when its objective is to secede from these federal institutions completely? Should Saskatchewan or Prince Edward Island have a veto over a package of constitutional "amendments" that would necessarily imply a reconstituted Supreme Court of Canada, or a change in the office of the Lieutenant Governor? What is the interest to be protected by such a veto? Not an undue advantage for Quebec. Inevitably, secession would involve a change in the distribution of powers, for Quebec. But does that really concern the other provinces in the same way that the "7/50" amending formula is conceived to protect the balances of federalism when all parties are planning to continue functioning as a federal state?

The Part V amending procedures reflect a preference to protect existing interests, and to ensure a wide consensus for change. They are based on the need for deliberation, with the fallback option of the status quo. Where parties have invested resources and political capital in an existing set of constitutional relations, the onus lies on those who seek change to demonstrate that no undue advantage is being taken, and that no disequilibrium or dysfunction is being created. Canadians do not need to be reminded how difficult it is to change the constitution.<sup>37</sup> The threshold for agreement is high, and the reflex to hold out for something better is powerful. In both the Charlottetown and Meech Lake processes, participants who live with the "swings and the roundabouts" of

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<sup>35</sup> The Canadian Bar Association (Quebec Branch) has been critical of the Quebec government's position that no Quebec lawyer should accept the *amicus* brief. Branch President Mark Peacock commented: "As lawyers, we believe in the rule of law. The questions that have been posed are legal questions. In our view it's important that there be an enlightened debate." "Quebec gets advocate it feared" *Globe and Mail* (16 July 1997) A4.

<sup>36</sup> *Reference Re Objection to a Resolution to Amend the Constitution*, [1982] 2 S.C.R. 793 at 806.

<sup>37</sup> See *supra* footnote 3.

democratic politics insisted on a much higher degree of predictability for constitutional changes. The irreversibility of constitutional amendments prompts a tendency to utopianism. If nothing else, Canadians proved in the Meech and Charlottetown processes that constitutional change can consume a great deal of time and energy, and that the process requires an extraordinary degree of consensus and political good grace. It would not be realistic to expect such a measure of grace or consensus in the event of a popular vote by Quebecers to secede. One can imagine that people who were content to say "let them go" in earlier constitutional rounds might be just as content to say "let them stay" in discussions about amendments to permit Quebec secession.

The argument that Part V may not be the relevant amending framework to deal with secession is one that Quebec, or an *amicus* appointed to assist the Court, might wish to develop in the *Secession Reference*.<sup>38</sup> Before developing it further here, it is appropriate to move on to consider the international law aspect. To close on the first question, the Attorney General and the interveners succeed not only in demonstrating that Quebec cannot legally secede unilaterally; they persuasively demonstrate the wide range of interests, beyond those that would be reflected in a majority vote in a referendum, that should be taken into account before signing off on Quebec secession. Before pursuing that point, we turn to the second *Reference* question, namely whether Quebec can effect a unilateral secession under international law.

### *Question 2: Public International Law*

2. Does international law give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?

The principal legal claim of Quebec sovereigntists has been that secession is a matter of international law, and derives from the right to self-determination. Daniel Turp, the leading proponent of this view, argues that a people included in a non-colonial, sovereign, independent state has a right to secede if they cannot freely determine their political status within the state, and freely promote their economic, social and cultural development. If that right to self-determination is denied at the domestic level, it and a corollary right to secede unilaterally can be exercised at the international level.<sup>39</sup> This view is echoed by Premier

<sup>38</sup> The argument is a logical extension of the position taken by the Attorney General for the Yukon, who contends that the unanimity requirement pertains to those who are *remaining*, not to those who are seceding from Canada.

<sup>39</sup> D. Turp, "Le droit à la sécession: l'expression du principe démocratique", in A.-G. Gagnon and F. Rocher, eds. *Répliques aux détracteurs de la souveraineté* (Montréal: Cvilb éditeur, 1992) 49 at 57; and, "Quebec's Democratic Right to Self-Determination: A Critical and Legal Reflection", in J. McCallum, ed., *Tangled Web: Legal Aspects of Deconfederation* (Toronto: C.D. Howe Institute, 1992) 99. See also: J. Brossard, *L'accession à la souveraineté et le cas du Québec: Conditions et modalités politico-juridiques*, 2e éd. (Montréal: Les Presses de l'Université de Montréal, 1995).

Bouchard who, citing the Bélanger Campeau Report, introduced his May 1996 motion reaffirming the freedom of Quebec to determine its own political status in the following terms:

Si les autres membres de la Fédération y consentaient, l'accession du Québec au statut d'État indépendant pourrait se faire par accord. Les modifications constitutionnelles requises pourraient être préparées et les divers arrangements de transition négociés préalablement à la prise d'effet du changement de statut.

En l'absence d'un tel accord, la démarche du Québec vers la souveraineté relèverait d'un processus de sécession unilatéral qui devrait se fonder sur une volonté populaire incontestable et clairement exprimée. La réussite du processus reposerait sur la capacité des institutions politiques québécoises d'instaurer et de maintenir à titre exclusif l'autorité publique sur le territoire du Québec. Elle requerrait également, selon le droit international, que d'autres États reconnaissent le Québec comme étant souverain.<sup>40</sup>

Thus viewed, secession is a question of confidence, requiring Quebec to have control over territory and to gain recognition from other states. This position seriously underrates international law, and overrates the likelihood that other states would recognize Quebec if it were to claim independence without Canada's blessing. International law on secession and recognition of breakaway states is as settled as it could be. With the exception of colonial situations, there is a strong reluctance to support unilateral secession or separation, and a clear preference to support territorial integrity and the unity of states.

Professor James Crawford,<sup>41</sup> a leading authority on state creation and secession, was retained by the federal government to prepare an expert report for the *Reference* on modern state practice in respect of unilateral secession and the right of self-determination. After presenting a formidable review of state practice and experience since 1945, Professor Crawford concludes that there is no unilateral right to secede based on a majority vote of the population of a subdivision or territory. Self-determination for peoples or groups within an independent state is achieved by participation in the political system of the state. Even where there is a strong and sustained call for independence (measured, for example, by referenda results showing substantial support), it is a matter for the government of the state concerned to consider how to respond.<sup>42</sup>

<sup>40</sup> *Journal des débats*, Assemblée Nationale, 2e sess., 35e Lég., pp. 1246-47. See footnote 24. See also Quebec Justice Minister Bégin's comments at his September 8, 1995 Press Conference announcing that the Quebec government would take no further part in the Bertrand litigation, confirmed this position: "Alors, moi je vous dis que à ce moment-là [in the event of a "yes" vote in a referendum], l'ordre international intervient et que c'est une question de reconnaissance et c'est ce que nous soumettons depuis toujours."

<sup>41</sup> Whewell Professor of International Law and Co-Director of the Research Centre for International Law, University of Cambridge; author of *The Creation of States in International Law* (Oxford: Clarendon Press, 1979); "Self-Determination outside the Colonial Context", in W.J.A. Macartney, ed., *Self-Determination in the Commonwealth* (Aberdeen: Aberdeen University Press, 1988); and, *The Rights of Peoples*, ed., (Oxford: Clarendon Press, 1988).

<sup>42</sup> J. Crawford, *State Practice and International Law in Relation to Unilateral Secession: Report* (19 February 1997) at 2. Professor Crawford's Report was reviewed by Professor Luzius Wildhaber, Professor of International, Constitutional and Comparative Law at the University of Basel and Judge of the European Court of Human Rights, who

In 1992, the Quebec National Assembly's Commissions on the Process for Determining the Political and Constitutional Future of Quebec retained a group of five international law experts to prepare an advisory opinion on "The Territorial Integrity of Quebec in the Event of the Attainment of Sovereignty".<sup>43</sup> In their view, the right of self-determination at international law "*except in colonial situations*, is an inadequate basis on which to found the right of a people to achieve independence to the detriment of the State to which it is joined."<sup>44</sup> On the possibility that Quebec might qualify as a colonial situation, the five-expert advisory opinion was categorical:

One can hardly seriously maintain that this is the case of Quebec.....[T]he Quebec people effectively exercises its right to self-determination within the whole of Canada and is not legally justified in invoking such right to found a possible independence. Yet, once again, this does not prevent it from claiming or obtaining or imposing such right; only, this is purely a question of fact which international law neither supports nor reproves. It merely takes note of it.<sup>45</sup>

With the exception of Professors Turp and Brossard, international legal opinion is unanimous that the right of self-determination would not be an adequate basis for a claim to unilateral independence by Quebec.<sup>46</sup> It is not difficult to see the underlying rationale for this position. It goes back to the rule of law, and to peace, security and human rights. Nation states, subscribing to basic human rights and democracy, with secure borders, are the building blocks of an international legal order. If mature, democratic countries like Canada can be dismembered by a simple majority vote of an internal unit, and in particular if independence were to derive juridically from international recognition by other states, without the consent of the existing state, any concept of an international rule of law would be lost. Borders would no longer be secure. Nation states would be fragile. International relations would be impossible. And there would be a net loss for human rights. In his Report *An Agenda for Peace*, former United

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characterizes Professor Crawford's Report as "admirably complete and fair". Professor Wildhaber's conclusion on the international scholarly opinion is as follows: "[A]part from a very few writers (such as Brossard or Turp...), scholars are practically unanimous that there is no right of unilateral secession at the free will of minorities, groups or other entities."

<sup>43</sup> T.M. Franck, R. Higgins, A. Pellet, M.N. Shaw and C. Tomuschat, "L'intégrité territoriale du Québec dans l'hypothèse de l'accession à la souveraineté", *Exposés et études*, vol.1, *Les attributs d'un Québec souverain* at 376. Québec, Assemblée Nationale, Commission d'étude des questions afférentes à l'accession du Québec à la souveraineté.

<sup>44</sup> *Ibid.* at para. 1.17 (English trans.) Emphasis added.

<sup>45</sup> *Ibid.* at para. 3.09.

<sup>46</sup> L. Eastwood Jr., "Secession: State Practice and International Law After the Dissolution of the Soviet Union and Yugoslavia" (1993), 3 *Duke J. Comp. & Int'l. L.* 299; J. Woehrling, "Les aspects juridiques d'une éventuelle sécession du Québec" (1995), 74 *Can. Bar Rev.* 291; N. Finkelstein, G. Vegh and C. Joly, "Does Quebec Have a Right to Secede at International Law?" (1995), 72 *Can. Bar Rev.* 225; A. Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge: Cambridge University Press, 1995); P.J. Monahan, "The Law and Politics of Quebec Secession" (1995), 33 *O.H.L.J.* 1; L. Wildhaber, "Territorial Modifications and Breakups of Federal States" (1995), 33 *Can. Y.B. Int'l. L.* 1.

Nations Secretary-General observed: "If every ethnic, religious or linguistic group claimed statehood, there would be no limit to fragmentation, and peace, security, and well-being for all would become more difficult to achieve."<sup>47</sup> One academic commentator, speaking specifically of the Quebec example, states:

Permitting groups such as the Québécois in Canada to invoke the right of secession based upon cultural or group identity alone would threaten to open the floodgates of secession, and could exacerbate group conflicts. It is difficult to imagine any clear limits upon a secession right that permits groups to secede from pluralistic, nonoppressive states such as Canada.<sup>48</sup>

So, the short answer to the second question posed in the *Secession Reference* is "no".<sup>49</sup> International law does not give Quebec the right to effect secession from Canada unilaterally. It is highly unlikely that other states would recognize a Quebec claim to independence based on a right to self-determination. International law leaves two paths by which Quebec can achieve the status of an independent state: (i) with the acquiescence and recognition of Canada; or, (ii) by demonstrating and exercising exclusive control of its territory (i.e., by revolution, peaceful or otherwise) resulting in the demonstrable exclusion of Canadian sovereignty and its replacement by Quebec. In either case, it would

<sup>47</sup> B. Boutros-Ghali, *An Agenda for Peace: Preventative Diplomacy, Peacemaking and Peace-keeping*, (New York: United Nations, 1992) at 9. There is plenty of evidence in the submissions of interveners in the *Secession Reference* to support the Secretary-General's point. The Grand Council of the Crees' factum reasserts the right of the Crees and other Aboriginal people's to choose not to be separated from Canada. The factum states: "There is not and has never been any Cree secessionist movement in Canada. However, the Crees reserve the right to claim a right to secede, in conformance with international law, should the Cree people and Cree territory be forcibly included in a sovereign Quebec, in violation of their fundamental rights....Rather, they can fully maintain their relationship and association with the existing Canadian state and, through peaceful measures, deny 'effective' control to any secessionist forces." (paras. 95 and 112). The Nunavik Inuit take a similar position, and raise concerns for the integrity of their traditional territory in Northern Quebec and the islands and waters of James Bay, Hudson Bay, Ungava Bay: "As Nunavik Inuit have clearly expressed their will that their territory not be separated from Canada, Canada is bound, under international law, to ensure the respect for their right to self-determination, including the protection of the integrity of their territory and of the Aboriginal and treaty rights." (para. 114). The Chiefs of Ontario point out that, of 133 First Nations in Ontario, seventeen have a direct territorial interest in Quebec because of their history and/or their positioning close to the Quebec boundary. The Algonquin First Nation Kitigan Zibi Anishinabeg asserts that Algonquins "seraient bien fondés à exercer leur propre droit à l'autodétermination" in the event of unilateral secession by Quebec (para. 108). Roopnarine Singh *et al.* take the position: "Precisely because Interveners are committed unconditionally to Canada's territorial integrity, they are concerned that it be made manifest that the *price of secession must indisputably be Quebec's own complete territorial disintegration.*" (para. 38). (emphasis in original).

<sup>48</sup> L. Eastwood Jr., *supra* footnote 46 at 342.

<sup>49</sup> Professor Wildhaber, *supra* footnote 42, applied the criteria for secession at international law to the situation of Quebec, and concluded (at 64):

Nor could Quebec invoke an external right to self-determination under international law without acquiescence or recognition by the federal government. The population of the province was neither colonial nor a victim of an undemocratic, discriminatory regime, nor was it exposed to flagrant violations of human rights.

be a matter of other nation states recognizing the fact of Quebec's effective sovereignty. As between the two scenarios, it is difficult to see how Quebec could demonstrate effective control without Canada's acquiescence.<sup>50</sup> It is one thing to exercise control in the place of a distant colonial power; it is another to shoulder a 130 year-old federal state out of the way. The essential process of international law is to recognize established facts, with a considerable burden operating against those who seek to change the juridical status quo.

In effect, international law leaves Quebec one path to sovereignty or independence: namely, through the consent or acquiescence of Canada. That consent can be achieved either by negotiation, or by resignation/surrender in a context of significant social, economic and civil breakdown. At international law, as in the domestic constitutional context, the rule of law favours the status quo and stability, and it favours peaceful solutions. It would take a lot of time, and more disruption than Quebecers and Canadians are ready to support, to reach a point of resignation/surrender. The bottom line is that the international rule of law will require a negotiated secession, or it will stick with the status quo.

### *Question 3: Conflicts between international and domestic law*

3. In the event of a conflict between domestic and international law on the right of the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally, which would take precedence in Canada?

The Attorney-General of Canada, with the support of all of the non-agnostic interveners, takes the position that there is no conflict between domestic and international law. Since Quebec does not have a right to secede unilaterally under either international or domestic law, that means there is no conflict. Further, there is a large measure of agreement that, if there were a conflict, domestic law would be dispositive.

In dealing so summarily with the third question, the parties may be passing over an important unresolved issue. At international law, the default position, once unilateral secession is rejected, is that independence can be attained with the acquiescence and recognition of *Canada*. At domestic law, the general assumption of the parties to the *Reference* is that the default position, once unilateral secession is rejected, is that independence can be achieved through the procedures of Part V of the *Constitution Act, 1982* (with some interveners arguing for additional requirements based on convention). These default positions are not equivalent. At international law, the federal government *could* recognize Quebec independence, and such recognition would be almost automatically adopted by other nations, and by the United Nations. If Canada were to give Quebec independence its blessing, and Canada's recognition would have to come first, international law would not be concerned with what Saskatchewan or Manitoba or Guy Bertrand may think about the decision or the

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<sup>50</sup> See Finkelstein, Vegh and Joly, *supra* footnote 45 at 256-260, for a discussion of the legal doctrine and relevant precedents on effective possession.

process that was followed. It is arguable that Aboriginal peoples with territorial interests in what is presently Quebec could contest such a decision in international fora, but events would most likely transpire faster than such challenges could be effectively mounted.

Leaving those issues aside for the moment, we come back to whether there is a conflict, and, if so, how it should be resolved. And we come back to the question posed earlier: whether Part V of the *Constitution Act, 1982* is the correct regime to deal with a negotiated secession by Quebec. In addressing those questions, it is important to reiterate the main assumption behind the *Reference*: that there could be a clear democratic mandate for the government of Quebec to attain sovereignty, and that Canada and Canadians, including Quebec and Quebecers, should be ready to respond without confusion about the relevant legal regime or criteria.

To resolve what may be a conflict between the two “default” regimes, it helps to characterize the situation as one of domestic or international law. In doing so, it is useful to ask what would be at stake in the event that a Quebec government received a clear mandate to secede and to take the necessary juridical steps to achieve independence. While the office of the Lieutenant Governor would most probably be affected, there is no reason why any other province, let alone every other province, should have a veto over how or whether an independent Quebec replaces the Lieutenant Governor. Neither should the focus be on the federal-provincial division of powers. The departure of Quebec may well cause a new equilibrium in the division of powers, or a fresh reassessment, but that would be for the remaining partners in Canada to sort out, probably after they agree *unanimously* on a revised constitutional amending formula. Representation in the House of Commons? Composition of the Supreme Court of Canada? Again, these are issues for those who are staying, not those intending to leave. That is the point: Part V of the *Constitution Act, 1982* is about staying, not about departing.

What would be at stake in the event of a clear vote for independence would not be how to reform the Canadian constitution, but whether to recognize Quebec as an independent country. In legal terms, it would be a matter of international law. The decision to recognize, or to not recognize, foreign states belongs to the federal government.<sup>51</sup> Just as the federal executive decides whether to recognize the People’s Republic of China, or Kurdistan, or the constituent elements of the former Yugoslavia, it has the constitutional authority to recognize Quebec. Seen this way, there is no conflict between domestic and international law. Under both regimes, it would be for the federal government, the Executive, to recognize or not recognize a newly independent state.

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<sup>51</sup> S.14(1)(a) of the *State Immunity Act*, R.S.C. 1985, c.S-18 provides that the certificate of the Secretary of State for External Affairs is conclusive proof of whether a country is a foreign state. See E.S. Binavince, “Canadian Practice in Matters of Recognition”, in R. St.J. Macdonald, G.L. Morris and D.M. Johnston (eds.), *Canadian Perspectives on International Law and Organization* (Toronto: University of Toronto Press, 1974) at 153-183.

*A process for responding to a secession mandate*

Even if the juridical act of recognition belongs to the federal executive, the decision to recognize or not recognize Quebec will nonetheless place considerable strain on relations with other players in Confederation. The ultimate test of success will be whether Canada can emerge from the process with a reasonable prospect of reconstituting the country and reforming the *Constitution Act* in the aftermath of Quebec secession. In effect, the federal government would need a strong consensus of provinces and territories, of Aboriginal peoples, and of *Charter*-identifying groups in reaching the decision to recognize or not recognize Quebec, although it would be almost impossible to conduct a simultaneous constitutional amendment process.

In such a scenario, the federal executive would have lead responsibility for recognizing an independent Quebec, but it would be well advised to conduct its decision-making process with an eye to consequential Part V constitutional amendments. Further, it would be difficult for the federal government not to incorporate the principles of the 1996 *Act Respecting Constitutional Amendments*.<sup>52</sup> The situation would require leadership, vision, generosity, firmness and imagination. Above all, it would require a passion for Canada's survival, ironic in the context of negotiating Quebec's secession. In order to carry off these many demands and challenges, the federal government should incorporate the following elements into its process or strategy:

- ensure that the expression by Quebecers in favour of sovereignty is definitive and democratic. Ideally this would not be an *ex post facto* issue, but could be assessed on the strength of a timely federal involvement in drafting the question and observing the referendum process.
- ensure that the wishes of Aboriginal peoples with territorial interests in what is presently Quebec are known. The importance of this perspective is well demonstrated, and well argued, by the interventions in the *Secession Reference*. Canada should take its lead on this question from the Aboriginal peoples.
- ensure that issues regarding territory or borders are resolved. The positions of the Northwest Territories and the Nunavik Inuit in the *Reference* underscore how a prospective secession can involve such considerations.
- ensure that issues regarding the free movement of peoples are clarified.
- ensure that the status of minority languages or ethnic communities are clarified. While it is not for Canada to set the terms on these issues for a newly independent Quebec, or for Quebec to set the terms for the remaining parts of Canada, these have been issues for Canada and Quebec from the time of Confederation. And they will have a bearing on decisions of citizens to remain in or migrate from Quebec or Canada.

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<sup>52</sup> S.C. 1996, c.1.

- ensure that the status of current federal institutions, assets and liabilities are resolved, including any questions of continuing common institutions.
- ensure that issues of transportation and openness of commerce are resolved.

The bottom line in all of this is that the federal government and Quebec would lead the process, with the objective being to find terms on which Canada would be prepared to recognize Quebec as a newly independent country. Canada would, in effect, hold the trump cards — unless it showed bad faith to the world community in a measure that would support the Quebec position of subjection and discrimination. However, accumulating such evidence would involve a considerable passage of time, and all parties would be under pressure to reach a timely agreement, in the interest of returning to stable social and economic conditions, including regaining the confidence of international markets.

There are two outstanding questions in this scenario: how Canada should deal with or bring in interested parties beyond the federal executive; and, how Canada should deal with Quebec and Quebecers. If Canada is in the juridical lead position, it should also take the political lead. If Canada is to be a viable country at the end of the process, and if the necessary constitutional amendments are to be subsequently approved as the basis for a new Canada, there will have to be a considerable measure of consultation and consensus-building incorporated into the process. Other commentators have predicted that a closed-door bilateral negotiation would have little chance of being accepted by those whose support would be required to put Canada back together.<sup>53</sup> Monahan and Bryant have proposed the establishment of a Canadian negotiating authority (CNA) that would have nine representatives of the provinces, nine federal representatives or nominees, and three aboriginal representatives. Whatever might be the ideal composition of such a body, the concept of a joint or national negotiating team should be fully explored. Such a body would help to address the concerns about outsiders and insiders that proved so problematic for the Meech Lake and Charlottetown Accords; anything less than demonstrable participation and inclusion would only exacerbate already high levels of tension surrounding the spectre of imminent national dissolution.

Just as the federal government should play a role in ensuring that the initial mandate for independence is based on a clear question, it should also play a role in having Quebecers, through a second referendum, affirm the terms of independence as worked out in negotiations.<sup>54</sup> It is important that independence be affirmed or rejected on its precise terms, and with the benefit of whatever reflections will be gained during the process of negotiations.

<sup>53</sup> Notably Monahan and Bryant, *supra* footnote 31 at 40-41.

<sup>54</sup> While it is difficult to see how the federal government could insist on a margin of more than “fifty per cent plus one” in the first referendum, there may be some room for debate about the appropriate margin for a confirming vote. Monahan and Bryant make reference to a poll conducted by CBC The National and SRC Le Point in March of 1996, in which 49% of Canadians outside Quebec and 40% of respondents in Quebec favoured a margin of 60% or more to support independence. In his expert report prepared for the

There may also be room for a parallel process, for a genuine “Plan A/Plan B” scenario. Plan A would negotiate and prepare the terms on which Quebecers would leave Canada: territory, people, debt, common institutions, etc., and put those terms to the Quebec people in second referendum. All of this would take an enormous measure of good will and open discussion, with a view to reconstituting two vital nations. Plan B, if there genuinely were a will to go down this path, could be prepared in parallel. It would develop a firm offer of a redefined federal state, one that would be put to Canadians in a consultative referendum. This would satisfy the need for referenda to be held in Alberta and British Columbia. And it would be an opportunity, the ultimate last chance, for Canadians to demonstrate to Quebecers their willingness to make constitutional change.

*Final reflections on democracy and the rule of law*

A further Quebec referendum will bring all Canadians to the sober reflection that we have unresolved constitutional business. There will be some, perhaps many, in Quebec and elsewhere who will say it is all too late and that independence is the only scenario. The purpose of this article has not been to put stumbling blocks in the way of achieving independence, but to ensure that any steps toward this end are taken within an appropriate legal framework. In that light the *Secession Reference* is an essential exercise. While the decision to secede, or to remain in Canada, will ultimately be political, the actions and policies of the government of Quebec, the democratic expression of Quebecers, and the recognition by foreign powers must all comprise a scenario surrounded by law *and* enabled by law. The test of validity will be the strength of the political mandate either to stay or to go, *and* the extent to which the process complies with international law and domestic constitutional law.

To people in a political hurry, the rule of law can be an impediment. To minorities, democracy can have its downsides. But no better system has been found than a democratic, pluralistic society in which governments are held to account for compliance with the rule of law. Canada is such a society. It is a continuing struggle to find the appropriate balance between legal controls and democratic mandates. It is possible for law to over-control. And it is possible for democratic urges run afoul of the law. The likely scenarios by which Quebec could achieve independence from Canada involve delicate and novel questions of both law and politics. It is not a question of law *or* politics, but of an intricate balance — politics *within* a legal framework. Without careful attention to the legal framework, any ostensible democratic expression will be illegitimate. On the other hand, if the rule of law becomes a straitjacket, exploited to frustrate the democratic process, that too would be illegitimate.

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federal government, James Crawford, *supra* footnote 42, observes that, in most cases, referenda conducted in territories wishing to secede have returned “very substantial majorities in favour (in the range of 65-99%).” at 42. See also Finkelstein, Vegh and Joly, *supra* footnote 46 at 249-251.

Quebec secession presents a context where people with strongly opposed views must strike a balance between democracy and the rule of law. People who have worked a lifetime to achieve Quebec independence must operate on the same rules as people for whom the breakup of Canada is tantamount to extinction. It is asking a lot for there to be a mutual respect for the rule of law, and deference to the democratic will, in such a deeply divided context. However, given that the alternative is some form of chaos, and that Canadians have such an admirable record of achieving accord in diversity, we should expect a peaceful reconciliation. Achieving that outcome will require a strong dose of the realism that is more actively reflected in international law than it is in domestic constitutional law. Canadian constitutional discourse, notably in the context of constitutional amendments, has become too idealistic, and legalistic, even utopian. International law, on the other hand, derives from an operational sense of what it means to conduct government without either democracy or the rule of law, and from ideals that regard Canada as a model for the international community. The challenge for the Supreme Court in the *Secession Reference* will be to combine the realism of an international law perspective with the accumulated idealism of Canadian constitutional law. The Court's greatest accomplishment would be to steer or inspire democratically mandated governments to show leadership within the framework of the rule of law.