THE QUEBEC SECESSION REFERENCE

CONSTITUTIONAL FORUM CONSTITUTIONNEL

Centre for Constitutional Studies/Centre d'études constitutionnelles

Volume 10, Number 1 Fall 1998 Edmonton, Alberta

CONSTITUTIONAL
FORUM
CONSTITUTIONNEL

Editor:
David Schneiderman

Design & Layout:
Christine Urquhart

Constitutional **Forum** Constitutionnel is a quarterly publication of the Centre for Constitutional Studies / Centre d'études constitutionnelles published with the financial support of the Alberta Law Foundation.

The opinions expressed herein are those of the individual contributors only. Contributions and replies are invited in either official language. Notes and articles should be limited to 3,000 words in length. The Editor and Management Board reserve the right to edit any submissions. Inquiries and contributions should be directed to the Editor, David Schneiderman, 459 Law Centre, University of Alberta, Edmonton, Alberta, T6G 2H5 or by telephone at (403) 492-5681 or Fax (403) 492-4924; or e-mail: curqhart@law.ualberta.ca.

Associate Memberships to the Centre for Constitutional Studies are available at $35.00 per year (entitlements are: newsletter, notification of Centre publications, lectures and events.) Retroactive memberships are still available for an additional fee. Retroactive membership for 1989-90 through 1996/97 are available at $10.00 per year. Make cheques payable to: The Centre for Constitutional Studies.

Constitutional **FORUM** Constitutionnel is indexed in: **Index to Canadian Legal Periodical Literature, Index to Canadian Legal Literature** and **Current Law Index.**

ISSN: 0847-3889

IMPOVERISHMENT OF THE LAW BY THE LAW: A CRITIQUE OF THE ATTORNEY GENERAL'S VISION OF THE RULE OF LAW AND THE FEDERAL PRINCIPLE

Jean Leclair

[U]n gouvernement s'expose quand il refuse obstinément et trop longtemps ce que le temps a proclamé nécessaire.

Ce qui est exagéré n'a pas de valeur.

Talleyrand (1754–1838)[1]

This brief article is devoted to a critique of the arguments put forward by the Attorney General of Canada in connection with the Reference concerning certain questions relating to the secession of Quebec (hereinafter, "the Reference"). This critique will not be presented from a plainly positivist standpoint. On the contrary, I will be examining in particular (1) how the approach taken by the Attorney General impoverished the legal concepts of the rule of law and federalism, both of which were, however, central to her submission; and, in a more general way, (2) how the excessively detailed analysis of constitutional texts contributes to the impoverishment of the symbolic function of the law, however essential that dimension may be to its legitimacy.[2] My criticism will take into account the reasons for judgement delivered recently by the Supreme Court in the Reference.[3]

IMPOVERISHMENT OF FUNDAMENTAL CONSTITUTIONAL PRINCIPLES

The position of the Attorney General of Canada as to the relevance of the rule of law and federalism concepts can be summarized as follows.

The Constitution of Canada is the supreme law of the land, the source of all authority. It determines the extent and limits of the powers of both levels of government. Any standard that contravenes the Constitution can be declared legally invalid. Furthermore, the Constitution sanctions a principle already recognized in Canadian law, namely the rule of law, according to which, to prevent arbitrariness, any action by the state must be authorized by law. Order and justice are therefore assured, as the state may act only in compliance with clear and previously stated rules that it has adopted itself. The courts are the guardians of the rule of law. Lastly, since Part V of the *Constitution Act, 1982* expressly establishes the rules to be followed to amend the Constitution, it follows that it is the only applicable standard.

The Attorney General maintained that Section 45 of the *Constitution Act, 1982*, the only one allowing a province unilaterally to amend a part of the Constitution, did not authorize secession; no one disputed this assertion. The issue, the Attorney General maintained, was therefore resolved. It followed, she said, that the Court did not have to make any further determination; the interpretation of section 45 sufficed.[4] The Court did not have to "stray into" issues such as how secession might be effected,[5] or express an opinion

[1] Quotations taken from Jean Orieux, *Talleyrand ou le sphinx incompris* (Paris: Flammarion, 1970) at 684 and 819.

[2] For my purposes here, there is no need to address the problems of international law raised by the Reference.

[3] This article is a modified version of a paper presented at the 1998 Annual Conference of the Canadian Association of Law Professors, which was held on June 3 at the University of Ottawa and had as its theme "Legality and Legitimacy: The Reference concerning certain questions relating to the unilateral secession of Quebec from the rest of Canada." I had been given the task of critiquing the arguments submitted by the Attorney General of Canada. Since then, the decision of the Supreme Court has been handed down: see *Quebec Secession Reference* (1998) 161 D.L.R. (4th) 385. Because some of the reasons expressed by the Court bore a resemblance to my earlier criticism, it was felt that an amended version of my paper should be published.

[4] It should be added that the Attorney General was of the opinion that international law did not recognize the people of Quebec's right to secede and that, in any event, domestic law had precedence over international law in this matter.

[5] Reply of the Attorney General, para. 41; Factum of the Attorney General of Canada, para. 116; Written Responses of the Attorney General to the questions asked by the Supreme Court, paras. 68-71. In this regard, the Attorney General

on the merits of the sovereignist project.[6] It did not have to explain whether other principles could have been invoked in support of such a project.[7] Neither did it have to express an opinion on the relevance of a national referendum,[8] or on the need to obtain consent from the Aboriginal peoples.[9] She even seemed reluctant to allow that the provinces could make a political commitment to recognize the people of Quebec's right to unilaterally decide their own future.[10] For the Attorney General, the rule of law compelled the Court to limit its examination to section 45 of the Constitution.

The Attorney General also enlisted the federal principle in support of her case against a province's right to secede. She said, "[o]ne of the consequences of the federal principle in Canada is that no single governmental institution — whether at the central or provincial level — can claim plenary authority over the population of a given province,"[11] which naturally excluded the power for a province to become fully sovereign. While the Attorney General recognized that "there is a Quebec people in a sociological, historical and political sense,"[12] in her view Quebec nevertheless remained a province like the others: "a full and equal — indeed a founding — member of the federation. The legislature of Quebec, *like other provincial legislatures*, exercises numerous important heads of power and enjoys significant autonomy under Canada's federal constitutional structure."[13] Lastly, when the concept of federalism is put forward, the emphasis is oddly on unity and not diversity, as, for example, when the Supreme Court referred in *Morguard* to "the obvious intention of the Constitution [of 1867] to create a single country."[14]

In short, we learn that the values of federalism and rule of law (and of democracy), "[f]ar from superseding or supplanting the terms of the Constitution, ... are found in the Constitution's specific amending provisions and reinforce their application."[15]

Pressed by the Court, which was anxious to know whether there were some principles that would show the way out of the deadlock brought about by the impossibility of obtaining the consent required by Part V to effect a secession, the Attorney General replied: "it is not Part V that would have 'failed' if a constitutional amendment proposal did not obtain the required resolutions of assent, but rather, the particular proposal under consideration."[16] The Constitution triumphed absolutely. The Titanic was indeed unsinkable. The ship did not sink; the water level, unfortunately, rose above the upper decks.

• • •

The preceding definitions of rule of law and federalism are perfectly consistent with what is found in most works of constitutional law. They are both deficient, however, in that they are based on the presumption that legal standards adopted by the state have an objectively identifiable content of universal scope. They conceal the fact that the porosity of these standards allows their interpreters to inflect their meaning. In this way, meaning becomes largely determined by the expectations of the target audience. Here comes into play the concept of legitimacy, which is not to be confused with strict adherence to a constitutional standard stripped of any context.[17]

---

invoked the fact that such questions could raise many issues apt to affect the provinces, which, with the exception of Manitoba and Saskatchewan, did not intervene in the Reference: Factum of the Attorney General of Canada, para. 118. Since the federal government could have inquired of the provinces whether it was convenient to proceed by reference to the Supreme Court, it is strange, to say the least, that it should invoke their absence to encourage the Court not to express an opinion on questions relating to how secession might be effected. If the provinces were absent, the Attorney General had only herself to blame.

6 Reply of the Attorney General, para. 32.

7 Factum of the Attorney General of Canada, para. 116.

8 Written responses of the Attorney General to the questions asked by the Supreme Court, para. 58.

9 Reply of the Attorney General, para. 44.

10 Written responses of the Attorney General to the questions asked by the Supreme Court, para. 52.

11 Factum of the Attorney General of Canada, para. 74.

12 Reply of the Attorney General, para. 91.

13 Reply of the Attorney General, para. 64 (emphasis added). Also see Factum of the Attorney General of Canada, paras. 193, 196.

14 *Morguard Investments Ltd.* v. *De Savoye*, [1990] 3 S.C.R. 1077 at 1099, passage quoted and approved in the *Provincial Court Judges Reference*, [1997] 3 S.C.R. 3 at paras. 97-98 and reproduced in para. 62 of the Reply of the Attorney General. Also see Factum of the Attorney General of Canada, para. 84, where it is said that "a central objective of Confederation was to bring together the then-province of Canada ... and the provinces of Nova Scotia and New Brunswick in a single federal union."

15 Reply of the Attorney General, para. 67. Content with the fact that "Canadian courts have long and frequently recognized" these values, the Attorney General did not feel the need to expand on their content.

16 Written responses of the Attorney General to the questions asked by the Supreme Court, para. 73.

17 To the Attorney General's credit, it must be said that she herself was a victim of the role she had been assigned (although did she herself not assume this role?). Indeed, the legal debate based on the invocation of mutually exclusive rights compels the parties involved to take die-hard positions and to ask for the maximum precisely in the hope of obtaining the maximum. In the words of my colleague Yves-Marie Morissette, it forces each party to "treat the other as if he was a liar."

The political institutions of a given society and the laws that they pass will appear legitimate, in the sense that the people will freely agree to obey them, to the extent that such institutions are in tune with the values and beliefs of the community members.[18] Legitimacy thus presupposes the possibility of dialogue amongst the various segments of the community and between state institutions and those segments. A political (or even judicial) institution failing to defend concepts of humanity, of community, and of public interest in keeping with people's expectations, will see its legitimacy and its power to constrain start to dwindle.[19] These values will, among other things, constitute the horizon,[20] the background of intelligibility, used by the judges as a basis for interpreting the vague concepts expressed above.[21] The interpretation of these concepts, which in their abstraction appear universal, will be sustained by "local" values.[22]

From this point of view the concepts of rule of law and federalism must be considered.

Faithfulness to the law, even constitutional law, is not necessarily identical with faithfulness to the moral ideal,[23] to the aspiration that underlies the notion of rule of law. Strict adherence to official legality may be nothing more than faithfulness to a legality stripped of any ethical concerns. I agree with Jeremy Webber's view that the rule of law means that the exercise of any political power is linked to an obligation to justify political actions in the eyes of all.[24] All political power must aim at the common interest ahead of special interests; a political action is therefore justified only if it tends to promote a concept of the public interest that can be defended publicly, before society *as a whole*. Such a power will be legitimate insofar as, within such a context, the decisions made by political institutions appear acceptable, even to those who oppose them.[25]

This concept of the rule of law is more restrictive than it seems, since it compels the political authorities, under penalty of a loss of legitimacy, to defend and give reasons for their notion of the public interest to all audiences that make up Quebec or Canadian society. It calls for dialogue, for consideration of varied interests, and for compromise. This concept of the rule of law is

---

18 Charles Taylor, "Alternative Futures: Legitimacy, Identity, and Alienation in Late-Twentieth-Century Canada" in *Reconciling the Solitudes: Essays on Canadian Federalism and Nationalism* (Montreal: McGill-Queen's University Press, 1993) at 59-119, 64: "This term [legitimacy] is meant to designate the beliefs and attitudes that members have towards the society they make up. The society has legitimacy when members so understand and value it that they are willing to assume the disciplines and burdens which membership entails. Legitimacy declines when this willingness flags or fails."

19 *Ibid.* note 18 at 68: "Institutions are defined by certain norms and constituted by certain normative conceptions of man. It is these conceptions that they sustain. But the relationship of support also works the other way. It is these normative conceptions that give the institutions their legitimacy. Should people cease to believe in them, the institutions would infallibly decay; they could no longer command the allegiance of those who participate in them. Institutions demand discipline, frequently sacrifice, always at least the homage of taking their norms seriously. When they lose legitimacy, they lose these."

20 Charles Taylor, *The Malaise of Modernity* (Concord: House of Anansi Press Ltd., 1991) at 37.

21 Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* trans. by William Rehg (Cambridge: The MIT Press, 1998) at 156: "A collective self-understanding can be authentic only within the horizon of an existing form of life; the choice of strategies can be rational only in view of accepted policy goals; a compromise can be fair only in relation to given interest positions. The corresponding reasons count as valid relative to the historical, culturally molded identity of the legal community, and hence relative to the value orientations, goals, and interest positions of its members. Even if one assumes that in the course of a rational collective will-formation attitudes and motives change in line with the arguments, the facticity of the existing context cannot be eliminated; otherwise ethical and pragmatic discourses, as well as compromises, would lack an object. ... As used for the validity component of legal validity, the expression 'legitimacy' designates the specific kind of prescriptive validity ... that distinguishes law from 'morality.' Valid moral norms are 'right' in the discourse theoretic sense of just. Valid legal norms indeed harmonize with moral norms, but they are 'legitimate' in the sense that they additionally express an authentic self-understanding of the legal community, the fair consideration of the values and interests distributed in it, and the purposive-rational choice of strategies and means in the pursuit of policies."

22 Some will object that, according to the point of view expressed here, there could be legitimacy of the law, even if the local values were perverse and allowed the adoption of legislative measures intended to oppress minorities. However, as I explain further on, there is respect for the rule of law, and therefore legitimacy, only insofar as the values defended by the state are publicly debated before *all members* of society, including minorities. This public debate and dialogue, and the compromises that it necessarily entails if it is based on a genuine willingness to listen and debate, will confer legitimacy on political actions because, from that point on, they will appear acceptable even to those who oppose them, their point of view having been heard and taken into account.

23 As understood by C. Taylor, *supra*, note 21 at 16, namely, "a picture of what a better or higher mode of life would be, where "better" and "higher" are defined not in terms of what we happen to desire or need, but offer a standard of what we ought to desire."

24 Jeremy Webber, "The Rule of Law Reconceived" in Kalman Kulcsar and Denis Szabo, ed., *Images, Multiculturalism on Two Sides of the Atlantic* (Budapest: Institute for Political Science of the Hungarian Academy of Science, 1996) at 197.

25 A constitution is not as inevitable as the law of gravity. The concept of legitimacy does not enter into our subjection to the latter: "The law of gravity is absurd and indefensible when you fall downstairs; but you obey it." See Arnold Bennett, *Helen With the High Hand* (Gloucester: Alan Sutton Publishing, 1983) at 22.

closely intertwined with the democratic principle.[26] It prevents a given society's differences from being crushed under the weight of ontological definitions or an idiotic presumption of unanimity. It avoids the "all or nothing" stance so characteristic of the official law. It recognizes that the law is not just a means to control, but also to facilitate, human relationships. Lastly, it supposes that the mainstay of a democratic constitutional order is neither the state, nor a 50 per cent plus one majority of citizens who have voiced their opinion on a possibly confusing question, nor a legislative text, albeit constitutional, conveying only a half-message to an important segment of the population. A democratic constitutional order is anchored in the general public, whose every member has the right to be heard, as the legitimacy of power derives from them all.[27]

Understood this way, the rule of law is not opposed to legal pluralism, respect for diversity, or the granting of special status to certain groups, provided these options are presented, explained, defended in public, discussed and approved by the community, and intended to contribute to the vitality of society *as a whole*.

The reasons for decision delivered in the Reference attest that this vision of the rule of law is shared by the Justices of the Supreme Court. The Highest Tribunal clearly disavowed the Attorney General's position.

According to the Court, the Constitution is not confined to its explicit provisions. Acknowledging the primacy of the written word, the Court nevertheless recognizes that the Constitution also encompasses underlying principles that "inform and sustain the constitutional text" (para. 49).[28] In fact, the Court finds it unnecessary to examine the amendment provisions.

Among the principles referred to by the Court are federalism, democracy, constitutionalism and the rule of law, and respect for minority rights (*ibid.*). These principles, and this is of capital importance, are said to function in symbiosis (*ibid.*); furthermore, none of them is absolute to the exclusion of the others (para. 93). Consequently, the rule of law and constitutionalism are closely linked to the democratic principle, and vice versa (para. 67). Furthermore, in the Court's opinion, the rule of law must not be confused with a blind subjection and adherence to legal norms, or democracy equated with majority rule. On the contrary, the rule of law serves a much broader purpose. It aims at "vouchsaf[ing] to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs" (para. 70). As for democracy, it must not be confined to its institutional and individual dimensions, but rather must be conceived as "fundamentally connected to substantive goals" such as the accommodation of cultural and group identities (para. 64), which includes the protection of minorities (paras. 79-82). Finally and

---

[26] J. Habermas, *supra*, note 22 at 135: "The law receives its full normative sense neither through its legal *form* per se, nor through an a priori moral *content*, but through a *procedure* of lawmaking that begets legitimacy. ... It is not the legal form as such that legitimates the exercise of governmental power but only the bond with *legitimately enacted* law. At the posttraditional level of justification, ... the only law that counts as legitimate is one that could be rationally accepted by all citizens in a discursive process of opinion- and will-formation" (emphasis in original).

[27] The solution to a problem of legitimacy does not lie in "better information" but rather in "better listening." Better information will not make the amending formula any more acceptable to the people of Quebec, or the majority principle any more acceptable to those who oppose Quebec's independence, if these groups do not feel that the processes in question were adopted following a serious public debate on the vision of justice and social order that they translate, a debate during which these groups will have had the opportunity to be heard and to have their opinion taken into account.

This vision of the rule of law assumes, to quote Rousseau, that "the more grave and important the questions discussed, the nearer should the opinion that is to prevail approach unanimity": Jean-Jacques Rousseau, "The Social Contract" in *The Social Contract & Discourses*, trans. by G.D.H. Cole (London: J.M. Dent & Sons Ltd., 1913) at 1-123, B.IV, Ch. 2 at 94. I feel it is important to quote Rousseau at greater length on this subject. Rousseau wondered about the following question: "[h]ow are the opponents at once free and subject to laws they have not agreed to?" (at 93). Does such submission of citizens who have not consented to the adoption of a law not constitute a form of oppression? Not in Rousseau's view: "When in the popular assembly a law is proposed, what the people is asked is not exactly whether it approves or rejects the proposal, but whether it is in conformity with the general will, which is their will. Each man, in giving his vote, states his opinion on that point; and the general will is found by counting votes. When therefore the opinion that is contrary to my own prevails, this proves neither more nor less than that I was mistaken, and that what I thought to be the general will was not so. If my particular opinion had carried the day I should have achieved the opposite of what was my will; and it is in that case that I should not have been free" (at 93-94). Rousseau then expresses his opinion on the thorny issue of the proportional number of votes necessary to conclude that this general will exists: "A difference of one vote destroys equality; a single opponent destroys unanimity; but between equality and unanimity, there are several grades of unequal division, at each of which this proportion may be fixed in accordance with the condition and the needs of the body politic. There are two general rules that may serve to regulate this relation. First, the more grave and important the questions discussed, the nearer should the opinion that is to prevail approach unanimity. Secondly, the more the matter in hand calls for speed, the smaller the prescribed difference in the numbers of votes may be allowed to become: when an instant decision has to be reached, a majority of one vote should be enough. The first of these two rules seems more in harmony with the laws, and the second with practical affairs. In any case, it is the combination of them that gives the best proportions for determining the majority necessary" (at 94).

[28] For the sake of brevity, references to the paragraphs of the decision will appear in parentheses in the text itself.

most importantly, between these two flying buttresses stands the *legitimacy* of a political system. There lies the reason for their inescapable symbiosis:

> The consent of the governed is a value that is basic to our understanding of a free and democratic society. Yet democracy in any real sense of the word cannot exist without the rule of law. It is the law that creates the framework within which the "sovereign will" is to be ascertained and implemented. To be accorded legitimacy, democratic institutions must rest, ultimately, on a legal foundation. That is, they must allow for the participation of, and accountability to, the people, through public institutions created under the Constitution. Equally, however, a system of government cannot survive through adherence to the law alone. A political system must also possess legitimacy, and in our political culture, that requires an interaction between the rule of law and the democratic principle. The system must be capable of reflecting the aspirations of the people. But there is more. Our law's claim to legitimacy also rests on an appeal to moral values, many of which are imbedded in our constitutional structure. It would be a grave mistake to equate legitimacy with the "sovereign will" or majority rule alone, to the exclusion of other constitutional values (para. 67).

The Court then stresses the fact that democracy is synonymous with a continuous process of discussion, a discussion that entails compromise, negotiation, deliberation, and, most importantly, a consideration of the dissenting voices that must be acknowledged and addressed "in the laws by which all the community live in" (para. 68). Again, rule of law and democracy are closely interrelated. Viewed in such a perspective, the Court is indeed correct when it states that "constitutionalism and the rule of law are not in conflict with democracy; rather, they are essential to it" (para. 78).

The Attorney General's description of the federal principle was also disarmingly simplistic. Indeed, federalism represents much more than a simple method of distributing powers between levels of government. Were the federal principle merely an abstract concept, there would be no difference between Belgian, Swiss, U.S., and Canadian federalism. However, no constitutional theory that takes history into account, nor any moral vision of what Canadian federalism might signify, enlivened the Attorney General's dry description. It was therefore impossible for the judges to determine, from such a definition, what gives Canadian federalism its particular texture. Before choices can be meaningful, that which sustains such choices must be made manifest. This lack of vision was distressing for everyone, not just for Quebec.

The current crisis in Canada fits into a historical continuity. History can therefore not be ignored without trivializing the Canadian constitutional conflict.

Unlike the situation in the U.S., nationhood has never been taken for granted in Canada.[29] It is always in the process of being built. I agree with Samuel LaSelva's assertion that Canadian nationality presupposes Canadian federalism, which in turn rests on a complex form of fraternity between diverse communities, such fraternity being aimed as much at those sharing our way of life as it is at those having adopted alternative ones.[30] This concept of fraternity, not being totally disembodied, recognizes the tragic failures of this brotherhood (the tragic fate of the Aboriginal peoples and of Francophones outside Quebec[31]) and recognizes the greatness as well as the misery of the Canadian federal structure. However, in the final analysis, if Canada is to survive, it is because some people are convinced that the acceptance of differences is the royal road to a more just society.[32]

Canadian federalism is therefore based on a mutual recognition of differences — meaningful differences, that is, for they are not all equal. A thing does not necessarily become important simply because it is asserted. It becomes so when this choice fits into a particular *shared* horizon of significance allowing agreement on the importance of a given difference.[33] While it is self-evident that all provinces are distinct each in its own way, they do not all offer such a degree of specificity as to justify creating distinctions among them, if the intent is to make a choice resting on the fundamental characteristics of Canadian federalism as

---

29 Samuel V. LaSelva, *The Moral Foundations of Canadian Federalism: Paradoxes, Achievements and Tragedies of Nationhood* (Montreal: McGill-Queen's University Press, 1996) at 38 and 190.

30 *Ibid.* note 31 at xiii and 3, 23-27.

31 In this regard, read Arthur Isaac Silver, *The French-Canadian Idea of Confederation, 1864-1900*, 2nd ed. (Toronto: University of Toronto Press, 1997).

32 S.V. LaSelva, *supra*, note 29 at 7.

33 Charles Taylor, *supra*, note 20 at 52: "To come together on a mutual recognition of difference — that is, of the equal value of different identities — requires that we share more than a belief in this principle; we have to share also some standards of value on which the identities concerned check out as equal. There must be some substantive agreement on value, or else the formal principle of equality will be empty and a sham. We can pay lip-service to equal recognition, but we won't really share an understanding of equality unless we share something more. Recognizing difference, like self-choosing, requires a horizon of significance, in this case a shared one."

it evolved from 1867,[34] namely and in particular, the existence of a Quebec in which the majority language and culture is French. Any definition of Canadian federalism that ignores Quebec's (and Aboriginal peoples') distinctiveness will never be legitimate.[35] By fiercely trying not to look at the past (and even at the present), and by clinging solely to defining abstract legal norms which in themselves have no ontological significance, we deprive ourselves of the power to make valid choices and to give meaning to law, which is anything but trivial and which can, on the contrary, engender legitimacy.

If all reference to the horizon of significance that history represents is eliminated, then all choices are equally valid, all equally important, and the net result is an anemic, trivial, and even absurd version of Canadian federalism.[36]

The Supreme Court certainly understood as much. In describing the above mentioned underlying constitutional principles, the Court did not fail to indicate that they "emerge[d] from an understanding of the constitutional text itself, *the historical context*, and previous judicial interpretation of constitutional meaning" (para. 32).[37] It then went on to recount the historical circumstances from which Confederation stemmed (paras. 33–48). Seen through this historical lens, federalism convincingly appears as much more than an abstract mechanism providing for the distribution of powers between different levels of government. In this light, not only does it appear as a "legal response to the underlying political and cultural realities that existed at Confederation and continue to exist today" (paras. 43, 57), but also as the *only* political mechanism by which the cultural and linguistic diversity of the different peoples inhabiting Canada could be reconciled with their desire to unite and work together toward common goals (para. 43). In addition, instead of trying to hide Quebec's specificity in Confederation, the Court clearly states that it was a determining factor in the choice for federalism in 1867:[38]

> The principle of federalism facilitates the pursuit of collective goals by cultural and linguistic minorities which form the majority within a particular province. This is the case in Quebec, where the majority of the population is French-speaking, and which possesses a distinct culture. This is not merely the result of chance. The social and demographic reality of Quebec explains the existence of the province of Quebec as a political unit and indeed, was one of the essential reasons for establishing a federal structure for the Canadian union in 1867.... The federal structure adopted at Confederation enabled French-speaking Canadians to form a numerical majority in the province of Quebec, and so exercise the considerable provincial powers conferred by the *Constitution Act, 1867* in such a way as to promote their language and culture. It also made provision for certain guaranteed representation within the federal Parliament itself (para. 59).

In short, the Court failed to acquiesce to the Attorney General's dwarfing definitions of the rule of law and the federal principle. It gave an answer that is undeniably more complex, but infinitely more subtle and more in tune with Canadian constitutional reality.

---

[34] Roderick A. Macdonald, "...Meech Lake to the Contrary Notwithstanding" (1991) 29 Osgoode Hall Law Journal 253-328 and 483-571, p. 542: "Other provinces are not distinct in a constitutionally relevant sense because there is no constitutional criterion (which rises to the level of constituting a "fundamental characteristic of Canada") out of which their distinctiveness emerges." At 565, he adds, "True equality of the provinces does not mean reducing all provinces to the same level. It means treating provinces equally in respect of issues where they are equal."

[35] See S.V. LaSelva, *supra*, note 29. R. A. Macdonald, *supra*, note 34 at 528-529 maintained, a few years ago, that the Meech Lake Accord could not have been adopted without an acknowledgment of Quebec's distinctiveness: "It [would have] require[d] the elaboration of a theory of Canada which acknowledges Quebec's distinctiveness and which celebrates the contributions of French-speaking Canadians throughout the country to Canadian self-definition."

A. I. Silver, *supra*, note 31 at 265-266: "From [the] point of view [of the rest of Canada], Quebec's attempts to bring its minorities into a French-speaking sphere seem to be only the bullying of minority groups by the majority ethnicity. But from the Quebec point of view, the integration of other ethnicities into the French-speaking community simply makes Quebec a full and integral society in the same way as the rest of Canada — a pluralistic society in which people of diverse backgrounds and ethnicities live together democratically with French as their common public language. *What we have, in effect, is two similar but distinct multicultural entities, one in the rest of Canada, living its public life in English, the other in Quebec, living in French.* If we insist on seeing French in Quebec as merely an "ethnic" language, we misunderstand both the nature of Quebec society and the meaning of Quebecers' demands. Yet, if we fail to understand them and refuse to recognize Quebec as the society it is, then it seems likely that a majority of Quebecers may soon decide to leave Canada altogether" (emphasis added).

[36] See Charles Taylor, *supra*, note 20 at 37-41 regarding what confers importance on the choices one makes.

[37] Emphasis added. Further on (para. 49), the Court explained that "[b]ehind the written word is an historical lineage stretching back through the ages, which aids in the consideration of the underlying constitutional principles."

[38] Since the Court did not hesitate to take the past and the present into account when appraising the rights granted by the Constitution to aboriginal peoples, why would it hesitate when the time came to examine Quebec's place in Confederation?

• • •

By basing her arguments on legal concepts that she implied generate their own meaning, and by disconnecting these concepts from the moral ideal that is their goal and from the specifically Canadian historical continuity in which they belong, the Attorney General was at once impoverishing their normative meaning and the legitimizing power they have in the minds of all Canadians.[39] Wrapping up the Canadian reality in legal frills removed from any context will never be enough to generate legitimacy.[40] Some will object to this view on the ground that lawyers are not historians or sociologists. This, to me, will be proof that, in their view, the law in itself can provide objective responses to complex questions. I do not believe this. The source of the law and of the political action it justifies is to be found elsewhere. The Supreme Court apparently shares a similar conviction.

On the part of the Attorney General, this was an attempt to use the law to give some lustre to an absence of constitutional theory or, at the very least, to a theory based on an understanding of the Canadian political order which, it goes without saying, is not shared by Quebec separatists but (is it necessary to remind those who, like Torquemada, see heresy everywhere?) also is not shared by a majority of Quebecers who are, at this point, still not interested in independence.

The Attorney General was deluding herself if she thought that the answers she was seeking would pull Canada out of the current crisis.[41]

IMPOVERISHMENT OF THE SYMBOLIC FUNCTION OF THE LAW

Law's indeterminate nature is one of its weaknesses, but paradoxically it can also be one of its strengths, insofar as it can serve its legitimizing function as a symbol.

In his *Pensées*, Blaise Pascal (1623-1662) wondered about the underpinnings of the authority of law. What he says on this subject is useful for grasping the relevance of the law from a legitimacy point of view: "One says that the essence of justice is the Legislator's authority, another the convenience of the Sovereign, still another the living customs, and he alone is right. Nothing is just by reason alone; everything changes with time. Custom is all equity, for the simple reason that it is accepted as such. That is the mystical foundation of its authority. He who tries to analyze its underlying principle will destroy it. Nothing is more faulty than those laws which aim at righting wrongs. Those who obey such laws because they are just, obey to the justice they imagine and not to the essence of the law. Law does not escape itself. It is law and nothing more."[42]

In short, there is law, and there is "the idea of law," as Georges Burdeau said.[43] The idea of law refers to the citizens' attitude with respect to law; to their willingness to invest it with — or, conversely, deprive it of — meaning. Law acquires a symbolic status when it allows everyone a glimpse of what they imagine or wish for. Law gets its strength from what it says and from what it does not say.[44] This mystical underpinning

---

39 The absence of a constitutional theory of federalism that would make it possible to explain the merits of the Meech Lake Accord not only led to the Accord's failure, but also had an adverse effect on Canadian constitutionalism in general "by undermining the public's confidence that there is a history, symbolism, and vision of the country which is capable of sustaining it in the future." R. A. Macdonald, *supra*, note 34 at 277.

40 According to the approach taken by the Attorney General, the law would act on its own accord, on a passive and sheep-like public, whereas in fact, the official law can act only if the standard that it expresses is already rooted in social "practices."

41 S.V. LaSelva, *supra*, note 29 at 15: "As depicted by poets, tragedy often results because crucial facts and events are misunderstood or forgotten when they need to be comprehended or acted upon."

42 Quoted by Philippe Malaurie, *Anthologie de la pensée juridique* (Paris: Éditions Cujas, 1996) at 79-80 (my translation). The original French version reads like this: "[L]'un dit que l'essence de la justice est l'autorité du législateur, l'autre la commodité du souverain, l'autre la coutume présente et c'est le plus sûr. Rien suivant la seule raison n'est juste de soi, tout branle avec le temps. La coutume [est] toute l'équité, par cette seule raison qu'elle est reçue. C'est le fondement mystique de son autorité. Qui la ramènera à son principe l'anéantit. Rien n'est si fautif que ces lois qui redressent les fautes. Qui leur obéit parce qu'elles sont justes, obéit à la justice qu'ils imaginent, mais non à l'essence de la loi. Elle est toute ramassée en soi. Elle est loi et rien davantage."

43 Georges Burdeau, "Essai sur l'évolution de la notion de loi en droit français" (1939) *Archives de Philosophie du droit* 7: "[L]'idée de loi appartient à tout citoyen: chacun lui donne sens et substance en dehors de toute préoccupation d'école ou de doctrine. On s'attache à elle, on la magnifie ou on la discrédite et c'est en grande partie de cette attitude de tous que dépend, en définitive, dans une démocratie la valeur de la loi."

44 In a televised documentary entitled *Thomas Jefferson* (a Florentine Films Production; financed by The Arthur Vining Foundations and the Corporation for Public Broadcasting; http://www.pbs.org), an American historian, Joseph Hellis, made this statement in regard to the U.S. Declaration of

of law, and that which makes it authoritative, is what today we call legitimacy.

But we, Canadians, have become masters in the art of transforming symbols into meaningless signs,[45] as shown by the finicky deconstruction of the phrase "distinct society" appearing in the Meech Lake Accord.[46] Law's indeterminate nature, useful this time, would in fact have made it possible to ensure this expression's symbolic function by allowing the people to invest it with meaning. The public's expectations would then have inflected the meaning given to this expression by the courts. But no, we preferred the kind of "definitionalism"[47] which destroys everything by making it necessary for everything to be said and, more tragically, which allows anything to be said.

In short, *dura lex sed lex* constitutionalists too often aid in the killing of the very instrument from which they make their living, the law. Yet such law has legitimizing power if we do not lose sight of its symbolic function,[48] and if we recognize that the vague concepts it includes have meaning only if they fit into the continuity peculiar to Canada's constitutional history. This is precisely what the Supreme Court has achieved.❑

Jean Leclair

Faculty of Law, Université de Montréal.

These comments were originally presented at the Joint Session of CALT/CLSA/CPSA, Congress of Social Sciences and Humanities, University of Ottawa, June 3, 1998 and were translated into English by I.M. Milne. The text was then revised following the release of the Supreme Court of Canada's opinion in the *Reference re Secession of Quebec*. I wish to thank Geneviève Daudelin, Doctor of Sociology, and Yves-Marie Morissette of the Faculty of Law of McGill University for their valuable comments. Needless to say, I alone am responsible for the ideas put forward in this text.

Independence: "Those are the closest things to the magic words of American history. Those are the words that all Americans, at some very very important level, believe in. They are the essential words of the American creed. And part of Jefferson's genius was to articulate, at a sufficiently abstract level, these principles, these truths that we all want to believe in. The level is sufficiently abstract so that we don't notice that these truths are, at some level, unattainable and, at another level, mutually exclusive. Perfect freedom doesn't lead to perfect equality; it usually leads to inequality. *But Jefferson's genius is to assert them at a level of abstraction where they have a kind of rhapsodic inspirational quality. And we all agree not to notice ... that they are unattainable, and not to notice that they are mutually exclusive or contradictory*" (emphasis added).

45 I have borrowed this expression from R.A. Macdonald, *supra*, note 34 at 276.

46 In this regard, read R.A. Macdonald, *ibid.* at 275-277.

47 R.A. Macdonald, *ibid.* at 276.

48 Pierre-Elliott Trudeau, the great defender of reason over emotion, nevertheless recognizes the importance of symbols in building a sense of national belonging. After asserting in "Federalism, Nationalism, and Reason" (in *Federalism and the French Canadians* [Toronto: Macmillan, 1968] at 182-203) that "... *in the last resort* the mainspring of federalism cannot be emotion but must be reason" (at 194; emphasis in original), because "[t]he rise of reason in politics is an advance of law; for is not law an attempt to regulate the conduct of men in society rationally rather than emotionally?" (at 196). He nevertheless admits that a "national consensus will be developed ... only if the [Canadian] nationalism is emotionally acceptable to all important groups within the nation. Only blind men could expect a consensus to be lasting if the national flag or the national image is merely the reflection of one part of the nation, if the sum of values to be protected is not defined so as to include the language or the cultural heritage of some very large and tightly knit minority, if the identity to be arrived at is shattered by a colour-bar" (at 193).

A COURT IN NEED AND A FRIEND INDEED: AN ANALYSIS OF THE ARGUMENTS OF THE *AMICUS CURIAE* IN THE QUEBEC SECESSION REFERENCE

Bruce Ryder

INTRODUCTION

The *amicus curiae* took on a daunting challenge in assuming the task assigned to him by the Supreme Court of Canada in the *Quebec Secession Reference*.[1] In agreeing to fill the gap left by the absence of the Quebec government from the proceedings, and in presenting arguments opposed to the positions taken by the Attorney General of Canada, Maître André Joli-Coeur confronted a legal deck stacked against him. The federal government framed the reference questions in such a way as to minimize the risk that it would get answers that it did not like. The questions were aimed directly at the legal achilles heel of the sovereignty movement, namely, that their project prior to and following the 1995 referendum had relied ultimately on the possibility of pursuing a unilateral declaration of independence, a rupture of the Canadian constitutional order.[2]

The vast majority of legal scholars agree that Quebec has no right to unilateral secession in domestic or international law.[3] It came as no surprise, then, that the Supreme Court's opinion in the *Secession Reference* dismissed all of the *amicus*' arguments in short order. What is perhaps more surprising is that the authority of the Supreme Court's opinion was nevertheless quickly accepted by the government of Quebec. Many of the arguments put forward by the *amicus* had formed the basis of the Quebec government's refusal to participate in the proceedings. Similarly, the *amicus* presented the same arguments used by sovereignists to portray the unilateral path to sovereignty as legitimate and ultimately lawful.

In this comment, I will briefly canvass the *amicus*' arguments and the Supreme Court's response to them. Then I will explore how the Supreme Court was able to bring sovereignists into a conversation framed by its opinion, at the same time as it was pulling the legal rug they had previously relied upon out from underneath them.

ARGUMENTS OF THE *AMICUS CURIAE*

On the distinctly unfriendly legal terrain presented by the reference questions, the friend of the court pursued two basic strategies in his submissions.

The first strategy was to argue that the Supreme Court should not answer the questions. Me Joli-Coeur argued that the Court should refuse to issue an opinion because the questions were too theoretical,[4] too political,[5] too hypothetical,[6] were concerned solely with international law,[7] and, in any case, federal and provincial laws conferring the power to hear references on the Supreme Court and provincial courts of appeal, respectively, are unconstitutional.[8]

---

1 *Reference re Secession of Quebec* (1998) 161 D.L.R. (4th) 385 (all further paragraph references in the text are to this decision).

2 Section 26 of Bill 1, *An Act respecting the future of Québec*, 1st Sess., 35th Leg., Québec, 1995, would have authorized the National Assembly to unilaterally proclaim sovereignty after a Yes vote in a referendum if negotiations with the government of Canada subsequently "proved fruitless". See also J. Parizeau, "La déclaration unilatérale est indispensable" *Le Devoir* (16 septembre 1997) A11.

3 See, for example, T.M. Franck et al., "L'intégrité territoriale du Québec dans l'hypothèse de l'accession à la souveraineté" in Commission d'étude des questions afférentes à l'accession du Québec à la souveraineté, ed., *Les attributs d'un Québec souverain: Exposés et études, Vol. 1* (Quebec: National Assembly, 1992) 377 at 419-25; S. Williams, *International Legal Effects of Secession by Quebec* (Background Studies of the York University Constitutional Reform Project, Study No. 3) (North York, Ont.: York University Centre for Public Law and Public Policy, 1992); N. Finkelstein et al., "Does Québec Have a Right to Secede at International Law?" (1995) 74 Can. Bar Rev. 225; J. Woehrling, "Les aspects juridiques d'une éventuelle sécession du Québec" (1995) 74 Can. Bar Rev. 293; J. Webber, "The Legality of a Unilateral Declaration of Independence under Canadian Law" (1997) 42 McGill L.J. 281.

4 Mémoire de l'*amicus curiae* (18 décembre 1997) paras. 28-37.

5 *Ibid.*, paras. 38-41.

6 *Ibid.*, paras. 42-45.

7 *Ibid.*, paras. 46-53.

8 *Ibid.*, paras. 8-23. The argument in the factum focuses on the constitutional validity of s.53 of the *Supreme Court Act*. In his responses to the written questions directed to him by the justices, Me Joli-Coeur took the position that the provincial statutes authorizing references were also invalid (Réponses écrites aux questions posées par la Cour Suprême du Canada à l'*amicus curiae*, 6 mars 1998, question 1).

The Court summarily dismissed each of these preliminary objections to its jurisdiction. The questions were justiciable: they had a sufficient legal component and were precise enough to permit a legal answer (paras. 28, 31). The reference jurisdiction was re-affirmed since the Canadian constitution lacks a rigid separation of powers that would prohibit the Court from issuing advisory opinions (para. 15). The argument that the Court should refrain from addressing an issue of international law was characterized as "groundless" (para.22). The legal rights and obligations of the government of Quebec in relation to secession could not be determined without a consideration of international law (para. 23). The position taken by the government of Quebec in the *Bertrand* and *Singh* proceedings in 1995 and 1996 — that the process of Quebec's accession to sovereignty was purely a matter of international law and beyond the jurisdiction of domestic tribunals[9] — was thus firmly rejected.

Me Joli-Coeur's second strategy for avoiding a contest he could not win was to answer different questions than those presented to the Court. Instead of pressing the argument that Quebec has a *right* of unilateral secession, and the federal government a corresponding obligation to facilitate the exercise of that right, Me Joli-Coeur's submissions stayed for the most part on firmer ground. He argued that a legally effective unilateral secession is possible and is not prohibited by international law.[10] He conceded that the international right of all peoples to self-determination did not give the Quebec people a right to secede.[11] However, he argued, the unilateral establishment of a sovereign Quebec state will be recognized at international law if Quebec can establish effective control over its territory.[12] Domestic constitutional law, he said, eventually would have to yield to the reality of an effectively sovereign Quebec state.[13] When pushed, in questioning from the Court, to reveal details of his position — for example, how *le principe d'effectivité* would operate, and how it would deal with the competing rights of self-determination of the multiple peoples within Quebec (and Canada) — Me Joli-Coeur reverted to his first strategy (as counsel for the Attorney General of Canada did in response to similarly difficult questions directed to him): the Court's questions were too hypothetical, too political, or beyond the Court's jurisdiction.[14]

The heart of the *amicus*' submissions can be summarized as follows: Quebec may proceed unilaterally to accomplish the secession of Quebec from Canada by virtue of the principle of effectivity. A secession will be effective when the government of Quebec exercises all state authority over the territory of Quebec. The establishment of effective and exclusive sovereignty will be founded on the democratic legitimacy of a majority vote of the Québécois people exercising their right of self-determination. Me Joli-Coeur's arguments were not novel or unusual in this regard; the principle of effectivity has been suggested as the legal basis of Quebec's accession to sovereignty by a range of scholars. Frémont and Boudreault, for example, have argued that the Canadian constitution does not apply to secession and thus Quebec "serait alors lui-même condamné à procéder à sa propre révolution."[15] Like the *amicus curiae*'s submissions, sovereignist scholarship in recent years has shifted from reliance on a right of self-determination to reliance on the alleged legitimacy and eventual legality of an effective assertion of sovereignty.[16]

The view that a unilateral secession can lead ultimately to the establishment of a new sovereign state recognized by other members of the international community is as uncontroversial as the federal government's position that a unilateral process would amount to an illegal rupture of Canadian constitutional continuity. Should the Quebec government and people choose to pursue the unilateral path to sovereignty, however, we are all in for a perilous journey. If Quebec were to follow the *amicus*' approach and attempt to assert effective control to achieve international recognition of an illegal secession, and if the federal government were to continue to take the position that it has an obligation to uphold the existing constitutional order until a negotiated settlement is reached, then the spectre of civil disorder and violence would loom large. The failure to even acknowledge the risk of such disastrous consequences accompanying a unilateral secession was the most troubling aspect of the *amicus*' submissions.

---

9 The *Bertrand* and *Singh* actions, and the Quebec government's motions to dismiss them, were described in the Attorney General of Canada's factum at paras. 18-50. See *Bertrand* v. *Begin* (1995) 127 D.L.R. (4th) 408 (Que. S.C.); *Bertrand* v. *Quebec (Attorney General)*, (1996) 138 D.L.R. (4th) 481 (Que. S.C.); motion to dismiss, *Singh* v. *Attorney General of Quebec* (30 April 1996) Montreal: 500-05-011275-953 (Sup. Ct.).

10 Mémoire de l'*amicus curiae*, paras. 75-81.

11 Mémoire de l'*amicus curiae*, paras. 92-112; Addendum au mémoire de l'*amicus curiae*, 5 février 1998, paras. 14-18. In his oral responses to the Court's questions, Me Joli-Coeur put more bluntly what his written submissions said more obliquely: "nous ne croyons pas avoir soumis à la Cour que le droit à l'autodétermination égalait droit à la sécession" (Réponses écrites aux questions posées par la Cour Suprême du Canada à l'*amicus curiae*, question 15).

12 Mémoire de l'*amicus curiae*, paras. 87-91, 109-112.

13 *Ibid.*, paras. 73, 114.

14 Réponses écrites aux questions posées par la Cour Suprême du Canada à l'*amicus curiae*, question 10.

15 J. Frémont et F. Boudreault, "Supraconstitutionallité canadienne et sécession du Quebec" (1997) 8 N.J.C.L. 163 at 203.

16 See, for example, H. Brun & G. Tremblay, *Droit constitutionnel*, 2d ed. (Cowansville, Que.: Yvon Blais, 1990) at 236-37; J. Woehrling, "Les aspects juridiques d'une éventuelle sécession du Quebec" (1995) 74 Can. Bar Rev. 293 at 314-22; D. Turp, "Supplément" in J. Brossard, *L'accession à la souveraineté et le cas du Quebec: conditions et modalités politico-juridiques*, 2e ed. (Montreal: Presses de l'Université de Montréal, 1995) at 800-801.

Moreover, the reliance on the principle of effectivity raises a host of practical and theoretical problems, some of them highlighted in the written questions members of the Court directed at the *amicus*. One basic problem is that the principle of effectivity will come into operation only when the government of Canada has ceased to exercise sovereign authority in Quebec. When asked by the Court how, when and according to what principles the federal government should or must withdraw, the *amicus* had nothing to say (other than that the question itself is beyond the jurisdiction of the Court).[17] This question highlights the difference between unilateral secession as an initially illegal course of action that might become legally effective if a new regime can exercise exclusive sovereignty, and unilateral secession as a right that imposes corresponding obligations on the government of Canada. As Professor Crawford stated in his reply to the *amicus*' experts, "international law permits the metropolitan state to oppose [secession] by all means consistent with non-derogable human rights and humanitarian law, permits the conduct [of secessionists] to be classified as criminal, and prohibits other states from providing any material assistance to [the secessionists]."[18] Moreover, the Attorney General of Canada took the position before the Court that the federal government has an obligation to ensure respect for the existing constitution.[19] Unless the government of Canada changes its position, the principle of effectivity would only come into play if the exercise of Canadian sovereignty is ousted by the use of force.

Another basic question raised by the *amicus*' position is whether *any* group can rely on the principle of effectivity to secede unilaterally from an established state such as Canada (or a future sovereign Quebec, for that matter). How does the principle espoused by Me Joli-Coeur contain such anarchic possibilities?

Me Joli-Coeur did not rely on the principle of effective control alone. He implicitly acknowledged that some secessionist attempts at establishing control through revolutionary means are worthy of respect and others properly resisted by the state. In Quebec's case, he argued that the assertion of effective control would be legitimized by the Québécois people's expression through democratic means of their right of self-determination. In other words, recourse to the principle of effectivity is particularly legitimate when a people has exercised its right of self-determination by putting its political future to a democratic vote. Me Joli-Coeur conceded that the right of self-determination cannot be equated, in Quebec's case, to a right to secede.[20] But, he seemed to suggest, the right of self-determination may provide moral and political legitimacy to any attempt to assert effective control if secession is the choice of the people. In that sense, he says, the exercise of the right of self-determination by "le peuple québécois fait partie du processus de la sécession éventuelle du Quebec."[21]

This position begs an important question: who exactly is "le peuple québécois"? Is there a single people within the province of Quebec? In the *amicus*' submissions, as in political discourse in Quebec more generally, there is considerable slippage between civic and ethnic understandings of the Quebec people. That is, sometimes "le peuple québécois" includes all persons living in the province, at other times it seems to include only Quebecers who are of French Canadian heritage. Pressed to clarify his position on this issue by the Court, Me Joli-Coeur conceded that there is not a single people living in Quebec. To his credit, and in contrast to the official Parti Québécois position, he said that the eleven Aboriginal nations in Quebec have the same rights as "le peuple québécois" to unilateral secession relying on the principle of effectivity as an expression of their right of self-determination.[22]

Further, when asked if there is a Canadian people, Me Joli-Coeur took the uncontrovertible position that there is no single Canadian people. Rather, he said, there is at least an English-Canadian people, a Québécois people, Aboriginal peoples, and an Acadian people.[23] He acknowledged that all peoples have recourse to the same rights at international law. According to the *amicus*' own logic then, Aboriginal peoples and representatives of the English-Canadian people within Quebec may choose to exercise their democratic right to stay in Canada. The principle of effectivity, when it draws its legitimacy from a people's exercise of the right of self-determination, leads directly to partitionist scenarios given that Quebec, like the rest of Canada, is a multinational society.

Therefore, far from being compatible with the rule of law, as the *amicus* contended,[24] reliance on the principle of effectivity as the sole legal norm relevant to the achievement of sovereignty leads to a situation where we would have two competing regimes, one legal

---

17 Réponses écrites aux questions posées par la Cour Suprême du Canada à l'*amicus curiae*, question 10.

18 James Crawford, *Response to Expert Reports of the Amicus Curiae*, 12 January 1998, para. 17.

19 The Attorney General's factum and reply contain no such statement. However, when asked by the Court whether the government of Canada is required to oppose secession, the Attorney General wrote that "it is the duty of the Government of Canada... to respect and uphold the Constitution of Canada and to preserve and maintain the rule of law" (Written Response of the Attorney General of Canada to Questions from the Supreme Court of Canada, 6 March 1998, para. 53).

20 *Supra* note 11.

21 Mémoire de l'*amicus curiae*, para. 112.

22 Réponses écrites aux questions posées par la Cour Suprême du Canada à l'*amicus curiae*, question 14 et question 18.

23 Réponses écrites aux questions posées par la Cour Suprême du Canada à l'*amicus curiae*, question 21.

24 Mémoire de l'*amicus curiae*, paragraphe 138; Duplique de l'*amicus curiae*, 2 février 1998, paras. 87-91.

and constitutional, the other illegal and unconstitutional, both claiming authority over the same territory and peoples, both with passionate supporters relying on the exercise of their right to self-determination and the view that international law eventually will recognize the victor in the struggle for effective control. This is a scenario fraught with risks of social, economic, and political disorder.

In light of these difficulties, it came as no surprise that the Supreme Court rejected the proposition that the principle of effectivity gives rise to a legal right to unilateral secession. The principle of effectivity, the judges said, "proclaims that an illegal act may eventually acquire legal status if, as a matter of empirical fact, it is recognized on the international plane." However, the subsequent condonation of an illegal act does not "retroactively create a legal right to engage in the act in the first place" (para. 146). The Court commented that while unilateral secession would therefore be initially illegal according to both domestic and international law, "this does not rule out the possibility of an unconstitutional declaration of secession leading to a *de facto* secession" (para. 155).

ROAD MAP OR ROADBLOCK?

The government of Quebec moved to dismiss the *Bertrand* and *Singh* declaratory actions in 1995 and 1996, and declined to participate in the Supreme Court reference itself, on the grounds that domestic law was irrelevant to the process of secession. Prior to the hearing, both federalist and sovereignist Quebec politicians asserted the right of the people of Quebec alone to determine their political future and urged the Supreme Court to decline to answer the questions or risk jeopardizing its remaining legitimacy in Quebec.[25] After the release of the opinion, the government of Quebec did not continue to reject the Court's authority. Instead, it immediately entered into a debate regarding the requirements and implications of the Supreme Court's opinion.[26] Given that the arguments of the *amicus curiae* were summarily dismissed, and that these arguments were the ones most commonly relied upon by sovereignists prior to the release of the opinion, why has a sovereignist government opted for this course?

In reality, the Parti Québécois government had no choice. It is one thing to object to the Supreme Court's authority over the legal framework for secession ahead of time, and quite another to reject the Court's authority after the legal basis of the objection has been dismissed. Legality and legitimacy are intertwined, and the government of Quebec's hopes of garnering international support for sovereignty will not be improved if it openly flouts the Supreme Court's views on the legalities of secession.

Moreover, the Court's opinion contained a number of gaps and ambiguities that sovereignists could exploit to portray it as a road map, rather than a roadblock as they had feared, to the achievement of their ultimate political goal. For one, the Court managed to avoid discussing the rigorous requirements for amending the constitution set out in Part V of the *Constitution Act, 1982*. This was so even though the negative answer to the first question necessarily entailed the conclusion that either (i) the unilateral amending procedure set out in section 45 of the Act does not apply to secession[27] or (ii) an unwritten amendment procedure applies to secession rather than the apparently exhaustive written rules set out in Part V. The federal government had urged the Court to consider and reject the applicability of section 45, and to not go any further in its investigation of the application of the written amending formulas.[28] Remarkably, there was no mention whatsoever of any of the amending procedures in the opinion.

This carefully constructed silence suggests that at least some members of the Court have doubts about whether Part V applies to secession at all.[29] The Court did agree that a lawful secession requires a constitutional amendment (para. 97). The statement that negotiations would "require the reconciliation of various rights and responsibilities by the representatives of two legitimate majorities, namely, the clear majority of the population of Quebec, and the clear majority of Canada as a whole"(paras. 93, 152) suggests that the Court may be envisioning a bilateral or binational amendment process far less cumbersome than the dictates of the 7/50 or unanimity procedures set out in sections 38 and 41 of Part V, respectively. By leaving such questions open, the Court dodged, for the time being, the

---

25 Parizeau, *supra* note 2; Bouchard, "Le dernier mot revient au peuple québécois" *Le Devoir* (13 février 1998) A11; O'Neill, "Ryan et Johnson dénoncent le renvoi en Cour suprême" *Le Devoir* (4 février 1998) A6.

26 Séguin, "Ruling legitimizes sovereignty drive, PQ leaders say" *Globe and Mail* (21 August 1998) A7; Cloutier, "Péquistes et libéraux satisfaits" *Le Devoir* (21 août 1998) A1; Bouchard, "La démarche souverainiste est légitime" *Le Devoir* (22 août 1998) A9; Ducas, "La souveraineté est renforcée, croit Bouchard" *Le Devoir* (22 août 1998) A5.

27 This point was made at length in the factum of the Attorney General of Canada at paras. 99-115.

28 *Ibid.* at paras. 116-7.

29 These doubts are shared by some scholars. See F. Gélinas, "Les conventions, le droit et la Constitution du Canada dans le renvoi sur la 'sécession' du Quebec: le fantôme du rapatriement" (1997) 57 Revue du Barreau 291; W. MacLauchlan, "Accounting for the Democracy and the Rule of Law in the Quebec Secession Reference" (1997) 76 Can. Bar Rev. 155; R. Howse and A. Malkin, "Canadians are a Sovereign People: How the Supreme Court Should Approach the Reference on Quebec Secession" (1997) 76 Can. Bar Rev. 186; Frémont et Boudreault, supra note 15.

accusation that the written amending procedures place Quebec in a straitjacket.[30]

Second, extrapolating creatively from underlying constitutional principles, the Court forged a new legal obligation that would be imposed on the other provinces and the federal government to negotiate with Quebec following a clear repudiation of the existing constitutional order. The duty to negotiate secession would be triggered by a vote of a "clear majority" of the population of Quebec on a "clear question" (para. 93); it would not arise if the expression of Quebecers' democratic will is "fraught with ambiguities" (para. 100). The Court indicated that whether the threshold of "a clear majority on a clear question" has been met in a future referendum is a determination to be made by unspecified "political actors," not the courts (paras. 100, 153).

Sovereignists naturally have found great comfort in the Court's affirmation that secession is a legitimate goal and that, indeed, a clear referendum result places an obligation on the other parties to Confederation to negotiate secession in good faith. Premier Bouchard and former Premier Parizeau have insisted that the Supreme Court opinion legitimizes the process followed in 1995 and nothing need change in any subsequent referendum campaign.[31]

This is a highly selective reading of the Supreme Court opinion. In fact, the Court's opinion suggests, without saying so directly, that the relevant "political actors" for determining what is a clear question and a clear majority are all of the parties that would be involved in negotiations, namely, "all parties to Confederation." If the Quebec government does not reach an agreement with other Canadian governments on the question and the required majority ahead of time, then it will not be able to claim that all parties have an obligation to negotiate secession in good faith.[32]

In addition, the Court clearly expressed the opinion that a unilateral declaration of sovereignty would be illegal and secession negotiations extremely difficult. Therefore, the Court said, negotiations could not proceed on the assumption that secession inevitably would be successfully accomplished: "such a foregone conclusion would actually undermine the obligation to negotiate and render it hollow" (para. 91). It follows that if the government of Quebec continues to suggest that secession would be a *fait accompli* following a clear referendum result, and continues to openly contemplate the prospect of unilateral secession in case negotiations reach an impasse, then the "other parties to Confederation" would be entitled to insist that they have no obligation to enter negotiations.

CONCLUSION

Maître Joli-Coeur struggled valiantly to make legal arguments to support a position contrary to that taken by the Attorney General of Canada in the *Secession Reference*. His submissions, however, accomplished only one thing: they revealed the weakness of the best available arguments in support of a legal right to unilateral secession. In this sense, the *amicus* proved to be a friend of the Court indeed. His contributions lent greater authority to the Court's rejection of the legal arguments that had previously undergirded the unilateral component of sovereignist strategy leading up to the 1995 referendum. The defective legal underpinnings of this strategy have now been effectively exposed, and the debate shifted to the threshold conditions that would have to be met before a duty to negotiate secession in good faith arises. The justices should be applauded for crafting an opinion that seeks to minimize the risks of social disorder that would accompany any unilateral declaration of sovereignty and to maximize the chances of a negotiated, peaceful accommodation of the political aspirations of a clear majority of Quebecers clearly expressed in any future referendum.❑

Bruce Ryder
Osgoode Hall Law School, York University. These comments, originally presented at the Joint Session of CALT/CLSA/CPSA, Congress of Social Sciences and Humanities, University of Ottawa, June 3, 1998, have been revised following the release of the Supreme Court of Canada's opinion in the *Reference re Secession of Quebec*.

---

[30] See D. Greschner, "The Quebec Secession Reference: Goodbye to Part V?" (1998) 10 Constitutional Forum 19.

[31] Bouchard, supra note 26; Parizeau, "L'avis de la Cour suprême se fonde sur un malentendu qui prend sa source dans la 'démonisation' systematique des souverainistes" *Le Devoir* (3 septembre 1998) A9; Parizeau, "Et si les négociations échouaient?" *Le Devoir* (4 septembre 1998) A11.

[32] In his letter of August 25, 1998 to Premier Bouchard, the federal Minister of Intergovernmental Affairs, Stéphane Dion, wrote that "the federal government, among others, cannot surrender its responsibility to evaluate the clarity of a question which could result in the break-up of the country." The full text of the letter can be found on the Ministerial website at http://www.pco-bcp.gc.ca/aia/ro/doc/eaug2698.htm.

A MOST POLITIC JUDGEMENT

Robert A. Young

INTRODUCTION

By throwing before the Supreme Court a set of questions about Quebec secession, the Minister of Justice of Canada and his government could have profoundly disturbed the Canadian political system. In posing and answering questions about Quebecers' right to attain sovereignty and the modalities of achieving Quebec secession, the Minister and the Court risked igniting in Quebec a nationalist firestorm that could have sent support for sovereignty soaring. But the justices of the Court avoided this eventuality. They produced a compact judgement, one that has three important consequences. First and foremost, the Court managed to preserve its own legitimacy, despite having been dragged onto a hotly contested political terrain. Second, while positing an exhaustive constitution and claiming unparalleled scope for judges to interpret it, the Court managed to preserve a great deal of political space; that is, an area in which contending arguments about Quebec secession can be debated, with the political process determining the outcomes. Third, while explicitly preserving this political space, the Court also managed to narrow it constructively, by eliminating two radical positions about secession from the set of arguments about Quebec sovereignty that are decent, respectable, and legitimate.[1]

As well, the Court tidied up a couple of issues about self-determination and secession, in a way that has attracted little attention from commentators but that will help ensure that it attracts a wide readership throughout the world. Finally, the judgement in *Reference re Secession of Quebec* left many matters unsettled, and justifiably so, but the Court might have clarified the difference between the constitutional rearrangements necessary for Quebec to become sovereign and the substantive matters that Quebec and Canada would have to settle in a secession. This, however, is a minor blemish on an astute response to hard questions in a tough political context.

LEGITIMACY

Both when the reference case was launched and when it was heard, sovereignist and nationalist politicians in Quebec attacked the federal government's move. Minister Rock's tone in the House of Commons was moderate; more significantly, by asking the court to address the issue of how Quebec secession *should* occur, the federal government admitted clearly for the first time that it *could* occur. Nevertheless, the sovereignists decried the federal strategy as one of intimidation and oppression, and one that should be rejected outright. As Mr. Bouchard argued, "there is only one tribunal to settle Quebec's political future and that's the Quebec people."[2] Even moderate Quebec nationalists and those politicians like Mr. Johnson and Mr. Charest who would have to appeal to them in elections declared that the reference was ill-advised. It was preferable to move forward on the "Plan A" side (accommodating Quebecers' legitimate desire for change) rather than the "Plan B" front (clarifying the process of secession and making its costs more obvious to the electorate.)[3]

But these criticisms are the normal stuff of secessionist politics. Much more serious was the threat that the Court as an institution might lose its credibility among Quebecers. The sovereignists certainly laid the groundwork for denouncing the institution and ignoring any decision it might produce. As the hearing approached, for example, Jacques Brassard, minister of intergovernmental affairs, flatly stated that "no decree, no federal law, no decision from any court whatsoever can call into question or discredit this right of Quebecers

[1] *Quebec Secession Reference* (1998) 161 D.L.R. (4th) 385. Bracketed numbers in this paper's text refer to paragraph numbers in the opinion.

[2] *London Free Press* (27 September 1996).

[3] *Globe and Mail* (3 and 18 February 1998).

to decide their future."[4] At a large sovereignist rally just after the hearings, Mr. Bouchard noted that most Quebecers believed they had the right to democratically determine their future, while Mr. Parizeau declared that "the judges can decide what they want. It has no importance. We will never live under the threat of decisions taken by others."[5] Taking up a line attributed to Maurice Duplessis, the Deputy Premier (Bernard Landry) claimed that like the leaning tower of Pisa, the Supreme Court of Canada always tilts the same way.[6] This *bon mot* was used in newspaper advertisements taken out by the Parti québécois to protest the reference. Among nationalists, some headway —perhaps a lot of headway — could be made using the argument that the court ruling, emanating from judges appointed by Ottawa, would put Quebecers into a straightjacket tailored in English Canada.[7]

In ROC (the Rest of Canada), there was no publicly discernible counterpart to this barrage on the Court, though a decision favourable to some aspects of the sovereignist position — such as that the required majority was 50 percent plus one — could have produced one. The real danger was in Quebec, where the hard-line sovereignists insisted that the Court's purview did not extend to the political decisions taken by *le peuple québécois*. And this is the threat that was removed by the Court's logical dexterity.

What is the structure of the judgement, after all? There is a brief introduction (paras. 1-3) and a discussion of whether the three questions posed are justiciable (paras. 4-31). Then follows the bulk of the judgement, built around Question 1 (paras. 32-108). Here, the Court discusses Canadian history (paras. 32-48) and some of the constitutional principles that are relevant to the reference (paras. 49-82) before moving to the core of the judgement, "The Operation of the Constitutional Principles in the Secession Context" (paras. 83-105). A brief discussion of effectivity (paras. 106-8) concludes the section. Question 2 is treated at much less length (paras. 109-46, just about half the length of Question 1) and Question 3 is dispensed with in a single paragraph. A summary follows (paras. 148-56). So, almost one-half of the 116 substantive paragraphs is devoted to laying the historical and constitutional foundation for the core section.

Here is where the Court saved its own bacon. It argued that four constitutional principles were relevant in the reference: federalism, democracy, constitutionalism and the rule of law, and the protection of minorities. It rolled out a barrage of precedents to show how the constitution is infused with these principles (and how courts have the power and the duty to define them). And it declared at the outset that "these defining principles function in symbiosis. *No single principle can be defined in isolation from the others, nor does any one principle trump or exclude the operation of any other*" (para. 49, emphasis added). It was this dictate that allowed the "Secession Context" section to deliver something to each side in the political contest over secession. The federalists got the judgement that secession must occur according to the rule of law, constitutionally, and with regard for the interests of all Canadians and of minorities within Quebec. The Court ruled that a unilateral secession — through a Unilateral Declaration of Independence — does not meet this standard. The sovereignists in turn got satisfaction from the Court's treatment of the democratic principle in a secession. A Yes vote would carry weight, the Court said, "in that it would confer legitimacy on the efforts of the government of Quebec to initiate the Constitution's amendment process in order to secede by constitutional means" (para. 87). Such a vote "would give rise to a reciprocal obligation on all parties to Confederation to negotiate constitutional changes to respond to that desire," because "the corollary of a legitimate attempt by one participant in Confederation to seek an amendment to the Constitution is an obligation on all parties to come to the negotiating table" (para. 88).

After a very brief period of hesitation, the sovereignists declared victory. Mr. Brassard claimed that the Court had "recognized the democratic legitimacy of both the option and the process leading up to the realization of the sovereignty project."[8] Mr. Parizeau said that the threat of a UDI had been necessary in the past to get ROC to the bargaining table after a Yes vote; now, however, the justices "say that the two sides have an obligation to negotiate in good faith. We say fine."[9] The next day, Mr. Bouchard called a news conference. He claimed that the judgement had destroyed five "federalist myths" and more generally that the Court "affirmed, from one end of its opinion to the other, the political nature of the process that would legitimately be set in motion by a Quebec referendum on sovereignty." In particular, the "federal judges upheld what sovereignists have been saying for 30

---

4 *London Free Press* (19 December 1997).
5 *Globe and Mail* (21 February 1998).
6 *Globe and Mail* (12 May 1998).
7 See the editorial by Lise Bissonnette, "Un an plus tard, la clarté" *Le Devoir* (17 September 1996). Ms. Bissonnette claimed that Quebec was now trapped in a "*carcan*" — an iron collar.
8 *Globe and Mail* (21 August 1998).
9 *Ibid.*

years: after a Yes vote, there will be negotiations."[10] The premier had nothing critical to say about the judgement; instead he used it to shore up the sovereignist interpretation of the process of secession.

All in all, the sovereignists accepted the judgement. Of course they dismissed or downplayed those aspects of it that comforted the federalists — the need for a clear question, a clear majority, and a lawful process. But they used the Court to substantiate their own position. In fact, one former Bloc MP predicted that "no one should be surprised to see the Supreme Court of Canada quoted in future campaign literature and on the posters of the Parti Québécois."[11] The judgement, in a sense, came to underpin and reinforce their arguments about secession. So rather than losing legitimacy, the Court found its political position substantially strengthened in Quebec. No doubt the sovereignists were prepared for a full scale attack on the Court and were ready to undermine its authority; indeed, some tried to do this in the wake of the judgement.[12] But this extreme position found no backers in the party leadership (or among editorialists). Instead, by using the judgement towards their own ends, the sovereignists strengthened the Court.

This is terribly important. Were there to be a Yes vote in the future, or even a referendum, the Court might be brought in to rule on highly contentious matters. The justices were undoubtedly aware of this possibility. Even as they tossed back into the political arena important issues like the clarity of the question and the required magnitude of a referendum vote for sovereignty, and circumscribed their own current role (paras. 98-105), they hinted at decisions that might come: "in accordance with the usual rule of prudence in constitutional cases, we refrain from pronouncing on the applicability of any particular constitutional procedure to effect secession unless and until sufficiently clear facts exist to squarely raise an issue for judicial determination" (para. 105).[13] In the course of an at tempted secession, the Court might be the only body able to decide procedural matters such as who participates in negotiations and how the constitution must be amended in order to effect secession, as well as substantive matters such as minority rights and citizenship. Because of its great prudence in the reference case, and the subtle balance it struck, the Court will take into any future secession a large enough stock of legitimacy to make authoritative decisions. This is the greatest success of the judgement.

POLITICAL SPACE

Having defined the constitutional principles relevant to secession, the Court preserved a large political arena for debate. It left open some very important questions:

- What would be the amending formula necessary to effect secession?
- What constitutes a "clear majority"?
- What constitutes a "clear question"?
- What would be the content of negotiations after a Yes vote?
- What parties would be involved in the negotiations?
- What are the rights of linguistic and cultural minorities, including Aboriginals?
- What would happen in the case of an impasse in negotiations?

Not surprisingly, intense political debate began immediately around these issues, as well as the ambiguities in the judgement itself. Stéphane Dion was especially quick to reply to Mr. Bouchard's interpretation of the Court's position.[14] This was perfectly appropriate in the view of the justices, as they had merely defined the broad constitutional framework within which such debate would occur, both before and after any future referendum on secession. "Having established the legal framework," they wrote, "it would be for the democratically elected leadership of the various participants to resolve their differences" (para. 101). The Court spent some time justifying the maintenance of this political space (paras. 98-102), on the grounds of precedent and practicality, and this restraint along with the Court's even-handedness undoubtedly helped preserve its legitimacy.

---

[10] Quebec, Office of the Premier, "Notes for a preliminary statement by the Prime Minister of Quebec, Mr. Lucien Bouchard, the day following the opinion of the Supreme Court of Canada on the reference by the federal government," Quebec City, 21 August 1998. See http://www.premier.gouv.qc.ca /discours/a980821.htm.

[11] Jean Lapierre, "How to design a 'winnable' referendum" *Globe and Mail* (25 August 1998).

[12] See Josée Legault, "How to deny Quebec's right to self-determination" *Globe and Mail* (21 August 1998). (A longer version of this piece was published in *Le Devoir*.) Ms. Legault denounced the justices as "political mercenaries working to reinforce the Canadian state" and "tools used by Ottawa to combat Quebec's affirmation."

[13] Of course the issue of what amending formula would be necessary to effect secession is far more clear-cut than many of the issues dealt with in the reference case — though it is harder to handle politically. For a hint that the Court might pronounce on some of the substantive matters under negotiation in a secession, see paras. 102 and 153.

[14] Canada, Privy Council Office, letter from Stéphane Dion to Mr. Lucien Bouchard, 25 August 1998. The full text of the letter can be found at http://www.pco-bcp.gc.ca/aia/ro/doc/eaug2698.htm.

Nevertheless, the justices did make one powerful foray to constrain the realm of political debate. In a manoeuvre that lies right at the heart of the judgement (paras. 90-93), they eliminated extremists from the legitimate political arena. Here, the Court rejected two "absolutist propositions" (para. 90). Against radical sovereignists, it held that "Quebec could not purport to invoke a right of self-determination such as to dictate the terms of a proposed secession to other parties" (para. 91). In other words, the principle of democracy cannot override the obligation to respect the other three principles and to negotiate within the broad constitutional framework. This would strip of legitimacy a hard-nosed Quebec bargaining posture backed up by the threat of a UDI. At the other extreme, the Court rejected the view that a clear Yes vote could be ignored, because "this would amount to the assertion that other constitutional principles necessarily trump the clearly expressed democratic will of the people of Quebec" (para. 92). This undercuts the ten or fifteen per cent of citizens in ROC who would prefer to ignore or repress a move by Quebecers towards sovereignty. Taken together, these central paragraphs constitute a ringing blow for moderation. While the justices left a great deal of room for political argument, they tossed the extremists out of the game and tilted the political playing field on both sides towards moderation and civility rather than polarization.

Minor Points

The serenity and balance of the judgement will ensure for it a wide international readership. There has never been a secession in an advanced industrial state, and Canada's Supreme Court now has provided a set of principles that should underpin such a process. While the sovereignists argue that this confers legitimacy on their project, the Court also insisted that negotiations would be difficult and that they "might not lead to an agreement." Notably, "while the negotiators would have to contemplate the possibility of secession, there would be no absolute legal entitlement to it and no assumption that an agreement reconciling all relevant rights and obligations would actually be reached" (paras. 96-97). Along with the declaration that breaching the duty to negotiate responsibly would affect the perceptions of the international community about legitimacy and recognition (para. 103), and the treatment (quite standard) of the Quebec case for self-determination in international law (paras. 111-39), this balanced and sanguine view will find a global audience.

So will the very decisive and neat treatment of the principle of effectivity. As argued by the *amicus curiae* (and as held by the realist school of international relations), if a seceding state can effectively control its territory, then the secession can come eventually to be recognized by the international community. Mr. Brassard, for example, argued against partitionists and others that a Quebec becoming sovereign would "exercise effective control over all its territory."[15] The Bélanger-Campeau commission had reached rather similar conclusions about what might happen were negotiations to break down.[16]

But here the Court was terribly firm. It distinguished between the right to pursue secession unilaterally (and to achieve effective control) and the power to do so (para. 106). Then it rejected the notion that the principle of effectivity could provide a justification, *ex ante*, for an unconstitutional and illegal secession. As an assertion of law, the principle of effectivity "simply amounts to the contention that the law may be broken as long as it can be broken successfully. Such a notion is contrary to the rule of law, and must be rejected" (para. 108). Further on, in the context of international law, the Court was even sharper. A secession might be "successful in the streets" and attract international recognition (para. 142), but this "empirical fact" cannot justify unilateral secession; there is no ground, ruled the Court, "to suggest that a subsequent condonation of an initially illegal act retroactively creates a legal right to engage in the act in the first place" (para. 146). This is an important closure of another avenue towards a non-constitutional secession, and the governments of other countries will surely note the reaffirmation of rights over power, both as they may contemplate their own secessionist movements and as they may contemplate an early recognition of a seceding Quebec.

One final aspect of the judgement deserves some brief attention, in my view. This is the content of the term "negotiations" in the context of secession. The Court is very clear that a Yes vote on Quebec sovereignty must draw parties from Canada into negotiations. At the outset of the treatment of this issue, the Court holds that negotiations are required because a Yes vote would indicate a desire by Quebecers to change their constitutional status. Just as when the government of a province proposes a constitutional amendment, other actors must come to the table: they have an obligation "to negotiate constitutional changes to respond to that desire" (para. 88).

The Court then slides to broaden the content of "negotiations." The judgement mentions several non-

[15] *Globe and Mail* (30 January 1997).

[16] See R. Young, *The Secession of Quebec and the Future of Canada* (Montreal: McGill-Queen's University Press, 1995) at 106.

constitutional matters that would be addressed by the parties in the context of a secession, including the national economy, the debt, boundaries, and minorities (para. 97). In so doing, the Court conflates two quite separate classes of matter: (1) the reconstitution of Canada, with amendments to the Constitution Acts that excise Quebec and effect its secession, and (2) the substantive terms and conditions of secession, including the debt, the armed forces, assets, mobility and transit rights, economic treaties, environmental matters, and so on. These two classes of matter are quite distinct.[17] In principle, negotiations about the constitutional changes necessary to create a sovereign Quebec (and to reconstitute Canada) are separate from negotiations about the terms of secession. In reality, the chances of keeping them separate may seem low, especially after the shock of the 1995 referendum caused provincial governments and other actors to calculate their interests and establish bargaining positions. Some provincial governments, for example, might try to hold up constitutional amendments in order to get their way on trade agreements or the allocation of the national debt. With many issues on the table in negotiations and many participants aware of their interests, this linkage would make a quick, clean secession very unlikely.

The Court might have eased this problem and clarified the situation by distinguishing between the two kinds of negotiation rather than lumping them together. This would have been no empty, legalistic gesture confronting the powerful forces of post-Yes *realpolitik*. It would have established, first, that an overwhelming Yes would put upon Canada the onus of amending the constitution to create a sovereign Quebec, but not to negotiate any particular terms and conditions of the separation. Second, the distinction would clarify the rights of various actors, especially concerning participation. Aboriginal peoples and the provincial governments, for instance, could have clear rights to participate in negotiating amendments to the Constitution Acts. But they may have no right to be at the table when Canada and Quebec are dividing debt and assets, or negotiating the framework of monetary policy, or setting out environmental treaties. Some precision about this could have dampened some of the expectations that the judgement has raised.

In the end, though, this is a small blemish on an ingenious and constructive judgement. It is most politic indeed.❑

Robert A. Young
Department of Political Science, University of Western Ontario.

[17] *Ibid.*, chapters 13 and 14.

THE QUEBEC SECESSION REFERENCE: GOODBYE TO PART V?

Donna Greschner

Since 1982 Canadians have possessed a complex set of amending formula in Part V of the *Constitution Act, 1982.* From its inception Part V has been afflicted with controversy. The government of Quebec's refusal to formally approve the 1982 *Act* rests, in part, on its dismay about losing its veto on constitutional change. Amendments binding on more than one province have proven almost impossible, with only one relatively small change successfully overcoming the obstacles posed by the formulas.[1] The rigidity stems partly from section 41, which requires all units of Confederation to agree to amendments pertaining to several matters, including changes to Part V itself.[2] The unanimity rule prevented adoption of the Meech Lake Accord. Moreover, several legislatures have supplemented Part V with statutory requirements to hold referenda on constitutional change.[3] These statutory promises to facilitate direct democracy contributed to the demise of the Charlottetown Accord. More recently, Parliament has enacted restrictions on its power to initiate and approve constitutional change.[4] The legal rules of amendment, both constitutional and statutory, have acquired such Byzantine dimensions that they seem designed to prevent amendments rather than permit them.

Against this backdrop of rigidity and failure, the *Quebec Secession Reference*[5] presented the Court with its first opportunity in over 15 years to consider the critical process of constitutional amendment. Question 1 asked: Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally? The Court's response does not delve into the intricacies of Part V. Even though the Court states that "our Constitution is primarily a written one" (para. 49), that "there are compelling reasons to insist upon the primacy of the written constitution" (para. 53), and that constitutional texts "have a primary place in determining constitutional rules" (para. 32), it writes 70 paragraphs without any explicit reference to a specific written provision on constitutional amendment. Instead, the Court emphasizes constitutional principles. It describes four foundational principles that underlie constitutional rules and practice: federalism, democracy, constitutionalism and the Rule of Law, and the protection of minorities. These principles generate legal duties for Confederation parties.

The proffered reason for the inclusion and emphasis on principles is instructive. For the Court, the constitutional framework must include principles because a written text cannot provide for every situation that might arise in the future. "These supporting principles and rules, which include constitutional conventions and the workings of Parliament, are a necessary part of our Constitution because problems or situations may arise which are not expressly dealt with by the text of the Constitution. In order to endure over

---

1 Several amendments that pertain only to one province have been passed pursuant to s.43, which requires resolutions only by the Senate, the House of Commons and the legislative assembly of the affected province.

2 Section 41 reads: "An Amendment to the Constitution of Canada in relation to the following matters may be made by proclamation issued by the Governor General under the Great Seal of Canada only where authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province:
(a) the office of the Queen, the Governor General and the Lieutenant Governor of a province;
(b) the right of a province to a number of members in the House of Commons not less than the number of Senators by which the province is entitled to be represented at the time this Part comes into force;
(c) subject to section 43, the use of the English or the French language;
(d) the composition of the Supreme Court of Canada;
(e) an amendment to this Part."

3 Both Alberta and British Columbia require a binding referendum before their respective Legislative Assemblies adopt a constitutional resolution. As well, many other provinces and Parliament have legislation permitting referenda.

4 *An Act respecting constitutional amendments*, S.C. 1996, c.1.

5 (1998) 161 D.L.R. (4th) 385. Bracketed numbers in this paper's text refer to paragraph numbers in the opinion.

time, a constitution must contain a comprehensive set of rules and principles which are capable of providing an exhaustive legal framework for our system of government" (para. 32). This reason is not self-evident. The application of unwritten principles is not essential for the stated purpose; it is not the only method of ensuring that a constitution adapts to changing circumstances. The formal process of constitutional amendment permits a constitution to keep up with the times. A constitution with an unworkable amending formula will require other methods of adjustment, however, such as constitutional principles. By implication, the Court is faulting Part V for not delivering the flexibility necessary to deal with new problems and situations.

THE FUNCTIONS OF PRINCIPLES

The Court assigns two functions to constitutional principles. First, principles generate a duty to negotiate an amendment to permit lawful secession: "The federalism principle, in conjunction with the democratic principle, dictates that the clear repudiation of the existing constitutional order and the clear expression of the desire to pursue secession by the population of a province would give rise to a reciprocal obligation on all parties of Confederation to negotiate constitutional changes to respond to that desire" (para. 88). If the two-fold trigger of a clear referendum question and a clear majority in favour of secession is met, then other Confederation parties must come to the negotiating table.[6] The Court notes that the *Constitution Act, 1982*, gives each party to Confederation the right to initiate constitutional change and that this right gives rise to a corresponding duty to engage in constitutional discussions (para. 69). Presumably the Court was referring to section 46(1), which states that the Senate or the House of Commons, or a legislative assembly, may initiate the amending process by passing a resolution.[7] But it does not identify the provision. In any event, the constitutional text is a secondary source of the duty: "This duty is inherent in the democratic principle which is a fundamental predicate of our system of government" (para. 68).

Duties to discuss constitutional provisions and proposals have been part of the written constitutional text since enactment of the *Constitution Act, 1982*.[8] For instance, section 49 required First Ministers to meet no later than 1997 to discuss the operation of the amending formula. Section 35.1 requires a constitutional conference of First Ministers and Aboriginal representatives before any amendments are made to the Aboriginal rights provisions. Section 37 required a conference no later than April 17, 1983, to identify and define Aboriginal rights, a provision which led to a constitutionally-entrenched requirement to hold three more conferences by April 17, 1987.[9]

The Court does not buttress the duty to negotiate with express mention of section 46 or reliance on the entrenched promises to negotiate. Perhaps a reference to any specific amending provision, even the important words of section 46, would have proven impolitic in Quebec because of the National Assembly's refusal to accept the *Constitution Act, 1982*, and its ongoing sensitivity about patriation of the constitution over the objections of the National Assembly and the loss of the Quebec veto. Perhaps connecting the duty to negotiate with explicit constitutional promises to discuss constitutional change was too politically charged in other quarters. After all, the First Ministers gave only lip service to section 49's entrenched promise to discuss the

---

[6] The Court does not discuss whether the referendum result would automatically activate the duty to negotiate, or whether the National Assembly would need to introduce a secession resolution, pursuant to s.46 of the *Constitution Act, 1982*, in order to bring the other parties to the table. Besides the political difficulties with the latter option, it seems a bit formalistic because the referendum has clearly indicated a desire for change. Moreover, the purpose of negotiations is to settle on the terms of the amendment. To insist on a formal resolution under s.46 before commencing negotiations likely would cause the initiating party to introduce a very general, temporary one, which would be supplanted by the precise text of the amendment agreed to after negotiations. However, in a non-secession context the application of the duty to negotiate would involve different considerations. Confederation parties might want a resolution in order to determine the strength of the initiating party's desire for constitutional change.

[7] Section 46 (1) reads: "The procedures for amendment under sections 38, 41, 42 and 43 may be initiated either by the Senate or the House of Commons or by the legislative assembly of a province."

[8] For an excellent analysis of promises to negotiate as a feature of Canadian constitutionalism, see Dwight Newman, "Reconstituting Promises to Negotiate in Canadian Constitution-Making" (1999) National Journal of Constitutional Law (forthcoming). He points out that these entrenched promises to negotiate have arisen in circumstances of mistrust and division. People believe that further constitutional change is necessary but do not trust other parties to engage in those discussions willingly.

[9] Both the failed Meech Lake and Charlottetown Accords contained even more extensive provisions about ongoing constitutional discussions. For instance, the Meech Lake Accord would have required annual First Ministers' conferences to discuss the economy, Senate reform, fisheries and other matters agreed upon by the parties. The Charlottetown Accord would have required four conferences on Aboriginal issues.

amending formula at a constitutional conference no later than 1997.[10]

Perhaps the Court does not cite section 46 because it did not wish to state unequivocally that the duty-holders are the federal and provincial legislative bodies, since they are the only parties with the right to initiate constitutional change under section 46. Not even the Territories, who have been full participants in constitutional discussions for several years, are duty-holders under section 46, let alone Aboriginal organizations or other groups.[11] Although at several places in the decision the Court refers to governments and other participants (paras. 92, 94), the opinion assumes that the negotiating parties are the eleven units of Confederation, Canada and the provinces. Or, perhaps section 46 is absent not because it limits the duty-holders to the eleven units of Confederation, but because it bestows the duty on the legislative branch of government, rather than the executive. In contrast, the entrenched promises to discuss constitutional proposals, such as section 35.1 and the defunct section 49, place the obligation on First Ministers, not on the legislative branches of government. Many questions are raised by locating the duty in legislative bodies. For instance, do the Senate and the House of Commons create, authorize, and control the federal negotiating team? What if they disagree? By not stressing section 46 as the source or limit on the duty, the Court may have given political actors more flexibility in designing the negotiation process.

Perhaps another reason the Court avoids any reference to the written text is because some of the provisions do not have the flexibility necessary to allow the constitution to endure over time. Section 41, with its underlying principle of equality of the provinces, is a prime example. It was inserted because many provinces would only accommodate Quebec's insistence on a veto over important constitutional changes by having a veto of their own. A veto for one became a veto for all, with the result that a change desired by many must be desired by all.

For whatever reason, the Court emphasizes principles as the source of the duty to negotiate. Part V is noticeable by its absence.

The second function of principles is to impose standards of conduct on the negotiating parties: "The conduct of the parties in such negotiations would be governed by the same constitutional principles which give rise to the duty" (para. 90). Principles will shape and assess every aspect of negotiations, from the agenda to the position of parties. For instance, the fourth principle, protection of minorities, will compel the parties to discuss various methods of ensuring protection for minority groups. The Court is clear that the duty to negotiate in a manner consistent with the principles is a legal obligation (paras. 98, 102).[12] Therefore, it trumps the desire of political actors to follow the wishes of their voters. Presumably, a ROC party could not refuse to negotiate because its electorate had rejected the very idea of secession negotiations in a referendum. Nor could any party refuse to discuss a particular proposal on the grounds that its electorate was opposed to the proposal, or to having the item even on the agenda. A referendum, plebiscite or opinion poll could not dictate a party's bargaining position and forestall sincere efforts to negotiate a new arrangement in response to a genuine desire for change. In a result consistent with the facilitation of change, a referendum in one province may trigger the duty to negotiate, while a referendum in another province may not block or unreasonably confine the duty.

By constraining the position that parties may take in negotiations, principles also limit or restrain the exercise of the parties' legal rights. The Court stresses that a party's failure to abide by the principles puts at risk the legitimacy of that party's assertion of its rights (paras. 93, 95). In determining whether the exercise of rights is legitimate, "the conduct of the parties assumes primary constitutional significance" (para. 94). By implication, the provinces and Canada must exercise their legal rights under section 41 or section 38 in a manner consistent with the four principles. For instance, if a matter is subject to section 41, a province has a legal right to veto a proposal for constitutional amendment.

---

[10] For a stinging critique of the purported compliance with the s.49 obligation, see John Whyte, "'A Constitutional Conference...Shall Be Convened...': Living with Constitutional Promises" (1996) 8 Constitutional Forum 15.

[11] The Territories would undoubtably exert considerable political pressure to become full participants in secession negotiations. As well, the political pressure to add Aboriginal groups would be extremely strong because of s. 35.1 of the *Constitution Act, 1982*, and the Charlottetown Accord precedent, in which 4 Aboriginal groups participated in negotiations. The fourth principle (protection of minorities) would support adding Aboriginal groups and others, such as minority linguistic groups, as participants in the negotiations. At a minimum, non-Confederation groups would insist on active involvement in the negotiating sessions, perhaps as members of the official 11 delegations. Having other parties around the table or in delegations makes negotiations more difficult, but not impossible. The constitutional principles "must inform the actions of *all* the participants in the negotiation process" (para. 94) (emphasis in original).

[12] For the Court, the non-justiciability of the parties' conduct is grounded in an appreciation of its proper role, not any purported non-legal nature of the duty (para. 99).

However, now it must exercise that right in a manner consistent with its duty to negotiate, which requires conformity with the principles. A party could not exercise its veto because it clung to the view that Quebec has no right to secede, or because it insisted on unreasonable terms on a specific item. If it did so, its veto could reasonably be challenged as illegitimate. Principles now act as the overriding judge of political actions.

If a party fails to conform to the four principles, the remedy for its illegitimate exercise of rights lies in the political arena. The decision about whether a party has breached the principles will be difficult. The breadth and generality of the principles mean that they admit of several reasonable interpretations, and a dissenting province could easily argue that its position merely represents a different understanding of them rather than a breach. At the end of the day, the international community, in determining whether to recognize the new state of Quebec, will decide on the legitimacy of each party's positions (para. 103).

By requiring negotiations to conform to principles, the Court sends a clear signal to ROC parties, especially the provinces, that they should not insist upon their strict legal rights under Part V, whether under the unanimity rule or the 7/50 formula. The implicit warning to them is that Quebec's remedy would be to declare independence, relying on the illegitimate actions of intransigent provinces for speedier international recognition. This warning is connected to the Court's definition of unilateral secession, which I will discuss below. Overall, the Court's message will put pressure on parties to act reasonably in negotiations. It supports the principle of the rule of law, which promotes orderly change. That principle is firmly placed as the overriding one.

THE FUNCTIONS OF THE DUTY TO NEGOTIATE

The Court gives the duty to negotiate two roles. First, negotiation is a condition precedent for amendment. The Court says that an amendment "perforce requires negotiation" (para. 84). This requirement supplements the provisions in Part V, which do not require negotiations prior to the introduction of a resolution in Parliament or the legislatures. The past practice has been that when one party passes a resolution, other parties may respond either by passing their own identical resolutions or simply doing nothing. For instance, several provinces have passed resolutions proposing the entrenchment of property rights, which have been ignored by other provinces and Parliament.[13] However, this new condition precedent for amendment does not entail that an amendment passed pursuant to Part V but without prior negotiation would be unconstitutional, unless the Court decides in the future to enforce the duty to negotiate.

Second, and more important, the presence or absence of prior negotiations determines the legality of the act of secession. The Court is explicit in its definition of unilateral secession: "[W]hat is claimed by a right to secede unilaterally is the right to effectuate secession without prior negotiations with the other provinces and the federal government" (para. 86). For the Court, the lack of negotiation is a definitional component of unilateral secession: "[T]he secession of Quebec from Canada cannot be accomplished ... unilaterally, that is to say, without principled negotiations, and be considered a lawful act" (para. 104). Unilateral secession is not one that is attempted without compliance with the Part V amending formula, but one attempted without principled negotiations beforehand. Conversely, a non-unilateral secession is one preceded by negotiations and, to use the Court's phrase, will "be considered a lawful act."

The implications of this definition are unclear. On the one hand, the Court admits that negotiations may not lead to agreement (para. 97), even if all parties follow the principles and act reasonably in negotiations. It notes: "We need not speculate here as to what would then transpire. Under the Constitution, secession requires that an amendment be negotiated" (para. 97). This passage could be read as contemplating that lawful secession requires consent under Part V. On the other hand, the emphasis on principled negotiations, and recognition that parties only have an obligation to negotiate, not to reach agreement, leads to a different conclusion. If principled negotiations do not produce an amendment to permit secession, a declaration of secession after the end of negotiations would be lawful, at least to the extent that lawfulness is measured by the legal principles of the constitution. Quebec can lawfully secede without obtaining the consent of other Confederation parties, and without justifying their wrath, because it has lived up to its constitutional obligation to engage in principled negotiations. Other parties will not be able to charge Quebec with illegality or breach of the rule of law by its assertion of independence without their consent. This result is consistent with the Court's view that "the Constitution is not a straitjacket" (para. 150).

---

[13] See Jean McBean, "The Implications of Entrenching Property Rights in Section 7 of the Charter of Rights" (1988) 26 Alta. L. Rev. 548 at 550.

If this interpretation holds sway, the Court has changed the political and legal discourse of secession. By defining unilateral secession as one that is not preceded by negotiation, rather than one that does not comply with the Part V amending formula, the Court further increases the pressure on the ROC units of Confederation to act reasonably in negotiations. They would no longer have available the rhetoric of unlawfulness in the public relations campaigns that would follow Quebec's declaration of independence.

GOODBYE TO PART V?

Overall, the Court's description of the functions of principles and the duty to negotiate, when coupled with the absence of Part V in the reasoning, leads to the inference that in the secession context the strict application of Part V rules will give way to broader principles. The Court's message to political actors is that the written rules, and the rights of parties that flow from the rules, are not as important as underlying constitutional principles. The application of principles softens the existing amending rules, and thus fulfills their *raison d'être* of facilitating change.

The diminished importance of Part V makes sense in the context of secession. The amending procedures do not fit comfortably with secession because they were not designed for the purpose of creating two new countries. Consider the many questions about the application of Part V that would arise in secession negotiations. For instance, does Quebec count as one province for the seven required by the 7/50 provision in section 38? Until the secession amendment takes effect, it is still a province and legally must count in the formula. For it to count under the 7/50 formula would mean that Ontario's consent would not be necessary to meet the conditions of the formula. It seems inconsistent with the democratic principle that the most populous province becomes bound by an agreement that Quebec is negotiating as a potential new state, not merely as a province. To count Quebec in the 7/50 formula does not make obvious sense. Moreover, at the moment that the secession agreement takes effect, the 7/50 formula would disappear.

Part V also presents difficulties with respect to delineating the negotiating parties for secession amendments. The Court assumes that the negotiating parties are the Confederation units who possess rights under section 46. Yet, throughout the negotiations, Quebec will be wearing two hats: one as a province and another as an emerging new country. At the same time, other provinces will be simultaneously in two roles: one as units of the old Canada, and another as units of a new Canada. Who will represent ROC as a whole? The Part V formula does not give the responsibility to anybody. Can the federal government represent an entity which may be coming into being during the process of negotiation? Will it have the authority, or the inclination, to represent both the old Canada (with Quebec) and the new Canada (without Quebec)? These questions are fundamental and complex, and Part V has little to say about them. Nor, for that matter, does the Court.[14]

One potentially pertinent question in the future is whether principles are available to trump the written provisions, in order to resolve deadlock and permit orderly change after the referendum. We know principles can fill in the gaps between rules and structure the exercise of discretion bestowed by rules. Can principles also contradict or override the written rules of the constitution? Overall, the opinion's message is that principles are more important than rules, notwithstanding the pronouncements about the primacy of the text (para. 53). The Court states that an agreement requires support from the "majority of Canadians as a whole, whatever that might mean" (para. 93) and that negotiation requires reconciliation of rights and obligations between "two legitimate majorities, namely the majority of the population of Quebec, and that of Canada as a whole" (para. 152). In an opinion obviously written with considerable care, these comments are not accidental. They may hint that the Court will dispense with Part V, especially the unanimity rule, if it stands in the way of peaceful transition. The Court deliberately does not address how secession could be achieved in a constitutional manner (para. 105). By emphasizing principles and assigning them legal force, the Court has given itself the tools to put principles first when they conflict with rules.

Practically, this could occur in several ways without completely shredding the text. The Court may yet become involved in assessing the conduct of the negotiating parties, which is of "primary constitutional significance," notwithstanding its protestations about the non-justiciability of evaluating conduct, and its lack of a "supervisory role over the political aspects of constitutional negotiations" (para. 100). Moreover, it has full jurisdiction over legal aspects of negotiations. It may be unable or unwilling to declare an agreement in force in the absence of compliance with Part V, which has "binding status" as part of the "surrounding constitutional framework" (para. 102). But the Court has the power to issue declarations about illegality, including violations of legally binding principles, and

[14] For a more extended discussion, see Alan Cairns, "The Quebec Secession Reference: The Constitutional Obligation to Negotiate" (1998) 10 Constitutional Forum 26.

thus coax or urge the parties back to the bargaining table. If non-legal conventions are subject to judicial pronouncements, with consequences for political discourse and actions,[15] legal principles necessarily are subject, as well.

REFERENDA AFTER AN AGREEMENT

Several provinces require referenda to approve constitutional change before a resolution is approved in their legislatures. More generally, democratic practice has evolved toward increased direct involvement by the people in constitutional change. Amendment is no longer viewed as the prerogative of governments, whether the executive or legislative branch. Will these statutory constraints prevent the implementation of a secession agreement?

The answer likely is no. The Court does not grapple with referenda as obstacles to secession amendments. However, it is reasonable to surmise that if constitutional principles are available to supplement, constrain and, perhaps, even trump the entrenched constitutional text, they have at least equal power with respect to statutory rules.[16] In this context, a legislature may violate its duty to negotiate if it enacts such onerous requirements for passage of a constitutional resolution that amendment becomes practically impossible. One could reasonably conclude that this hypothetical legislature is not sincerely interested in responding to a genuine desire for change. Quebec could legitimately secede if other parties refused to pass resolutions because of referenda outcomes. No other result is consistent with the Court's proclamation that "the Constitution is not a straitjacket" (para. 150).

The principles buttress this conclusion. The principles of constitutionalism and the rule of law would favour passage of resolutions despite referenda promises, rather than uncertainty and disruption of the legal order occasioned by failure to implement the amendment. Statutes requiring binding referenda could be repealed by the legislatures, or struck down by the courts as inconsistent with the Constitution. Nor would the principle of democracy support tenacious adherence to referenda approval of a deal. The Court emphasizes that the fundamental value of democracy is not encapsulated by the notion of majority rule, but contains both substantive and procedural aspects. Democracy requires "a continuous process of discussion" (para. 68), with governments building majorities by compromise and negotiations that take into account dissenting voices. It is not merely a matter of toting up ballots. The Canadian conception involves representative government, with citizens having the right to participate in the political process as voters (para. 65). In the secession context, elected representatives have the duty to respond to one party's initiative with respect to constitutional change by engaging in negotiations. The people do not negotiate directly. That responsibility is for their elected representatives.

In this instance, what the principles ignore are the political consequences for legislators who break their promises. In the event of secession, however, these promises to engage in direct democracy may quickly become insignificant. The secession amendments will give birth to two new countries. As Bob Young has argued in his comprehensive and sophisticated analysis of secession, the legislators and people of each unit of old Canada outside Quebec will have far more interest in reconstituting Canada than in time-consuming procedures for ratifying the terms of secession amendments.[17]

At first glance the Court's opinion may seem stuck in a 1982 time frame: Ottawa and provinces negotiating amendments without popular ratification. But, if anything, it returns to a pre-1982 time frame, when amendment required federal approval and substantial provincial consent, not unanimity, and many people thought Quebec had a veto over constitutional change. Now Quebec exercises its veto by legitimate exit.

THE ROAD AHEAD

Few people will disagree with the Court that negotiations after a referendum would be exceedingly difficult. Two different countries are being born: reconstituted Canada and Quebec. There would be two sets of negotiations, although likely not simultaneously. One set would negotiate the terms of secession with Quebec while the other would involve units from ROC negotiating the terms of their new arrangements. Both

---

[15] *Patriation Reference*, [1981] 1 S.C.R. 753. The Court's opinion in the *Secession Reference* also makes conventions irrelevant and obsolete as constitutional norms. For instance, Canadians no longer need a convention to restrict the legal right of the Governor General to withhold Royal assent to bills. The constitutionally binding principle of democracy does the job directly. Henceforth, conventions will merely illustrate or signal constitutional principles.

[16] In any event, s.52 of the *Constitution Act, 1982* declares that any law inconsistent with the Constitution is of no force and effect. There is no legal reason why ordinary statutes pertaining to constitutional amendment cannot be challenged as violating the Constitution itself.

[17] Robert A. Young, *The Secession of Quebec and the Future of Canada* (Montreal & Kingston: McGill-Queen's University Press, 1995) at 250-251.

sets, especially the ROC one, would have numerous parties. The Court shows political realism in signaling that amending rules designed for a united Canada must soften during the emergence of two new countries. In February 1998, the Toronto Star reported the Attorney General of Canada, Anne McLellan, as having said that the "extraordinary nature" of secession would require one to determine "what process would be pursued at that point."[18] By stressing principles, and the legal obligations that flow from them in the face of Part V rights, the Court essentially has agreed with her.[19]

Perhaps if a majority of Quebeckers vote to leave Canada, political activity will occur so quickly that the Court's opinion will play a minor role in the debates, deliberations, and decisions necessitated by the rupture of Canada. However, between now and then, the opinion may influence debate amongst the political elite and the general public. Whether the opinion will reduce the likelihood of a Yes vote in a future Quebec referendum, and thus contribute positively to the federal Plan B strategy, is open to debate. Any optimism must be tempered with realism. For smaller provinces, one implication of the opinion is that they ought to begin preparing now for both sets of negotiations, as well as continuing with the Plan A strategy currently underway with the Social Union negotiations. In the secession context, their influence will depend on their persuasiveness, not on their legal rights under an almost-obsolete amending formula. And when power turns on persuasiveness, good preparation is essential.❑

Donna Greschner

College of Law, University of Saskatchewan.

Of the many people who have discussed the opinion with me over the past two months, I wish to thank especially George Peacock, Q.C., for his perspicacious analysis and, in particular, close critique of an earlier draft. While he would still not agree with some points in this paper, it is richer and, I hope, more persuasive because of his generosity and erudition.

[18] "New Hurdle for Quebec" *The [Toronto] Star* (16 February 1998) 1.

[19] In argument, federal counsel insisted that the Attorney General held fast to her view that Question 1 was a legal question. The Court proved her correct by giving a legal answer, but one that flowed from principle, not written text.

THE QUEBEC SECESSION REFERENCE: THE CONSTITUTIONAL OBLIGATION TO NEGOTIATE

Alan C. Cairns

[Terminology can be confusing when a country might break up. For the sake of clarity, I often use "old Canada" for the present reality and "new Canada" for the smaller, residual Canada that would survive should Quebec secede. Bracketed figures in the text refer to the paragraph numbering of the Reference re: Secession of Quebec.[1]]

The *Globe and Mail* headline "The Quebec ruling: Canada must negotiate after Yes vote"[2] correctly identified the most innovative aspect of the Court's ruling. According to Conservative senator and constitutional law professor Gerald Beaudoin, "[t]he constitutional obligation to negotiate that's new in the jurisprudence ... I am very impressed — that's quite something."[3] Premier Bouchard loudly proclaimed the obligation to negotiate as a victory for the sovereignists. It blunted the federalist assertion that Ottawa could not or would not negotiate following a Yes vote.[4] "The obligation to negotiate," asserted Bouchard, "has a constitutional status. This is of the utmost importance. There is no way the federal government could escape it."[5] Subsequently, extracting even more positive results from the decision, he asserted that Canada will have "no choice but to negotiate a new economic relationship with Quebec."[6]

The Court's finding of an obligation to negotiate, the linchpin of its analysis once it had decided that neither domestic constitutional law nor international law authorized the unilateral secession of Quebec from Canada, deserves intense scrutiny. While the Court's dictum on the obligation to negotiate has injected a welcome note of civility into our constitutional introspection, the analysis that supports it and the consequences that might flow from it have serious weaknesses. However, before elaborating on some deficiencies in the Court's reasoning, deficiencies that were largely products of the reference questions it was asked, it will be helpful to present the Court's position on the negotiation obligation. The shrewdness of the negotiation requirement, which was warmly received within Quebec, is that it nevertheless constrains the discretion of the Quebec government in the politics of the referendum process (a result dear to policy makers in Ottawa) and, as noted below, identifies a supportive role for the international community in monitoring the integrity of the negotiation process.

A Constitutional Obligation: The obligation to negotiate in good faith is a constitutional obligation. It is not a matter of choice or of the presence or absence of an electoral mandate for governments outside Quebec. That obligation, of course, applies equally to Quebec, the necessity for which was clearly indicated by the revelation that Parizeau planned a very hasty UDI if the Yes forces had won the 1995 referendum in spite of the contrary wording of the referendum question (paras. 69, 88).

Prior Criteria: The obligation to negotiate only comes into play if the referendum electorate has been asked a clear question and has responded with a clear majority Yes (paras. 93, 100). This prior requirement gives political actors outside Quebec a rationale for refusing to negotiate if the Court's criteria have not

---

1 (1998) 161 D.L.R. (4th) 385.

2 Graham Fraser, "The Quebec ruling: Canada must negotiate after Yes vote" *The Globe and Mail* (21 August 1998).

3 *Ibid.*

4 In the closing days of the 1995 referendum campaign, Prime Minister Chrétien raised the possibility there would be no "other side" for Quebec to bargain with following a Yes vote. See Tu Thanh Ha, "Yes vote no picnic, Chrétien warns" *The Globe and Mail* (19 October 1995).

5 Rhéal Séguin, "Federalist cause 'poisoned' by ruling, Bouchard says" *The Globe and Mail* (22 August 1998).

6 Rhéal Séguin, "Bouchard says next referendum would put question more clearly" *The Globe and Mail* (21 August 1998). Deputy Premier Bernard Landry and former Premier Jacques Parizeau shared Bouchard's enthusiasm for this aspect of the Court's ruling. Rhéal Séguin, "Ruling legitimizes sovereignty drive, PQ leaders say" *The Globe And Mail* (21 August 1998) for Landry, and Jacques Parizeau, "Lettre ouverte aux juges de la cour suprême" *Le Devoir* (3 September 1998) for Parizeau.

been met. "A right and a corresponding duty to negotiate secession cannot be built on an alleged expression of democratic will if the expression of democratic will is itself fraught with ambiguities" (para. 100). The negotiation obligation, therefore, reaches back into the political process in Quebec and gives to governments outside Quebec an indirect influence on the leadup to the referendum within Quebec and its subsequent interpretation.

International Community Role: The negotiation requirement also reaches forward, for negotiation takes place under the watchful eye of the international community. The international reception of a Quebec unilateral secession will be influenced by whether it is preceded by good faith bargaining by Quebec and intransigence by Canada, by the reverse, or by something in between (paras. 103, 142-43, 155).

Why Negotiation? Negotiation is necessary because a constitutional amendment is required for a legal secession, which necessarily requires consultation and agreements among the relevant actors, primarily defined as governments (paras. 84, 97).

Substance and Process: The Court, faithfully adhering to the wording of the reference questions, gave an explicit focus to the negotiation agenda by its reiterated use of the "secession" of Quebec as the object to be achieved by an amendment. This narrow and clear focus appeared to rule out any obligation for Canada to negotiate association or partnership. On the other hand, the Court, perhaps wisely, did not indicate which amending formula — unanimity, 7/50, or some other — would be applicable (para. 105). Had it supported unanimity as the appropriate rule, the resultant cries of outrage in Quebec would have overcome any positive features sovereignists found elsewhere in the decision. No mention was made of the federal government's unfortunate loan of its veto by parliamentary resolution in 1996 to the five regions of Canada, a serious constitutional *faux pas* that added an unwelcome rigidity to an amending process crying out for more flexibility.

Difficult Negotiations that Might Fail: The Court indicated that negotiations would be very difficult and that, among other subjects, the position of Aboriginal Peoples, especially in northern Quebec, and boundaries could be on the table. The justices admitted that negotiations might fail even if both sides undertook good faith negotiations (paras. 96-97, 139, 151). However, their only suggestion for a response to failure was that a unilateral secession would be more favourably received by the international community if the failure of negotiations could be attributed to the recalcitrance of parties other than Quebec (para. 103). Finally, the Court noted that law tends to follow fact, in that effective control of its territory and population by the Government of Quebec after a unilateral secession would contribute to international recognition (paras.142-43, 155).

The preceding points are important contributions to our constitutional self-understanding. While some scholars may disagree that "contributions" is the appropriate word in all cases, and politicians, as is their wont, will play fast and loose with their "real" meaning, the problems with the Court's analysis are more basic.

Problems with the Court's Analysis: The Court appears to propose two competing negotiating/ amending processes. On the one hand, much of its analysis presupposes the use of the basic amending formulae of the 1982 Constitution Act, which privilege governments and legislatures. The decision speaks of the legal necessity of "an amendment to the Constitution" (para. 84) and states that secession "must be undertaken pursuant to the Constitution of Canada" (para. 104). Elsewhere, however, the decision asserts that negotiations would "require the reconciliation of various rights and obligations by the representatives of two legitimate majorities, namely, the clear majority of the population of Quebec, and the clear majority of Canada as a whole, *whatever that may be*" (para. 93, emphasis added). Are these two ways of describing the same process, with the latter being the Court's interpretation of the former? Or are these two different processes? Claude Ryan has interpreted these as two processes, although he castigated the Court for its lack of clarity on this key issue.[7] The two majorities are dissimilar, as one refers to population and the other refers to Canada as a whole. The meaning of "representatives of ... the clear majority of Canada as a whole" is unclear, as the Court intimated with its phrase "whatever that may be." Clear majority does, however, appear to rule out unanimity as a requirement, in which case the Court has eliminated one of the amending formulae that elsewhere it had said were not up for judicial determination at this time (para. 105). On the other hand, "clear majority" is not a particularly helpful way to describe the 7/50 process that requires the approval of eight of the eleven governments — the federal government and seven provinces with 50 percent of the population. It is even less appropriate as a description of the degree of agreement required to get over the hurdles of the

[7] Claude Ryan, "What if Quebeckers voted clearly for secession?" *The Globe and Mail* (27 August 1998).

federal government's 1996 loan of its veto to the five regions of Canada.

The Court's description of one of the two negotiating parties as "Canada as a whole" raises more complicated problems. Canada as a whole necessarily includes Quebec. Accordingly, Quebec participates twice — once on its own behalf as a secession-seeking government and also as part of "the clear majority of Canada as a whole," which necessarily includes the federal government representing all Canadians, including Quebecers. By contrast, there is no mention of the Rest of Canada — the prospective new Canada — in the judgement, even by inference. The premise appears to be that Quebec is cleanly excised, and "Canada" continues. However, new Canada with Quebec gone is a new country, in a way that Canada without P.E.I. would not be. It is not simply a slightly modified version of the old Canada. To suggest that it is, is to argue that Quebec's presence has had only minimal influence on Canada's evolution as a people, on the federal system, on our foreign policy, etc. Accordingly, a negotiating process and the reaching of a constitutionalized secession agreement needs to accommodate a successor new Canada that will no longer be a whole, but a smaller Canada with a gaping hole in the middle. This Canada is the second, new country that will emerge should Quebec leave and the country to which all the arrangements struck with Quebec will apply.

The Court unavoidably and unsurprisingly advocates a lead role for the Canadian government in the negotiation process. Such a lead role for the federal government is justified by the gravity of the issue, the threatened dismemberment of the country; by the fact that the federal government has moral obligations to Quebecers who do not wish to leave Canada and/or are concerned with their position in an independent Quebec; by its fiduciary obligations to native peoples; and by the fact that implementing secession will require an incredibly complex devolution of federal responsibilities in Quebec to the new seceding government — including offices, hundreds of thousands of files and records, the proffering of policy advice to the new administrative class, and the movement of civil service personnel in both directions — all of which, without federal government support, will degenerate into chaos. A lead role for the federal government is further required because Canada continues to exist, and it remains the government of all Canadians until Quebec's exit is formalized by a constitutional amendment or by a successful unilateral secession. Further, negotiations may fail, an unconstitutional secession may not be attempted, and Canada may continue. Or, in the post-Yes negotiations, the federal government, supported by provincial governments, may manage to keep Canada together by an acceptable offer of renewed federalism at one minute to midnight. Whether Quebec goes or stays, all of the preceding scenarios necessitate a prominent, leading role for the federal government in the post-Yes negotiations. Further, whatever amending formula is required, the legislative approval of the federal government is necessary. These are heavy responsibilities that reasonably belong to the federal government (with, of course, significant input from provincial governments and probably from nongovernmental actors). They are the daunting tidying-up problems of disentanglement, moral obligations that properly pertain to the federal government, and a possible last ditch effort to keep the country together and preserve the federal government's coast-to-coast role. The responsibility to represent the interests of new Canada, however, or even of its future central government does not logically apply to the federal government of old Canada, even in combination with provincial governments.

Given a clear question, a clear Quebec majority, the constitutional obligations on both sides to negotiate, the possibility that negotiations might be successful, or the possibility of unilateral secession should negotiations fail, old Canada might not survive. If and when that happens, a process directed to the secession of Quebec will have produced two new countries, not one. At this point, Canada as a whole, in the language of the Supreme Court, ceases to exist. The federal government of old Canada also ceases to exist. The agreement it has struck, assuming a constitutional exit, applies not to itself but to its successor, a shrunken survivor, the retreating central government of a fragmented, different country, probably still called Canada. Whether new Canada survives as a united country or experiences further fragmentation is debatable.[8] In any case, the answer to that question may not immediately emerge. As is argued elsewhere, new Canada will emerge as a separate state with virtually no preparation, either of governments or of citizens, for its new status. Given that lack of preparation, the rational course of action is for the new, smaller Canada to continue with its existing constitutional arrangements — modified only by the excision of Quebec — while it works out its own future.[9]

The difficulties confronting the new Canada will be compounded if the Supreme Court's interpretation of the negotiating task is accepted, for the agreements

---

[8] See Alan C. Cairns, "Looking into the Abyss: The Need For a Plan C" C.D. Howe Institute Commentary No. 96, *The Secession Papers* (September 1997) for a discussion.

[9] *Ibid.*

it will be expected to assume will have been bargained by others in its absence. It will be the recipient of decisions made by an entity — Canada as a whole — that will have disappeared from the scene. Canada as a whole, for example, may agree to reciprocal regimes of official minority language rights far more generous than would be voluntarily assumed by the successor, new Canada.

The emergence of a new country — the new Canada — is of no concern to the Court. The Court's task was to examine the legalities of unilateral secession by Quebec. However, the secession of Quebec creates not one, but two new states — new Canada and Quebec — a reality the Court could not address or even perceive, given the questions it was asked. Only one of those prospective states is present at the bargaining table that leads to its creation; new Canada emerges as a by-product of negotiations by old Canada to work out the terms for the secession of Quebec. Quebec will automatically be a player in its own emergence. However, in the Court's interpretation of the post-Yes negotiation scenario, no one speaks for the new Canada. It is not there.

Overcoming the discrepancy between the bargaining objectives of old Canada and a prospective new Canada requires the explicit recognition that the secession of Quebec will create two new states, not one, and that a process designed only to work out the secession of Quebec is unacceptable. Further, any idea that the federal government of old Canada can speak and bargain for its successor, the central government of a different successor country, should be rejected. Indeed, the Court's decision makes it clear that the federal government speaks for all Canadians inside and outside Quebec until secession is an accomplished fact; it cannot simultaneously be a proxy for new Canada, for Canada without Quebec, particularly if, as may be the case, it is tempted to make last-ditch efforts to placate Quebec by explicit major proposals for renewed federalism. The idea that the governments of the provinces in negotiations focussing on the secession of Quebec can be trusted to represent the interests of a prospective Canada without Quebec is also implausible, unless that future country is to be thought of as an aggregation of particularisms.

Canada without Quebec (new Canada) and Canada as a whole with Quebec (old Canada) are clearly different constellations of interests. They would strike somewhat dissimilar deals with Quebec. Accordingly, a deal struck by Canada as a whole may subsequently be unacceptable to the shrunken new Canada, the former ROC. Given this fact, the Supreme Court either seriously misunderstood or ignored the complexity of the negotiation process it was recommending. Its proposals were directed to the emergence of one new state. It overlooked the simultaneous emergence of a second state — a smaller, new Canada — and thus left the latter in the audience, absent at its own creation. It addressed itself to the task of establishing guidelines for the conciliation of the concerns of "the clear majority of the population of Quebec, and the clear majority of Canada as a whole," but not to the concerns of any kind of majority from the emerging second state.

This point requires emphasis. Although the Court asserts that "the content and process of the negotiations will be for the political actors to settle" (para. 153), it does, in fact, set an agenda. It asserts that negotiations would be necessary to address the interests of the federal government, of Quebec, of the other provinces, "and other participants," and the rights of all Canadians within and without Quebec, "and specifically the rights of minorities" (paras.92, 151). The negotiators are governments. The sovereign people, "acting through their various governments duly elected and recognized under the Constitution [have the power] to effect whatever constitutional arrangements are desired within Canadian territory, including, should it be so desired, the secession of Quebec from Canada" (para. 85). The justices agree that the amendments necessary for legal secession "could be radical and extensive" and that the changes to "current constitutional arrangements ... would be profound" (para. 84), but they nevertheless must be treated as "amendments to the Constitution of Canada" (para. 84).

The Court, as the preceding paragraph indicates, does not include the interests of new Canada (without Quebec) among those to be addressed. It does not include at the bargaining table spokespersons for the second country that will emerge if Canada breaks up, for there is no government "duly elected and recognized under the Constitution" that can speak for the interests of the new Canada that will emerge if Quebec leaves. The Court appropriately observes that "aboriginal interests would be taken into account" if negotiations are undertaken (para. 139), but no similar observation is addressed to the interests of the new Canada waiting in the wings.

By focussing on old Canada bargaining with Quebec over the terms of secession, the Court neglects what will be left behind following Quebec's surgical removal. The magnitude of the change is minimized by the constant resort to "Canada" and by the failure or unwillingness to employ any label to distinguish new Canada (without Quebec) from old Canada (with Quebec). This exaggerates the continuity between the (old) Canada that precedes Quebec's secession and the

(new) Canada that follows it. This might be acceptable if the seceding province was small and on the geographic periphery. It is misleading when the seceding province is Quebec, whose location, numbers, and history made it central to the nature of old Canada, and whose departure would correspondingly be a major shock. New Canada, therefore, is not simply old Canada writ small.

Recommendation: The politics of the negotiating process must incorporate a voice for new Canada in the hard bargaining directed to the secession of Quebec. How that role is to be performed is beyond the capacity of this short essay to describe. There are no easy answers. Prior to its emergence, new Canada is institutionally formless. It is headless. No one speaks for it. It is an anticipation, not a historic, structured political community like Quebec. And yet, if Quebec secedes, it will overnight become a new state, doubtless sporting, at least for a transition period, the institutional and constitutional clothing of old Canada. New Canada's inchoate nature prior to its possible future emergence should not become an excuse for ignoring the fact that it and Quebec, assuming the latter's constitutional exit or a successful unilateral secession, will emerge into separate statehood simultaneously. Now, while the crisis of a possible Quebec referendum Yes is some distance away, is the time to think through the necessity and complexity of a negotiating process in which Quebec, old Canada, and new Canada are all present while the futures of all three are being worked out. It is irrational for a negotiating process that could lead to the breakup of Canada to give leading roles to the existing federal government and to a "Canada as a whole" that will not survive the secession of Quebec, and to have no presence of the interests of the new Canada of a lesser whole and of a central government of a smaller population and reduced territory that will survive Quebec's exit.

A possible solution might be to reduce the role of federal representatives from Quebec on issues that pertain to new Canada. Perhaps there should be a special monitoring committee within the bargaining team constantly assessing proposed agreements from a new Canada perspective. Old Canada or Canada as a whole must realize its limitations. It is biased towards the past. It cannot represent new Canada, which will be looking toward the future. Partnership arrangements struck by old Canada on behalf of new Canada are out of the question because, at this time, the future constitutional shape of new Canada is unknown, and it may not even survive as one country.

Conclusion: Apparently the Court thought that a negotiating response to a Quebec Yes was a question of "will," which could be resolved by underlining the constitutional obligation to negotiate secession terms in appropriate circumstances. It is also, however, a question of capacity, which becomes the question of how a negotiating process and an amending formula that assumes constitutional continuity can be employed to generate two new independent states — Quebec and new Canada. The Court's attention focussed exclusively on the former (Quebec) and completely neglected the latter (new Canada). The Court's negotiation proposal, therefore, is incomplete. It only does half the job.

It would be unfair to affix too much of the blame for this shortcoming on the Court itself. Its answers were structured by the questions it was asked. The justices focussed on the legality of the unilateral secession of Quebec as part of the Plan "B" strategy to inform Quebecers that secession was a high risk enterprise. By suggesting criteria that must be met in the referendum process — a clear question and a clear majority followed by a constitutionally obligatory negotiating process characterized by good faith on both sides — the Court has removed some of the risk, for all parties. The Court, however, doubtless unwittingly, has also structured the post-Yes negotiation process in such a way that a new set of risks has been visited on the second successor country that will emerge should Quebec leave. This appears as a classic example of the unintended consequence of purposive social action, one that the federal government did not foresee when it launched the reference, one the Court did not intend, one no provincial government publicly anticipated, and, at the time of writing, one that no post-decision commentator appears to have noted. It is not too late to supplement the Court's contributions by devising a negotiating process that is appropriate to the actual tasks that will confront the post-Yes negotiators.❑

Alan C. Cairns
Law Foundation of Saskatchewan Professor, College of Law, University of Saskatchewan. He wishes to thank Russell Isinger for excellent research assistance.

Published by UBC PRESS
in association with the
Centre for Constitutional Studies

Aboriginal and Treaty Rights in Canada

Essays on Law, Equality and Respect for Difference

Edited by Michael Asch

In this interdisciplinary collection, the authors state that although Canadian law has historically served to impose the values and institutions of the dominant cultures upon indigenous peoples, legal venues have also facilitated successful challenges to those institutions. Aboriginal treaty rights were acknowledged and affirmed in the Constitution Act of 1982, but courts and legislatures are increasingly relying on a mode of understanding that is grounded in the legacy of the British colonial system.

The book begins by discussing the theoretical models involved in the negotiation of treaty rights. While one essay argues for the need to use a historical approach to understand the concept of distinct societies another proposes a modern paradigm based on autonomy and equality. The book then examines current practices in contemporary aboriginal society and suggests that these do not necessarily represent authentic aboriginal traditions and may not help to foster the development of viable self-governing societies. The final chapter speculates on the ramifications of progressive policy implementation to the political relationship between indigenous peoples and the rest of the country.

Throughout the book, the authors illustrate their arguments with examples of legal issues relating to the treaties. They consider the legality of voluntary secession of land by First Nations to the province, the flexibility of the legal concept of aboriginal title, and the full consequences of the Royal Proclamation in regards to native self-government.

Aboriginal and Treaty Rights in Canada shows that, although the constitution has recognized existing aboriginal and treaty rights, changes to the way these rights are interpreted are urgently needed.

Michael Asch is a professor in the Department of Anthropology at the University of Alberta and the author of *Home and Native Land: Aboriginal Rights and the Canadian Constitution* (1984).

CONTENTS:

288 pages, January 1997
ISBN 0-7748-0580-3, hc $65

Enquiries: Tel: (604) 822-4546
Tel. Orders: (604) 822-5959
Fax: 1-800-668-0821
E-mail: orders@ubcpress.ubc.ca

Order to: UBC Press
University of British Columbia
6344 Memorial Road
Vancouver, BC V6T 1Z2

The Centre for Constitutional Studies
is pleased to announce the publication
in association with the University of Toronto Press of

Charting the Consequences: The Impact of Charter Rights on Canadian Law and Politics

edited by
David Schneiderman and Kate Sutherland

Contents:

COST:

Cloth: $50.00 ISBN 0-8020-0811-9
Paper: $22.50 ISBN 0-8020-7181-3

For further information, contact: The University of Toronto Press
Fax: (800)221-9985 / (416) 667-7832 Telephone: (800) 565-9523 / (416) 667-7791

STYLE GUIDE

MANUSCRIPT FORMAT:

- We prefer that manuscripts are double spaced, with at least one inch margins all around.
- Please avoid using computer codes, other than those concerning font and line spacing. Use hard retruns only at the end of a paragraph.

COMPUTER SOFTWARE:

- We prefer submissions in WordPerfect 6.1 or in other PC-DOS systems. Please use 3½" diskettes.

SPELLING:

- Please follow *The Canadian Oxford Dictionary* for spelling usage.

STYLE:

- Please follow *The Chicago Manual of Style*, 14th ed. where not inconsistent with the *Canadian Uniform Guide to Legal Citation*.
- Use double quotation marks, except for quotes within quotes.
- Commas, periods, and other marks should be inside quotation marks, except for colons and semi-colons.

CITATIONS:

- Please follow the *Canadian Uniform Guide to Legal Citation,* 3rd ed. for citations. Author's first names may be used, but we ask that the style be uniform throughout. Footnotes or endnotes are acceptable for submissions.
- For books: P.J. Williams, *The Alchemy of Race and Rights* (Cambridge: Harvard University Press, 1991).
- For edited books: R.F. Devlin, ed., *Canadian Perspectives on Legal Theory* (Toronto: Emond Montgomery, 1991) or S.L. Elkin and K.E. Soltan, eds., *A New Constitutionalism: Designing Political Institutions for a Good Society* (Chicago: University of Chicago Press, 1993).
- For edited books by separate author: C. Taylor, *Reconciling the Solitudes: Essays on Federalism and Nationalism,* ed. by G. Laforest (Montreal and Kingston: McGill-Queen's University Press, 1993).
- For translated works: A. Honneth, *The Struggle for Recognition: The Moral Grammar of Social Conflicts,* trans. J. Anderson (Cambridge: Polity Press, 1995).
- For newspaper articles: "Nunavut Proposal Would Ensure Half of Government Seats Go to Women" *The Edmonton Journal* (25 November 1996) A8.
- For articles: B.S. Turner, "Outline of a Theory of Human Rights" (1993) 27 Sociology 489.
- Subsequent references: *Ibid.* if immediately above or *supra*, note # if further above. You may use *infra*, note # for references below.
- Pinpoint Citations: Use "at [page number]". As in: *Supra*, note 10 at 29.