Reference re: Secession of Quebec, in Context

Articulating Canada's Underlying Constitutional Principles, Examining the Right to Self-Determination, Confronting the Court's Limits in Dealing with Political Matters

In Canada, the federal Government has the power to ask the Supreme Court of Canada for its opinion on a legal question. Although the opinions which follow are not technically binding, they often tackle critical issues in Canadian constitutional law. The *Reference re: Secession of Québec* (the *Secession Reference*) is one such reference case, considering questions that arose as a result of the 1995 Québec Referendum. In this Referendum, the people of Quebec voted on the issue of secession from Canada; it very nearly passed.

"Secession" is the act of formally withdrawing from an organisation, in this context the country of Canada. Québécois "separatist" movements advocate different forms of independence, ranging from full to partial secession, where the province would retain some ties to Canada.

The Supreme Court's opinion reiterated the legality of the reference power and touched on Canada's most deeply held national values, reaffirming the importance of underlying principles in interpreting the Constitution. The Court's decision necessitated a thorough analysis of self-determination in international law. It prompted both federal and provincial legislation, as Canada and Québec sought to respond to the framework the decision established. For these reasons, scholars have called the *Secession Reference*"perhaps the most important decision in contemporary Canadian constitutional law."[1]

SEPARATISM IN MODERN QUÉBEC: AN OVERVIEW

Early French Nationalism and the Quiet Revolution

The Anglophone-Francophone divide has shaped Canadian politics since the country was a British colony, taking on different forms as society evolved and circumstances changed. For many years before and after Confederation in 1867, French-Canadian nationalism took the form of "ultramontanism" – a school of thought rooted in Catholicism and imported from those who rejected the secular values adopted following the French Revolution. Ultramontanism associated French nationalism with the ideal of a "church-dominated, self-contained society."[2] This principle, a sectarian one, formed the dominant strand of French nationalism until the Quiet Revolution of the 1960s fundamentally transformed Québec into a secular, socially democratic province.[3] With it, the Quiet Revolution brought a new type of nationalism – Québecois nationalism:

In shedding the strongly ethnic components that defined the earlier nationalism, including its racist elements, the new cement of the nationalism became primarily the territorial element, focused on Quebec.[4]

Québec's "Mouvement Souverainiste" Gains Traction

Québec's Movement Souverainiste – which aspired to make Québec its own country – rejected the "tokenism" (superficiality) of past gestures towards respecting the province's autonomy and spurred the modern separatist movement.[5] Toward the end of the 1960s, le Front de Libération du Québec (FLQ)[6]– a nationalist group advocating separatism through terrorist means – began a series of bombings and kidnappings. These incidents culminated in the October Crisis of 1970, lasting until the arrest of several FLQ members on December 28 of that year.[7]

In 1968, in the midst of this period of growing separatist sentiment, the Parti Québécois (PQ) was founded. The party was led by a former-Liberal Cabinet Minister for Québec's National Assembly René Lévesque. The PQ advocated a softer form of Quebec separation called "sovereignty-association," which would involve political independence from Canada, but economic association.[8] In 1976, the PQ was elected as province's the governing party, holding a 41% plurality (more seats than any other party, less than a majority) of seats in the Québec National Assembly.[9]

In 1980, the PQ initiated a referendum campaign, asking the people of Québec whether they wanted the province to negotiate for sovereignty-association with the rest of Canada. In that referendum, 60% of Quebeckers voted against these negotiations.[10] The PQ was re-elected in 1981 but lost in 1985 to the Liberal Party after Lévesque resigned from PQ leadership. Support for political independence remained steady at about 40% throughout that time.[11]

It is important to note that polling data differs drastically depending on which term is used to describe independence, suggesting a high level of uncertainty amongst Québécois.[12]

Québécois separatist sentiments are partially related to the circumstances surrounding the signing of the*Constitution Act, 1982*. Québec refused to sign the *Constitution Act, 1982*, feeling that the *Charter*'s focus on individual rights rather than collective rights weakens its position.[13] Support for separatism agreements increased dramatically when Meech Lake Accord (which was meant to assuage Québec's *Constitution Act, 1982* concerns) failed in 1990.[14] When the Charlottetown Accord, which called for the decentralisation of power among other things, failed via a national referendum, Québécois separatism was further invigorated.[15]

After the PQ was re-elected in 1994, pro-independence sentiments returned to roughly 40%.[16]Meanwhile, the Bloc Québécois – a party contesting in federal elections which began as an advocate for Québec sovereignty – had formed in 1990[17] and won 52 House of Commons seats in the 1993 federal election.[18]

Under PQ leadership, Québec renewed moves towards secession. In 1995, a second referendum asked: "Do you agree that Québec 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 Québec and of the agreement signed on 12 June

1995?"[19]An extremely narrow majority, 50.56% of Quebeckers, voted "no."[20]

THE *SECESSION REFERENCE*

Before the 1995 Referendum, *An Act Respecting the Future of Québec* ("Bill 1") was introduced in Québec's National Assembly.[21] This Bill would have given the National Assembly the power to unilaterally declare independence one year after the 1995 referendum.

Guy Bertrand, a lawyer in Québec, sought an order to stop the 1995 referendum on the basis that Bill 1 represented a "virtual constitutional *coup d'etat*."[22] He argued in Québec Superior Court that his *Charter*rights were under threat. While the Court agreed with Bertrand's argument, it allowed the referendum to proceed, because Quebeckers wished to express themselves on the issue.[23] Following the referendum, Bertrand again went to Québec Superior Court[24], asking the Court to prohibit Québec from pursuing secession via the unilateral means expressed in Bill 1.[25] Justice Robert Pidgeon ruled that a full hearing should be allowed, identifying a number of issues deserving an answer.[26] Using the issues brought forward by Bertrand, in 1996 the Government of Canada utilised the reference procedure to ask the Supreme Court for their opinion. In the *Secession Reference*, it asked the Supreme Court three questions. Summarised, they were:

1. In Canadian domestic law, is it legal for Québec to unilaterally secede?
2. In international law, is it legal for Québec to unilaterally secede?
3. If questions 1 and 2 conflict, which takes precedence?

The Government of Québec refused to participate in the *Secession Reference* hearing, criticising the federal government and the Supreme Court's legitimacy as an "independent arbiter in Canada's federal system."[27] Essentially, the Government of Québec saw the Supreme Court, a federal institution, as intrinsically biased towards the federal government. To ensure that the *souverainiste* perspective was heard, the Supreme Court appointed André Joli-Coeur as a "friend of the court" (*amicus curiae*) to argue the legal position of the province of Quebec. This ensured that the Court had the opportunity to hear both sides of the issue during the hearing. In addition, several interveners participated in the case: the province of Saskatchewan, the province of Manitoba, the Territories, several First Nations groups, minority rights advocates and Guy Bertrand.[28] Interveners are parties that that are not directly involved in a case that the Court chooses to let participate in the hearings by submitting written or oral arguments.

The Supreme Court rendered its opinion in 1998.[29]

It was argued by Joli-Coeur (the *amicus curiae* presenting a case in Québec's stead) that the reference power – the ability of the government to ask the Court for an advisory opinion on matters of law, established in section 53 of the Supreme Court Act[30] – is unconstitutional. As detailed in this article on the reference power, previous cases had dealt with this issue before and again upheld the constitutionality of the reference power. As well, it was argued that the Court would be going beyond its role by answering the reference questions, for

various reasons. [31] The Court did not agree with these arguments, viewing the reference questions to be both within the Court's jurisdiction as a domestic body and of national importance.

THE DECISION: *SECESSION REFERENCE* SUMMARY

QUESTION 1: Within Canadian law, can Québec Unilaterally Separate?

Recognising that the word "unilateral" could mean various things, the Court interpreted it to mean "to effectuate secession without prior negotiations" with the other provinces and the federal government.[32]

In dealing with this question, the Supreme Court immediately began by reaffirming the importance of underlying constitutional principles as "a necessary part of our Constitution because problems or situations may arise which are not expressly dealt with by the text of the Constitution."[33] The Constitution of Canada does not speak on the issue of secession, specifically. So, the Supreme Court drew on four relevant constitutional principles within the context of Canada's historical evolution: federalism, democracy, constitutionalism and the rule of law, and respect for minorities.

The Supreme Court held that underlying constitutional principles "inform and sustain the constitutional text: they are the vital unstated assumptions upon which the text is based."[34] Underlying principles can aid in linking individual elements of the Constitution together or "breathing life into" the text.[35] The Constitution's underlying principles form part of our "unwritten constitution" which, though important, is subordinate to the "written constitution."[36]

The process of applying the above four underlying constitutional principles to the Secession Reference included three steps. First, the Court highlighted how each of these principles figured in Canada's constitutional development. Second, it described what each principle means in the Canadian context. Third, the principles were applied to the question of unilateral secession.

Where do these underlying principles come from? Canadian Constitutional Development: Relevant Historical Context

The Court included a brief history of Confederation, with an eye to each principle. In particular, the Supreme Court emphasized that Confederation was a **democratic** initiative undertaken by elected representatives, not by "Imperial *fiat*." Negotiations took place amongst elected representatives and the agreement was passed by each colony's respective legislature (the Province of Canada representing what is now Québec and Ontario; New Brunswick; Nova Scotia), even though there was no legal requirement to do so.[37] The concept of federalism was crucial to Confederation negotiations and the **protection of minorities** was recognised as a priority in guarantees given for linguistic and religious groups.[38] The Court emphasized that federalism was the means of "reconcile[ing] diversity with unity;" it was the first step towards building a nation.[39]

Shortly after Confederation, following the first Dominion election where anti-Confederation representatives won a large majority of seats in Nova Scotia's legislature, there was an attempted secession by Nova Scotia. Nova Scotia appealed to the Imperial Parliament in London, asking to undo the Confederation agreement, but the request was rejected on the grounds that:

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….[40]

So, **federalism** was a political mechanism for bringing diverse regions together in a union, one which created obligations for each.

Lastly, the *British North America Act* (now the *Constitution Act, 1867*)[41] stressed continuity in its preamble, proclaiming "a Constitution similar in Principle to that of the United Kingdom."[42] Moreover, the gradual process of independence from Britain preserved **the rule of law** and stability through continued use of legal processes, ensuring legitimacy. Even in 1982, when the Constitution Act, 1982[43] completed Canada's transition to an independent state, it was seen as imperative to transfer power legitimately through existing legal channels.[44]

Having demonstrated that all four principles have been important to the evolution of Canada since the time of Confederation, the Court discussed each principle separately, to explain its meaning.

Federalism

The *Constitution Act, 1867* granted the "federal government sweeping powers which threatened to undermine the autonomy of the provinces." [45] Yet the Supreme Court has emphasized that, in practice, Canadian politics has respected federalism, suggesting a system of partial federalism.[46] For example, the federal government has the power of disallowance – it can disallow any provincial law – but this power, although once frequently invoked, has not been used since 1944.[47]

Federalism has several purposes. It:

- Recognises the diversity of provinces through a sphere of autonomy;[48]
- "Facilitates democratic participation by distributing power to the government thought to be most suited to achieving the particular societal objective;"[49] and
- "Facilitates the pursuit of collective goals by cultural and linguistic

minorities which form the majority within a particular province."[50]

Federalism, the Supreme Court held, creates political units wherein groups that would otherwise be minorities can form a majority within their political unit. It was a response to the political reality that, at the time of Confederation, the four provinces-to-be had markedly distinct cultures which they hoped to protect through autonomy over local matters. The Supreme Court sees federalism as a "central organizing theme" of our Constitution.[51]

Democracy

The Supreme Court described the democracy principle as "a sort of baseline against which the framers of our Constitution, and subsequently, our elected representatives under it, have always operated."[52] It is an assumed for Canada's political institutions, even if the *Constitution Act, 1867* never explicitly mentions a "democracy principle."[53]

The Court began its description of the democracy principle by calling it "a political system of majority rule."[54] Democracy in Canada's tradition has evolved. The *Magna Carta* (1215) gave way to the English*Bill of Rights* (1689), which paved the way for the formation of representative government bodies in the colonies, the development of responsible government, and Confederation.[55]

Democracy is a vehicle for the expression of self-government, the Supreme Court held; it is concerned with more than just the process of government.[56] The Court referred to a quote from *R v Oakes*,[57] which articulated several values linked inherent to democracy:[58]

- Respect for human dignity
- Social justice and equality
- Tolerance for a wide variety of beliefs (pluralism)
- Respect for cultural and group identity
- Faith in the institutions of government

The Supreme Court went on to discuss the institutional and individual components of democracy. Institutionally, democracy requires that Members of Parliament and representatives of each provincial legislature be elected by popular franchise (everyone has the right to vote).[59] Individually, citizens have a right to participate in the process.[60]

Finally, democracy interacts with other underlying constitutional principles, the Court said. It explained how the democracy principle relates to the three other underlying constitutional principles: federalism, the rule of law, and protection of minorities. First, federalism means that there can be "different and equally legitimate majorities."[61] Second, the rule of law is necessary for democracy, creating "the framework within which the 'sovereign will' is to be ascertained and implemented."[62] To be legitimate, democratic institutions have to have a legal foundation. Likewise, "law's claim to legitimacy rests on an appeal to moral values."[63]

Lastly, democracy requires continuous discussion which requires that the majority "be

committed to considering dissenting voices."[64] Respect for minorities works towards preserving the "marketplace of ideas" that is crucial to the process of deliberation, a necessary element of democracy. Significantly, , the*Constitution Act, 1982* allows any participant in Confederation to initiate constitutional change, imposing "a corresponding duty on the participants in Confederation to engage in constitutional discussions in order to acknowledge and address democratic expressions of a desire for change."[65] This duty to negotiate is crucial to the Court's decision.

Constitutionalism and the Rule of Law

The Court made use of three other reference cases to explain the rule of law: *Patriation Reference*,*Manitoba Language Rights Reference*, and *Provincial Judges Reference*.[66] The rule of law, the Court held, consists of at least three aspects. The first two, taken from the Court's decision in the Manitoba Language Rights Reference, are:

1. Law is supreme; and

2. The rule of law requires that there be laws and that those laws be created to embody the "normative order" (laws should strive to create a good society).[67]

Thirdly, as laid out in the Provincial Judges Reference:

3. All exercises of public power must "find its ultimate source in a legal rule."[68]

Constitutionalism is similar to the rule of law, though the two concepts are distinct. Essentially, constitutionalism differs from the rule of law only in that it deals with the Constitution specifically. It "requires that all government action comply with the Constitution" and that all laws do so as well.[69]

The Court offered three, overlapping, reasons to have a Constitution that requires more than a simple majority to amend it:

- An added safeguard for human rights and freedoms
- To ensure that vulnerable minority groups have the institutions and rights necessary to maintain and promote their identities
- To divide political power between different levels of government[70]

In keeping with these reasons for having a Constitution, the Court denied that a successful province-wide referendum could circumvent constitutional supremacy. Canada is not a system of simple majority rule: constitutional rules define the majority which must be consulted in order to alter the fundamental balances of political power in Canada.[71] The Court held, for that reason, that a significant change to the Canadian political order would require seeking an amendment to the Constitution through the amendment process. The amendment process ensures that there is an opportunity for the constitutionally-defined rights of all parties to be respected and reconciled.[72]

Protection of Minorities

The final underlying constitutional principle that the Court examined was the protection of minorities. In particular, the Court pointed to minority religious education rights, minority language rights, and Aboriginal rights as examples of a constitutional principle emphasizing the protection of minorities. Despite acknowledging that some constitutional provisions "protecting minority language, religion and education rights" were the product of historical compromises, the Court insisted that these compromises nonetheless worked towards a broader principle of protecting minorities.[73]

The protection of minorities would have been important to the Supreme Court's ruling, had it determined that there was a right for Québec to unilaterally secede. It is worthwhile, for example, to note that part of the*Secession Reference* hearing concerned Canada's duty towards its Aboriginal peoples, which might be in jeopardy in the event of unilateral secession. Does the Government of Canada have a fiduciary ("holding in trust" – Aboriginal groups agreed to treaties with Canada, trusting that Canada would protect their interests) duty towards its Aboriginal populations. If Québec were to secede, Canada might have a duty to ensure that Aboriginal groups within the territory of Québec received the same protections that they had in Canada. Because the Court ruled unilateral secession to be illegal, this argument was not discussed in the decision, though it has received scholarly attention. [74]

Application of Underlying Constitutional Principles to Unilateral Secession

Secession is an act which withdraws a group from the "political and constitutional authority of that state," the Court held.[75] The secession of a province from Canada requires an amendment to the Constitution because it represents a fundamental change in the Constitutional balance of political power. Stated in a different way, "an act of secession would purport to alter the governance of Canadian territory in a manner which undoubtedly is inconsistent with our current constitutional arrangements."[76]

The Court held that unilateral secession was illegal, which pundits and legal analysts had largely expected.[77] However, it also ruled that the rest of Canada had a "duty to negotiate," in the event of a referendum demonstrating the political will to secede.[78] How did the Court reach this conclusion, within the context of our Constitution and underlying constitutional principles?

The Duty to Negotiate

The Court began by affirming the importance of referenda as an expression of the democratic will of the people. Though the Court accepted that the Constitution does not itself give direct legal effect to a referendum, the democratic principle demands that "considerable weight" be given to a clear demonstration that the people of a province wish to secede.[79]

The Court qualified the point above by stating, in order for a province to claim that an expression of democratic will has taken place, that there would need to be both a "clear majority" and a "clear question."[80] Enough of the population would need to vote "yes",

and the reference question would need to be clear enough as to give voters an unambiguous sense of what they are supporting. The Court declared that it would have no role in deciding either of these matters, as only political actors "would have the information and expertise to make the appropriate judgement."[81]

Moving to another principle, the Court said that federalism also pointed to a duty to negotiate. If, through a referendum, one province clearly renounced the status quo, the rest of the country would have an obligation to respond to that desire. This point was buttressed by the fact that any participant in Confederation can initiate constitutional amendment. The Court held that, if one participant has a right to seek an amendment, the corollary ("flip-side") of this right is an obligation by all others to come to the negotiating table.[82]

The Court rejected that the federal government and other provinces had a duty to accept secession on the basis of a referendum, negotiating only on details. Forcing other parties to accept secession is illegitimate for two reasons:

1. It would undermine federalism, the rule of law, and the democracy principle for the whole of Canada. Federalism and the rule of law both call for secession to be done via the amendment process stipulated in the *Constitution Act, 1982*; the democracy principle cannot "trump" both of these. In addition, a right to secession would undermine the democracy principle "in other provinces or in Canada as a whole."[83]
2. If secession is a legal entitlement, negotiations could not be effective. Québec, if it was able to invoke a right to secession, would have disproportionate power in negotiations.[84]

At the same time, the duty to negotiate requires that the other provinces and the Government of Canada not "exercise their rights in such a way as to amount to an absolute denial of Quebec's rights."[85] Still, the Court recognised that negotiations may, legally, fail.[86] The duty to negotiate only asks that negotiations "contemplate the possibility of secession."[87]

Judicial Boundaries: the Role of the Court in Enforcing the Duty to Negotiate

The Court referred to its decision in the Patriation Reference[88], where it distinguished between the "law of the Constitution" and "the conventions[89] of the Constitution."[90] Constitutional conventions are enforced by political sanctions; they are not enforced by courts. The Court, further, said that even judicial intervention in the "law of the Constitution" must be limited to within the court's constitutional role.[91]

The Court ruled that it "has no supervisory role over the political aspects of constitutional negotiations."[92]Just as it would not determine whether the "impetus for negotiation" (a clear majority and a clear question) had taken place, the courts could not say whether parties to secession negotiations were ignoring other principles or negotiating in good

faith.[93] The duty to negotiate is still binding, but the consequences for not doing so carry political, not legal, sanctions. The Court pointed to international ramifications (other countries may not recognise Québec's statehood if it unilaterally secedes) as an example.[94]

QUESTION 2: In International Law, Does Québec Have the Right to Secede Unilaterally?

The Court was asked to consider the principles of international law. Because the potential secession of Québec asks about the status of a group wishing to become a state, that group's rights under international law are an important aspect of the situation.

International law has formal sources (treaties) and informal sources (principles of general behaviour that are repeated over time). Canada agrees to abide by the formal laws that it signs onto, meaning that they are binding, even if enforcement is sometimes difficult. Sometimes informal sources of international law (norms) are used to decide disputes as well. If Québec has a right to secede from Canada in treaties and conventions that Canada has agreed to, that would have to be considered against the constitutional duty to negotiate.

So, it was important that the Court answer this question. Three principles of international law were at-issue in the *Secession Reference*: effectivity, self-determination, and territorial sovereignty.

Effectivity

It was argued that, in the end, international law will recognise effective political realities.[95] Essentially, the idea behind this argument was that, even if secession wasn't legally completed domestically, that the international community might view it as *de facto* complete and recognise Québec as a state. Recognition is really the only condition of statehood in the international system: a state is a state if other states say that it is and let it join international organizations.

The principle of effectivity was employed to underpin this claim. Effectivity is a fundamental norm in international law (meaning that it is part of informal international law), the necessary prerequisite for the legal validity of new political situations.

Essentially, effectivity recognises *de facto* situations. For example, in the *United States v. Netherlands* (a case heard at the Hague in 1925), the sovereignty of the Netherlands over Isla de Palmas "was recognised against valid title held by the United States because, *de facto*, the Netherlands had administered the island over previous years."[96]

The Court did not accept the principle of effectivity, stressing that "the existence of a positive legal entitlement is quite different from a prediction that the law will respond after the fact to a then existing political reality."[97]

Having dispensed with the effectivity argument, the Court turned to secession in the context of self-determination and sovereignty.

The Interplay between Self-Determination and Sovereignty: Two Central Features of International Law

In international law and politics, "self-determination" is the right of a people to "choose its own political status and to determine its own form of economic, cultural and social development."[98] The right to self-determination exists alongside territorial sovereignty, however, and doesn't mean that any group has a right to secede. As is explained below, the right to self-determination is generally actualised *internally*, not externally.

"Territorial sovereignty" is considered by many to be *the* fundamental principle of international law. It means that states have the right to protect and administer the area within its borders. Within its territory, a state is "sovereign" – it is supreme, it has independent authority. Territorial sovereignty is the principle that makes acts of aggression (invading another country) illegal, for example.

Secessionist groups often articulate a right to self-determination, while their states express a desire to protect their territorial sovereignty. Sometimes secessionist movements are viewed as legitimate, other times they aren't. The Court considered whether, for the case of Québec, the right to self-determine should mean a right to secede unilaterally.

The Court listed various sources of international law which endorse the right of self-determination. There were many, including the *Charter of the United Nations*, the *International Covenant on Civil and Political Rights*, and the *International Covenant on Economic, Social and Cultural Rights*.[99] Self-determination is a well-established "general principle of international law"[100], but is it applicable to the secession of a province from Canada?

The Court considered the scope of the right to self-determination, distinguishing between *internal* and*external* self-determination. Internal self-determination is most common and occurs within the structure of the state. A right to external self-determination "arises only in the most extreme of cases and, even then, under carefully defined circumstances."[101]

This is because self-determination exists in the context of an international system which also values territorial sovereignty as a central organising principle. The Court pointed out that most documents supporting a right to self-determination also contain statements which limit the exercise of that right to an "existing state's territorial integrity or the stability of relations between sovereign states."[102] The Court pointed to several examples of this, including: the *Declaration on Friendly Relations* and the *Declaration on the Occasion of the Fiftieth Anniversary of the United Nations*.[103]

International law "places great importance on the territorial integrity of nation states and, by and large, leaves the creation of a new state to be determined by the domestic law of the existing state of which the seceding entity presently forms a part."[104]

However, there are certain defined contexts where external self-determination can be

exercised. The Court considered these, finding two. First, there is a right of colonial peoples to break away from the "imperial" power, but that situation isn't applicable to Québec.[105] Second, if a group is "subject to alien subjugation, domination or exploitation outside a colonial context" they can also exercise a right to external self-determination.[106] Again, Québec is not in this situation.

A third, disputable, circumstance was proposed: "when a people is blocked from the meaningful exercise of its right to self-determination internally."[107] The Court did not rule on whether this third circumstance was an established standard in international law, finding – at any rate – that Québécois have not been denied access to their government.[108]

The Court found that, except in the case of colonialism, the international right to self-determination is expected to be achieved within the framework of a people's existing state. If a government represents the whole of the people and treats citizens equally, it is entitled to its territorial integrity under international law. International law does not give Québec the right to unilaterally secede.

QUESTION 3: If there is a Conflict Between Canadian and International Law, Which Wins?

The Court did not find a right to unilaterally secede in either Canadian or international law, so there was no conflict. As a result, the Court did not find it necessary to consider this question.[109]

AFTER THE REFERENCE CASE: EVENTS TO CONSIDER

The *Secession Reference* dealt with one of Canada's critical political issues: whether Quebec has the power to make a unilateral decision to leave Canada. This is an issue which did not evaporate after the decision was rendered. As well, because the Supreme Court left it to political institutions to determine the definition of a "clear question" and a "clear majority," both the National Assembly of Québec and the Parliament of Canada produced legislation in response to the Court's decision.

Legislative Responses: *The Clarity Act* and Bill 99

The Parliament of Canada enacted *The Clarity Act* in 2000.[110] This Act reaffirms the Court's finding that secession amounts to a constitutional amendment and also gives the House of Commons the power to determine whether a clear expression of democratic will has taken place. In effect, the federal government gave itself the discretion to decide whether it must take place in negotiations. Part of the Act also demands that the House of Commons say in advance whether a referendum question is clear. [111] The Act does not define what constitutes a "clear majority." Instead, it only says that the House is required to state whether the (undefined) standard has been met after the fact.

Québec's National Assembly responded to *The Clarity Act* with its own legislation in 2000, with *An Act respecting the exercise of the fundamental rights and prerogatives of the Québec people and the Québec State*, dubbed "Bill 99."[112] Bill 99 says that a "clear majority" is any that meets the 50% + 1 threshold. It also declares that the Government of

Québec has sole control to decide the content of a referendum, while affirming other values like Québec's commitment to aboriginals and territorial integrity.[113] When brought before Québec Court of Appeal in 2007, sections 1, 2, 3, 4, 5, and 13 of "Bill 99," the heart of the legislation, were ruled unconstitutional.[114]

Essentially, the *Clarity Act* sets the conditions under which the federal government will negotiate secession with Québec. Bill 99 set different conditions under which the federal government should negotiate secession with Québec, but it isn't valid any more.

The *Secession Reference* tackled an issue of utmost importance related to the English-French divide in Canada, contemplating the legal ramifications if Quebeckers had voted to secede in 1995. It is also known for being the first articulation of all four "unwritten" constitutional principles together. As separatist sentiment in Québec continues to simmer today,[115] the *Secession Reference* decision remains an important element of Canadian constitutional law.

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[5] *Supra* note 3.

[6] "Front de Libération du Québec" *Canadian Encyclopedia*, online : Canadian Encyclopedia.

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[15] *Ibid*

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[18] *Supra* note 8.

[19] "Québec Referendum 1995" *Canadian Encyclopedia*, online: Canadian Encyclopedia.

[20] *Ibid*

[21]Bill Q-1, *An Act Respecting the Future of Quebec*, 1st Sess, 38th Leg, 1995 (never voted on).

[22] David Schneiderman, ed, *The Quebec Decision: Perspectives on the Supreme Court Ruling on Secession* (Toronto: James Lorimer & Company Ltd., 1999) at p2.

[23] *Ibid* at p3.

[24] *Bertrand v. Quebec (A.G.)*, [1995] 127 D.L.R. (4th) 408.

[25] *Supra* note 21 at p4.

[26] *Ibid.*

[27] *Supra* note 21 at p6.

[28] *Supra* note 21 at p7.

[29] *Reference re Secession of Quebec*, [1998] 2 SCR 217 .

[30] *Supreme Court Act*, RSC 1985, c S-26, s 53.

[31] *Supra* note 28 at para 6-31.

[32] *Supra* note 28 at para 86.

[33] *Supra* note 28 at para 32.

[34] *Supra* note 28 at para 49.

[35] *Supra* note 28 at para 49-52.

[36] *Supra* note 28 at para 53.

[37] *Supra* note 28 at para 35, 36, 39.

[38] *Supra* note 28 at para 38.

[39] *Supra* note 28 at para 43.

[40] Cited in s*upra* note 28 at para 42, Colonial Office's response to then-Premier Howe.

[41] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91, reprinted in RSC 1985.

[42]*Supra* note 28 at para 44.

[43]*Constitution Act, 1982*, being Schedule B to the *Canada Act 1982*(UK), 1982, c 11.

[44] *Supra* note 28 at para 47.

[45] *Supra* note 28 at para 55.

[46] *Ibid*

[47] *Ibid*

[48] *Supra* note 28 at para 58.

[49] *Ibid*

[50] *Supra* note 28 at para 59.

[51] *Supra* note 28 at para 57.

[52] *Supra* note 28 at para 62.

[53] *Ibid*

[54] *Supra* note 28 at para 63.

[55] *Ibid*

[56] *Supra* note 28 at para 64.

[57] R. v. Oakes, [1986] 1 SCR 103 .

[58] *Supra* note 28 at para 64.

[59] *Supra* note 28 at para 65.

[60] *Ibid*

[61] *Supra* note 28 at para 66.

[62] *Supra* note 28 at para 67.

[63] *Ibid*

[64] *Supra* note 28 at para 68.

[65] *Supra* note 28 at para 69.

[66] *Supra* note 28 at para 70.

[67] *Supra* note 28 at para 71.

[68] *Ibid*

[69] *Supra* note 28 at para 72.

[70] *Supra* note 28 at para 74.

[71] *Supra* note 28 at para 75,76.

[72] *Supra* note 28 at para 76, 77.

[73] *Supra* note 28 at para 79-82.

[74] See, for example: Jill Wherrett, "Aboriginal Peoples and the 1995 Quebec Referendum: A Survey of the Issues" *Library of* Parliament, online: Parliament of Canada.

[75] *Supra* note 28 at para 83.

[76] *Supra* note 28 at para 84.

[77] *Supra* note 21.

[78] *Supra* note 28 at para 88.

[79] *Supra* note 28 at para 87.

[80] *Ibid*

[81] *Supra* note 28 at para 100.

[82] *Supra* note 28 at para 88, 69; alluded to in para 76, 77.

[83] *Supra* note 28 at para 91.

[84] *Ibid*

[85] *Supra* note 28 at para 93.

[86] *Supra* note 28 at para 96.

[87] *Supra* note 28 at para 97.

[88]*Re: Resolution to amend the Constitution*, [1981] 1 SCR 753 .

[89]''Constitutional Keywords – Convention'' *Centre for Constitutional Studies*, online : Centre for Constitutional Studies.

[90] *Supra* note 28 at para 98.

[91] *Ibid*

[92] *Supra* note 28 at para 100.

[93] *Supra* note 28 at para 101.

[94] *Supra* note 28 at para 103.

[95] *Supra* note 28 at para 110.

[96]Anne Bayefsky, *Self-Determination In International Law : Quebec And Lessons Learned: Legal Opinions*(Boston : Kluwer Law International, 2000) at p 338.

[97] *Supra* note 28 at para 110.

[98] ''Self-Determination'' *Unrepresented Nations and Peoples Organization*, online" UNPO.

[99] *Supra* note 28 at para 113-121.

[100] *Supra* note 28 at para 114.

[101] *Supra* note 28 at para 126.

[102] *Supra* note 28 at para 127.

[103] *Supra* note 28 at para 128-130.

[104] *Supra* note 28 at para 112.

[105] *Supra* note 28 at para 132.

[106] *Supra* note 28 at para 133.

[107] *Supra* note 28 at para 134.

[108] *Supra* note 28 at para 135, 136.

[109] *Supra* note 28 at para 147.

[110] *Clarity Act,* SC 2000, c. 26.

[111] Tom Flanagan, "Clarifying the Clarity Act" *The Globe and Mail* (8 July 2011), online:

The Globe and Mail.

[112] Bill 99, *An Act Respecting the Exercise of the Fundamental Rights and Prerogatives of the Québec People and the Québec* State, RSQ 2000 c. E-20.2.

[113] *Ibid*.

[114]*Henderson c. Québec (Procureur général),* 2007 QCCA 1138.

[115]"Quebec Separatism: Appetite for Independence Endures in Quebec, According to Poll" *Canadian Press*, online: Huffington Post.