

The Public Policy Role of the Supreme Court of Canada in the Secession Reference

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To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the person on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation...

Between these alternatives there is no middle ground. The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it.

Chief Justice Marshall, *Marbury v. Madison*,
5 U.S. 137 (1803)

When the Attorney General of Canada, the Honourable Allan Rock, announced on September 26, 1996 that the federal government was referring three questions on the legality of unilateral Quebec secession to the Supreme Court of Canada, the announcement drew little praise and widespread criticism from most quarters. Many commentators in English-speaking Canada argued that the entire exercise was at best pointless (since everyone already knew that, in law, Quebec had no right to secede unilaterally) and could even backfire badly by inflaming the very separatist sentiment that the Reference was allegedly designed to dampen. In Quebec, meanwhile, the federal government was widely condemned, even by federalist parties, for purporting to deny the democratic right of the people of Quebec to define their own destiny “without interference”.¹ Quebec Premier Lucien Bouchard stated that his government would not

1. In May of 1996 the Quebec National Assembly had passed a motion affirming that “the people of Quebec are free to take charge of their own destiny, to determine without interference their political status and to promote their economic, social and cultural development.” See Quebec, National Assembly, *Votes and Proceedings* (22 May, 1996), No. 24.

participate in the Reference and vowed repeatedly to defy any Court ruling that purported to thwart the democratic right of self-determination of the Quebec people.

The Court's unanimous ruling on August 20, 1998 silenced the critics on all sides. Indeed, undoubtedly the most remarkable aspect of the outcome is the fact that both sovereigntist and federalist leaders have thus far been almost universally laudatory of the Court's opinion.

The Court achieved this remarkable outcome by doing what no-one had foreseen; rather than focus on whether Quebec had a unilateral right to secede from Canada, it turned the Reference into an extended analysis of the federal government's constitutional obligations in the event that the Quebec government is able to obtain a clear mandate in favour of a secession in a future referendum.

While no one anticipated that the Court would shift the ground of the Reference in this particular direction — the federal government's "duty to negotiate" which formed the centrepiece of the judgment was not even argued by the *amicus curiae* appointed by the Court² — in general terms the outcome was entirely consistent with the Court's reaction to similar federal initiatives in the past. Over the past thirty years, when the federal government has attempted to enlist the Supreme Court as an ally in its jurisdictional battles with the provinces, it has often been disappointed.³ "Be careful what you ask for" is a maxim that

2. Given the Quebec government's refusal to participate in the proceedings, in July of 1997 the Supreme Court appointed Quebec City lawyer André Joli-Coeur to ensure that the Court received arguments on all sides of the Reference questions.

3. Obvious examples that come to mind include : *Re Anti-Inflation Act*, [1976] 2 S.C.R. 373 (where the Supreme Court upheld federal prices and incomes legislation but on narrow grounds); *Re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753 (where the Court upheld the legal validity of the proposed unilateral federal patriation of the constitution but held that such action was inconsistent with a constitutional convention requiring "substantial provincial consent"); and *Re Upper House*, [1980] 1 S.C.R. 54 (where the Court ruled against unilateral federal power to abolish or alter the Senate). Note that whereas the first and third of these references were initiated by the federal government itself, the second was initiated by the provinces in three courts of appeal and subsequently was appealed to the Supreme Court.

might usefully be kept in mind before any similar references are contemplated by federalists — including this one⁴ — in the future.⁵

Still, in what is now the Supreme Court's trademark search for compromise and "middle ground", the opinion gave something to federalists as well as sovereigntists. The fact that both sides "won" ensured that leading political figures from both the sovereigntist and federalist camps would claim victory and react positively.

The existence of a "consensus" involving Jean Chrétien and Lucien Bouchard on anything to do with Canadian federalism is no mean accomplishment. Surely the fact that these two habitual combatants both endorse the Supreme Court's opinion must count for something. And one cannot help but notice the fact that the political rhetoric in Quebec on the sovereignty issue appears to have muted considerably in the year since the Court's opinion was released. Moreover, the fact that Premier Bouchard has bestowed praise on a federal political institution has served to rehabilitate the reputation of the Court within Quebec, which is not only a positive development for Canadian federalism but for the principle of the rule of law itself. Indeed the Quebec government, which in the days leading up to the oral argument in the Reference was running newspaper advertisements condemning the Court as the "leaning tower of Pisa of Canadian federalism",⁶ has now taken to referring to the Court's judgment as establishing one of the "winning conditions" for the next sovereignty referendum.

Yet, while the short-term political effects of the judgment have been positive, the longer-term political and legal consequences are far from clear. The Court has clarified certain aspects of the legal framework governing secession, particularly the significance of the frequently-cited international law principle of "self-determination of peoples". The Court has also clarified the fact that

4. I acknowledge that I was an early and strong proponent of a reference to the Supreme Court on the secession question. See, *i.e.*, P.J. Monahan and M.J. Bryant, *Coming to Terms with Plan B: Ten Principles Governing Secession* (C.D. Howe Institute, 1996).

5. Ironically, the litigation commenced by Guy Bertrand, a private citizen, against the unilateral secession initiative of the Quebec government was, for reasons to be discussed, more successful from a federalist perspective than the Reference itself. See *Bertrand v. Quebec* (1995), 127 D.L.R. (4th) 408 (September 8, 1995) (hereinafter "*Bertrand No. 1*") and *Bertrand v. Quebec (Attorney General)* (1996), 138 D.L.R. (4th) 481 (hereinafter "*Bertrand No. 2*"). *Quaere* whether private initiatives of this kind are likely to continue to be better received by courts in the future, since they frame the issue in terms of the protection of individual rights from illegal government action, rather than as a conflict involving the federal and provincial governments.

6. These ads were an attempt to revive the old Duplessis canard that the Court "always leans the same way, against Quebec".

secession of a province from Canada would require a constitutional amendment and that, therefore, a unilateral declaration of independence by a provincial legislature, legislative assembly or government would be unlawful under the Constitution of Canada.⁷ At the same time, however, the Court has found that there is a legal duty to negotiate the terms of secession following a clear mandate in a referendum. The circumstances in which this duty would arise, the parties to whom it would apply, as well as the conduct it would mandate, were not clearly defined by the Court.

This paper will provide a detailed analysis of the reasoning and the result in the *Secession Reference*. As we will see, the legal foundation for the Court's recognition of a duty to negotiate appears shaky; the Court seems to have taken a purely political obligation and converted it into a legal one. This transformation of political considerations into legal obligations is likely to play an important role in any future sovereignty referendum campaign, with both sovereigntists and federalists seeking to rely on the Court's reasoning to their advantage. I will argue that given the equivocal and politically malleable nature of the Court's opinion, it is imperative that federalists devise and implement a coherent political strategy designed to supplement the Court's reasoning on certain key points. In particular, it is essential that the federal government clearly identify well in advance of the next referendum campaign the circumstances that would trigger the "duty to negotiate", as well as the range of issues — including boundary questions — that would necessarily have to be negotiated and resolved.

The Court's judgment in the *Secession Reference* may have important implications for Canadian Constitutional law in a variety of other areas, regardless of whether there is another referendum on Quebec sovereignty. The Court appears to have proceeded on the basis of a rather novel and enlarged conception of the judicial role in constitutional matters, one in which the judiciary is free to create constitutional obligations whenever it identifies a "gap" in the constitutional text. Given the wide variety of matters that are not expressly dealt with in the constitutional text — the constitution sets out only a bare framework for the relationship between state and citizen, leaving most issues to the realm of day-to-day political debate — this approach, if widely applied, could lead to considerable uncertainty in the law. I will argue that the Court's underlying theory of the relationship between courts and legislatures is open to serious question, and ought to be approached with great caution in future cases.

7. See W.J. Newman, *The Quebec Secession Reference, the Rule of Law and the Position of the Attorney General of Canada* (forthcoming, York University Centre for Public Law and Public Policy, 1999.)

I. JURISDICTIONAL ISSUES

The *amicus curiae* raised a number of objections to the Court's jurisdiction to hear or answer the Reference questions, including the argument that section 53 of the *Supreme Court Act* exceeded Parliament's authority in section 101 of the *Constitution Act, 1867* to establish a "General Court of Appeal for Canada" and was therefore unconstitutional. The Court dismissed these arguments summarily, holding that section 101 authorized Parliament to establish a Court with original jurisdiction that could render advisory opinions. This response was hardly surprising, given the fact that the Privy Council had upheld the Court's advisory jurisdiction in 1912. Moreover, all provincial governments, including Quebec, have similar reference procedures in relation to their own Courts of Appeal and had made frequent use of this procedure over many decades without objection or adverse comment by the courts.

Perhaps the most interesting and potentially significant aspect of the Court's analysis on the jurisdictional issues related to its treatment of the question of whether the matters raised were too hypothetical or speculative to be justiciable. The *amicus* had argued that the Reference questions did not relate to a real or continuing controversy, since the 1995 referendum had been concluded and it was not certain that another referendum would ever be held in the future. Similar objections had been raised by the Quebec government in *Bertrand No.1* and *Bertrand No. 2*; on both occasions the Quebec Superior Court had rejected these arguments on the basis that the Quebec government's unilateral secession plans constituted a real and continuing threat to the supremacy of the Constitution and the rule of law. In particular, Pidgeon J. in *Bertrand No.2* had pointed out that during the course of the argument before him in May of 1996, the Quebec National Assembly had passed a resolution affirming its right to determine its political future unilaterally.⁸ In other words, the fact that the Quebec government was continuing to maintain its right to secede unilaterally, regardless of the legal requirements of the Canadian Constitution, represented a continuing threat to the rights of citizens that could not be ignored or dismissed as hypothetical.

In its analysis on this point, the Supreme Court of Canada did not refer to the fact that the Quebec government was continuing to maintain that it was not bound by the Canadian Constitution and the rulings of Canadian courts on the secession issue. Rather, the Court emphasized the fact that the questions were before it in the context of a reference rather than private litigation. It commented as follows :

8. See the resolution referred to *supra* note 1.

*In the context of a reference, the Court, rather than acting in its traditional adjudicative function, is acting in an advisory capacity. The very fact that the Court may be asked hypothetical questions in a reference, such as the constitutionality of proposed legislation, engages the Court in an exercise it would never entertain in the context of litigation.*⁹

Ironically, the questions that were before the Supreme Court were based upon questions that Mr. Justice Pidgeon had set down for trial in *Bertrand No. 2*, which was of course private litigation rather than a reference. By suggesting that it would answer questions on a reference that it would “never entertain in the context of litigation”, was the Court attempting to indicate, if only by inference, that Justice Pidgeon in *Bertrand No. 2* had been wrong to order these very matters to trial?

Some lower courts appear to have interpreted this passage as precluding them from entertaining challenges to draft legislation in the context of private litigation. For example, in *Campbell v. British Columbia (Attorney General)*,¹⁰ Mr. Justice Williamson of the British Columbia Supreme Court relied upon paragraph 25 in the *Secession Reference* as establishing that courts will not generally rule upon the validity of legislation until such time as it has been enacted. He therefore refused a motion to set down for hearing a point of law on the validity of the *Nisga’a Final Agreement* because the federal and provincial legislation ratifying the agreement had not yet been enacted. In a subsequent ruling, Justice Williamson refused to set down the same action for trial in advance of the enactment of ratifying legislation, holding that to do so would be tantamount to permitting the plaintiffs a “private reference”, which would be inconsistent with reference legislation granting that exceptional right to the executive alone.¹¹

While the Supreme Court in the *Secession Reference* relied on the fact that it was dealing with a reference rather than private litigation in order to justify its decision to respond to the questions that had been raised, in my view there was a clear alternative basis upon which the Court could have justified its decision on this point. The issuance of a unilateral declaration of independence (UDI) by the Quebec government would constitute an exceptional threat to the

9. *Secession Reference*, [1998] 2 S.C.R. 217 at par. 25. The Court also pointed out that the questions before it were directed only at establishing the legal framework governing secession and would not purport to dictate political outcomes.

10. [1999] B.C.J. No. 121 (QL).

11. *Campbell v. British Columbia*, [1999] B.C.J. No. 233 (QL) at par. 32.

rule of law and the Canadian legal order; it would represent an attempt to overthrow the Constitution of Canada and to substitute, through revolution, an entirely new legal regime. This new legal regime would include the substitution of courts and judges appointed by or under the authority of the new Quebec state in place of those lawfully exercising authority under the Constitution of Canada. While it is no doubt true as a general proposition that courts will not rule upon the validity of proposed or hypothetical legislation, this general rule cannot extend to a situation where the very existence of the constitutional order is at issue. In such a case, the effect of waiting until after the UDI has been issued before ruling on its legality is to deprive citizens of an effective remedy. If the seceding province is able to establish “effective control” over some or all of the territory in question, citizens living in that territory will no longer have access to Canadian courts for the vindication of their rights, despite the clear illegality of the UDI. It is for this reason imperative that courts establish in advance the general legal framework governing secession, whether the issues arise in the context of a reference or through private litigation.

This analysis finds support in prior Privy Council authority on point. For example, in *Rediffusion (Hong Kong) Ltd. v. A.G. of Hong Kong*¹² the Privy Council acknowledged that challenges to proposed legislation would not be easily entertained. However, the Board also stated that the key question in deciding whether to rule on proposed legislation was the presence or absence of an effective alternative remedy. Where the enactment of legislation would have the effect of depriving a plaintiff of any remedy, the Court should exercise its discretion to grant relief in advance of the actual enactment of the bill :

*The immunity from control by the courts, which is enjoyed by members of a legislative assembly while exercising their deliberative functions is founded on necessity. The question of the extent of the immunity which is necessary raises a conflict of public policy between the desirability of freedom of deliberation in the legislature and the observance by its members of the rule of law of which the courts are the guardians. **If there will be no remedy when the legislative process is complete and the unlawful conduct in the course of the legislative process will by then have achieved its object, the argument founded on necessity in their Lordships’ opinion leads to the conclusion that there must be a remedy available in a court of justice before the result has been achieved which was intended to be prevented by the law from which a legislature which is not fully sovereign derives its powers.***¹³

12. [1970] A.C. 1136 (P.C.).

13. *Ibid.* at p.1157 (per Lord Diplock) (emphasis added).

It is apparent that in the vast majority of cases, the mere enactment of unconstitutional legislation will not deprive an individual of an effective remedy. This is because governments in this country operate on the basis of the rule of law and have generally accepted the right of Canadian courts to rule on the constitutional validity of their enactments. There is thus normally no necessity to rule on the validity of proposed legislation in advance of its actual enactment since governments will comply with a later ruling declaring the legislation to be invalid. This, indeed, is the situation with respect to the *Nisga'a Final Agreement*, since the British Columbia government has given no indication that it would refuse to comply with a court ruling that the *Agreement* or the ratifying legislation is unconstitutional. The presence of an effective remedy following the enactment of the legislation means that Justice Williamson was correct in exercising his discretion not to deal with the validity of proposed legislation prior to its enactment.

A different situation prevails, however, where the government in question claims the right to overthrow the entire constitutional order, including the jurisdiction of the existing courts. In such a case, it is imperative that the court act in advance of any attempt to make good on these unlawful claims. Indeed, for a government to claim openly that it is above the jurisdiction of the courts or the Constitution — as the Quebec government has done repeatedly since the 1995 referendum¹⁴ — is itself a significant threat to the rule of law, since it undermines public confidence in judicial institutions. It also represents a threat to rights guaranteed under the *Charter of Rights*, with section 24 of the Charter guaranteeing an effective remedy for such violations. In these circumstances, it is not only appropriate but necessary for the courts to affirm the primacy of the Constitution and the rule of law, whether in the context of private litigation or a reference.

II. QUESTION ONE

Question One asked whether, under the Constitution of Canada, the National Assembly, legislature or government of Quebec could effect the secession of Quebec from Canada unilaterally.

This question, as well as the answer to it, appeared relatively straightforward. Under the Constitution of Canada, Quebec has the status of a

14. Repeated public statements to this effect were made by Premier Lucien Bouchard and by Attorney General Paul Begin at the time of the Reference to the Supreme Court, and are reproduced in documents filed in *Bertrand No. 3*, [1998] R.J.Q. 1203 (Sup. Ct. of Quebec).

province within Canada. While the Constitution's amending formula does not expressly deal with secession, there was a broad consensus amongst legal scholars who had examined the issue that under the Canadian Constitution no province could secede through mere issuance of a UDI.¹⁵

The Supreme Court apparently did not find the questions to be so straightforward. According to the Court, the questions that had been posed were "susceptible to varying interpretations",¹⁶ although it did not identify the varying interpretations it had in mind. The fact that the questions were "thought to be ambiguous" meant that, although the Court would not "refuse to answer at all", it was "free either to interpret the question...or it may qualify both the question and the answer."¹⁷ The questions posed were "not too imprecise or ambiguous to permit a proper legal answer."

A. Four Principles and their Function

On this basis, rather than proceed to answer directly Question One, the Court set out an extended discussion of the historical circumstances that led to the enactment of the *British North America Act, 1867*. The Court also discussed the subsequent evolution of the country's constitutional arrangements, including patriation in 1982. On the basis of this discussion, the Court concluded that the evolution of our constitutional arrangements had been characterized by at least¹⁸ four general principles : federalism, democracy, constitutionalism and the rule of law, and protection of minorities.¹⁹

15. While certain scholars had questioned whether secession was legally possible at all under the existing constitution, the main academic debate centered on whether secession required the consent of the federal houses of Parliament and seven provinces (section 38 of the *Constitution Act, 1982*), as opposed to unanimous provincial consent (section 41). For a discussion of these arguments see P. Monahan, *Constitutional Law* (Irwin Law, 1997) at pp. 180-181.

16. *Secession Reference*, *supra* note 9 at par. 31.

17. *Ibid.* The Court was here adopting a passage from the *Patriation Reference*.

18. Note that at paragraph 32 the Court states that the principles it identifies are not exhaustive of the principles underlying the Constitution.

19. In a law review article written prior to the Court's decision and referred to in argument before the Court, the same four constitutional principles were identified as being germane to the question of unilateral secession. In R. Howse and A. Malkin, "Canadians are a Sovereign People : How the Supreme Court Should Approach the Reference on Québec Secession", (1997) 76 Can. Bar Rev. 186 at 195, the authors state : "constitutional principles are the basic cement of a gapless normative order. At least four such principles have direct applicability to the legality of unilateral secession. These are : the democratic principle; the principle of the rule of law; the federal principle and the principle of the protection of minority rights." Note, however, that the authors' application of the democratic principle is quite different from that

The fact that these principles underlie our existing constitutional arrangements seems plain and obvious. What appears more controversial is the Court's analysis as to the legal significance of these underlying principles. While constitutional principles "could not be taken as an invitation to dispense with the written text of the Constitution", they can be used to form "the premises of a constitutional argument that culminates in the filling of gaps in the express terms of the constitutional text."²⁰ Moreover, the Court stated that "these defining principles function in symbiosis". Therefore, "no single principle can be defined in isolation from the others, nor does any one principle trump or exclude the operation of any other."²¹

In the *Provincial Judges Reference* the Court had reviewed earlier cases which had established that the Canadian Constitution embraces unwritten norms which could be utilized to fill in "gaps" in the written text. However, as the Court itself acknowledged in the *Provincial Judges Reference*, given Canada's commitment to a written constitution, the resort to such unwritten norms is clearly an exceptional circumstance. In fact, the Court identified only a handful of instances since 1867 in which such unwritten norms had been utilized.

1. Identifying "Gaps"

The key question is what constitutes a "gap" in the constitutional text, since it is only in these circumstances that resort to unwritten norms is said to be appropriate. There are at least two possible theories as to the circumstances in which a "gap" could be said to exist. The broader or expansive view is that there is a gap in the text whenever there is a matter upon which the constitution fails to make provision or is silent. On this view, whenever a matter is not provided for in the constitutional text, the courts would be free to fill in the "gap" through resort to unwritten norms of principles.

It is immediately apparent that the Court in the *Provincial Judges Reference* cannot have intended to have endorsed such an open-ended definition of a "gap". The Constitution provides only a general framework within which the political process is intended to operate. As such, the Constitution makes express provision for only a limited number of fundamental issues, leaving the vast

of the Court.

20. *Secession Reference*, *supra* note 9 at par. 53, citing *Reference re Remuneration of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 (hereinafter "*Provincial Judges Reference*").

21. *Secession Reference*, *supra* note 9 at par. 49.

majority of matters free of constitutional constraints so that they may be worked out in the give and take of the ordinary political process. If the Courts were free to add to the constitution through the use of unwritten norms whenever they discovered a matter that was not provided for in the text, this would amount to an open-ended license to rewrite the constitution at will. The Courts would be able to incorporate wholly new norms or obligations into the constitution, even where the political authorities had determined that such matters should not be constitutionalized and should, instead, be left to the realm of ordinary politics. The distinction between the judicial function (the interpretation of the constitution) and the political function (the enactment of the constitution) would be rendered meaningless. Moreover, since there is no legislative override available in respect of unwritten constitutional principles, these judicially-crafted constitutional norms would be permanently binding unless altered indirectly through constitutional amendment. It is clear, therefore, that a “gap” cannot be said to exist merely by virtue of the fact that a matter is “not provided for” in the constitution.

Although the matter was not expressly defined, the Court in the *Provincial Judges Reference* seemed to have in mind a much more limited conception of the circumstances that would amount to a “gap” such that resort to unwritten constitutional principles would be appropriate. The Court stated that the use of unwritten principles was needed in that case (as well as in others where such unwritten principles had been utilized) in order to ensure that the “underlying logic of the Act can be given the force of law.”²² In the *Provincial Judges Reference* the Court noted that, while sections 96-100 of the *Constitution Act, 1867* provided specific guarantees of tenure and financial security to federally-appointed judges, it could not have been intended that courts not specifically referred to in those provisions (such as provincial court judges appointed under section 92(14)) would be subject to the absolute discretion or control of the executive. Otherwise the principle of the independence of the judiciary and the rule of law, which is the principle underlying the guarantees in sections 96-100, would be undermined and threatened. In effect, there was a “gap” in the text not simply because something was “not provided for” (the expansive theory rejected above) but because the logical or necessary implication of the text required that some form of protection be extended to provincial court judges.²³ On this view, a gap may arise when, in order to give legal effect to the “underlying logic” of what has been provided for, it becomes necessary to rely upon an unwritten norm.

22. *Provincial Judges Reference*, *supra* note 20 at par. 95.

23. Although the Court’s ruling in this case has proven controversial for many commentators, I believe the result in this case was defensible : see P. Monahan, *supra* note 15 at pp. 120-122.

2. Filling in the Gaps

Suppose that, based on this analysis, a gap is found to exist in the constitutional text. How is a court to fill that gap? Again, two possible theories present themselves. The first, which might be termed the “judicial balancing” theory, suggests that where the courts find a gap, they should conceive of their role as akin to constitutional drafters. On this view, the Court should fill in the gap by relying upon their own conception as to the best or most appropriate set of constitutional norms that should be added to the existing text. The second, which might be termed the “interpretive” theory, suggests that the court should attempt to fill in that gap by adopting an interpretation that is most consistent with the underlying logic of the existing text, and then to rely upon that logic in order to “complete” the constitutional text.

It is immediately apparent that only the interpretive theory is compatible with the judicial role. The “judicial balancing” theory, which asks the judiciary to balance *for themselves* underlying constitutional values and to choose the balance that they believe most appropriate, fails to distinguish the interpretation of the text from its creation. To be sure, the line between these two functions is not always easy to draw, since interpretation is a creative exercise that permits and requires the judiciary to exercise significant discretion. But while the line may not always be clear, neither is it meaningless.

How does the Court in the *Secession Reference* describe the methodology that should be used to fill in gaps in the constitutional text? The Court suggests that in circumstances where it finds a “gap” in the constitutional text, its function is to “fill in” that gap by reference to the four background principles of the Canadian Constitution that it has identified. Moreover, the Court states that its role is to ensure that these principles are “balanced” against each other, so as to ensure that no single principle “trumps or excludes” the operation of the others.

Because the four principles that the Court identifies are derived from the constitutional text, on first glance the approach advocated bears a superficial resemblance to the “interpretive” theory. On closer examination, however, the Court’s preferred approach seems more closely aligned with the “judicial balancing” theory. The Court describes its role as being to balance *for itself* the four constitutional principles it has identified, rather than attempting to ascertain the balance that is most consistent with the underlying logic of the existing text. This is reflected most clearly in the Court’s statement that the four principles that it identifies must be balanced in such a way as to ensure that no one value “trumps” or “excludes the operation” of any other. This ignores the possibility

that, in certain circumstances, the drafters of the Constitution might well have chosen to give primacy to certain values or norms to the exclusion of others. It is not for the courts to attempt to rewrite or recalibrate that tradeoff in the name of striking a balance seen by the Court to be more appropriate. So, for example, even though the granting of a power of disallowance to the federal government may “trump or exclude” the value of federalism and may no longer be appropriate as a political matter in a modern federal state, this does not give the courts the right to rule, as a matter of law, that the power has been “abandoned”.²⁴

In short, the idea that particular constitutional values cannot be used to “trump” or “exclude” others, however desirable in principle, is a judicially-created value choice, not one derived from the text itself. It is a reflection of the Court’s implicit acceptance of the “judicial balancing” theory, in which the judiciary attempts to balance *for itself* underlying constitutional values such as democracy or federalism, rather than attempting to give effect to the underlying logic of the existing constitutional text, however imperfect that text may appear to contemporary eyes.

3. The Rule of Law in the Balance?

Even if it were somehow appropriate for the courts to assume for themselves the right to balance underlying constitutional values such as federalism or democracy, this judicial balancing could not extend to the principle of the rule of law and constitutionalism. This is because, as Chief Justice Marshall pointed out in the passage from *Marbury v. Madison* quoted at the beginning of this article, you either accept that the Constitution is supreme or you do not. As Marshall forcefully explained, there is no “middle ground” between a constitution founded on the rule of law and a constitution founded on the principle that the state can override the law when justified. The contrary idea — that the principle of the rule of law may be overridden and the constitution set aside in order to accommodate principles of democracy or federalism — is to embrace the very doctrine that Chief Justice Marshall so forcefully and eloquently discredited in *Marbury* :

24. See the curious statement to this effect in paragraph 55. It is unclear whether the Court’s statement in regard to the power of disallowance was intended as mere political commentary rather than a legal declaration. The Court cites Dean Hogg’s text as authority for its statement; however the relevant passage in the Hogg text refers only to commentators who “by convention” view the disallowance power as “obsolete”. See P.W. Hogg, *Constitutional Law of Canada* (Scarborough, Carswell, looseleaf edition, 1992) at pp. 5-19, note 70.

This doctrine [that the Constitution can be overridden by ordinary law] would subvert the very foundation of all written constitutions. It would declare that an Act which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare that if the legislature shall do what is expressly forbidden, such Act, notwithstanding the express prohibition, is in reality effectual. It would be giving the legislature a practical and real omnipo-tence, with the same breath which professes to restrict their power within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

That it thus reduces to nothing what we have deemed the greatest improvement on political institutions, a written constitution, would of itself be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the construction.²⁵

In fairness to the Supreme Court it should be noted that, even though it stated at numerous points that constitutional principles, including the rule of law, must be “balanced” against each other, its substantive discussion of the meaning of these principles sometimes seemed to suggest otherwise. In particular, in discussing the meaning of democracy, the Court noted that “democracy in any real sense of the word cannot exist without the rule of law.”²⁶ The Court acknowledges that the law creates “the framework within which the ‘sovereign will’ is to be ascertained and implemented.” This suggests that there was no real conflict or opposition between democracy and the rule of law and thus no need to “balance” these values against each other. The Court makes precisely this observation in a later paragraph, concluding that “viewed correctly, constitutionalism and the rule of law are not in conflict with democracy; rather, they are essential to it.”²⁷ But this makes the Court’s earlier comment to the effect that there must be an “interaction between the rule of law and the democratic principle” and that “the system must be capable of reflecting the aspirations of the people” even more puzzling and enigmatic.²⁸

25. *Marbury v. Madison*, 5 U.S. 137 (1803) at p.178. This is not to deny that, in interpreting the meaning of the constitutional text, principles of democracy and federalism must be taken into account. See H.W. MacLauchlan, “Accounting for Democracy and the Rule of Law in the Quebec Secession Reference” (1997) 76 Can. Bar Rev. 155 at p. 157.

26. *Secession Reference*, *supra* note 9 at par. 67.

27. *Ibid.* at par. 78.

28. *Ibid.* at par. 67. As with the earlier statement regarding the disallowance power, it is unclear whether the Court is here merely offering political commentary or is intending to suggest some legal consequences flowing from this statement.

B. The Principles Applied

It is sometimes the case that, even where the Court's elaboration of a general legal framework is unclear or ambiguous, that ambiguity is resolved when the Court actually applies the framework to a concrete set of legal issues. How, then, does the Court apply this general legal framework to the secession context?

The Court begins by stating the obvious : secession is a legal act as well as a political one. Thus, while secession raises "political questions of great sensitivity",²⁹ the fact that it has juridical consequences makes it a legitimate matter for consideration in a court of law. On the other hand, the Court's intervention is only legitimate to the extent that it is limited to establishing the legal framework governing secession, and avoids involvement in purely political considerations.³⁰

In keeping with this mandate, the Court then states that secession "requires an amendment to the Constitution, which perforce requires negotiation".³¹ The Court also comments that the "amendments necessary to achieve a secession would be radical and extensive." While the Constitution is silent as to the ability of a province to secede, it must be possible to enact such amendments under the existing authority contained in the Constitution of Canada :

an act of secession would purport to alter the governance of Canadian territory in a manner which undoubtedly is inconsistent with our current constitutional arrangements. The fact that those changes would be profound, or that they would purport to have a significance with respect to international law, does not negate their nature as constitutional amendments to the Constitution of Canada.

It would seem to follow inexorably from this paragraph alone that the answer to Question One must be "No". This is because the only amendment procedure which permits provinces to act "unilaterally"³² is section 45 of the

29. *Ibid.* at par. 1 (citing *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721 at p. 728).

30. *Ibid.* at par. 27.

31. *Ibid.* at par. 84.

32. The term "unilateral" is defined in the *Concise Oxford Dictionary* (Toronto : Oxford University Press, 1982) at p. 1173 as meaning "performed by or affecting only one person or party". I use the term in this common or non-technical sense although, as indicated below, the Supreme Court seemed to favour a somewhat different definition, the meaning of which is not entirely clear.

Constitution Act, 1982, and the Court's comments in this paragraph make it plain and obvious that section 45 cannot be the basis for the secession of a province. First, section 45 permits provinces to enact amendments only to the "constitution of the province" whereas, as the passage quoted above explains, the amendments necessary to give effect to secession would be amendments to the "Constitution of Canada". Second, section 45 does not require provinces to negotiate proposed changes with others, since amendments under section 45 are accomplished by ordinary provincial statute and do not require the consent or participation of any other government or legislature. According to the Court, however, the "radical and extensive amendments" necessary to achieve secession would "perforce require negotiation" with the other provinces and the federal government. Therefore, while the precise amending procedure that applies is not specified, it is clear that section 45 cannot be employed and that secession cannot be accomplished "unilaterally", in the dictionary sense of that term.

Rather than follow this argument immediately to its logical conclusion, however, the Court turns to a discussion of the meaning to be given to the term "unilateral secession". According to the Court, what is meant by the term "unilateral secession" is "the right to effectuate secession without prior negotiations with the other provinces and the federal government".³³ This emphasis on the need to conduct negotiations seems puzzling for a number of reasons. First, the Quebec government had never asserted, either in the 1980 or 1995 referendum campaigns, an intention to declare sovereignty "without negotiations"; in fact, Bill 1, *An Act respecting the future of Quebec*, had expressly required negotiations prior to a declaration of sovereignty. Secondly, it is difficult to see how the entering into of negotiations is either a necessary or a sufficient condition for the validity of a constitutional amendment. Under Part V of the *Constitution Act, 1982*, the enactment of an amendment to the

33. The Court states that this was the sense in which the term "unilateral secession" was used in argument before it, but it is difficult to determine the basis for this statement. For example, although the factum of the Attorney General of Canada did not contain an express definition of the term "unilateral", the analysis in the factum was directed at proving that secession could not be accomplished through the vehicle of section 45. This was significant, according to the Attorney General, since only section 45 permits a province to enact amendments without the consent of other governments. In this sense, "unilateral secession" was clearly referring to secession achieved by a province without the consent of another party (i.e. "performed by or affecting only one person or party", the *Concise Oxford Dictionary* definition noted *supra* note 32). The Supreme Court's emphasis on whether or not the party seeking to secede had entered into "negotiations" with others seems beside the point since this focuses only on the actions of the party attempting to secede rather than on the presence or absence of consent from others. In fact, if a province could achieve secession merely by entering into negotiations with other parties, without obtaining their consent to an amendment, this would be secession by unilateral act since the activity necessary to effect secession would be entirely within the control of the party seeking to secede.

Constitution of Canada requires a proclamation issued by the Governor General where so authorized by resolutions passed by the houses of Parliament and the appropriate provincial legislative assemblies. If the resolutions are passed and the proclamation duly issued, the amendment is legally effective regardless of whether it has been preceded by good faith negotiations between the governments concerned. Conversely, if the necessary resolutions and proclamation are not passed or issued, then the fact that negotiations may have occurred is legally irrelevant. For example, in June of 1990, when the necessary resolutions approving the *Meech Lake Accord* had not been passed within the three year time limit, the amendment could not become effective regardless of the fact that there had been extensive negotiations conducted over the preceding three years. Nor was the conduct of the parties during the negotiations relevant for constitutional purposes; it could not have been argued, for example, that the amendment ought to have been proclaimed because of the alleged “intransigence” of Newfoundland Premier Clyde Wells in refusing to call for a vote on the Accord in the Newfoundland House of Assembly. All that mattered, as far as the law of the constitution was concerned, was that the necessary legislative resolutions had not been enacted within the necessary time.

Be that as it may, the Court then states that in order to determine whether a province could achieve sovereignty “without prior negotiations”, it is necessary to determine the legal effect of an “expression of democratic will in a referendum in the province of Quebec.”

The Court notes that the Constitution “does not address the use of a referendum procedure” and that the results of a referendum “have no direct role or effect in our constitutional scheme.” Since referendums have no legal status or direct legal effects under our Constitution, one might have supposed that use of a referendum was an entirely political as opposed to a legal matter. But the Court comes to a different conclusion, rejecting what it terms two “absolutist propositions”. One of these “absolutist propositions” is that “there would be a legal obligation on the other provinces and the federal government to accede to the secession of a province” following a clear referendum mandate in favour of secession. The Court rejects this proposition since this would involve the use of the “democracy principle” in order to “trump” principles such as federalism, the rule of law and the rights of individuals and minorities. However, on the same reasoning, a clear mandate in favour of secession by “the people of Quebec” could not be entirely dismissed by the federal government and other provinces since “this would amount to the assertion that other constitutionally recognized principles necessarily trump the clearly expressed democratic will of the people

of Quebec.”³⁴ Rather, the clear expression of a right to secede would require the federal government and the other provinces to enter into negotiations based on the four underlying constitutional principles identified by the Court.

The Court makes it clear that this duty to negotiate is not merely political or a matter of constitutional convention but is a legal and constitutional duty imposed on the federal government and the other provinces.³⁵ Yet if the duty to negotiate is a *legal* duty, does it not follow that the failure to act in accordance with the duty would lead to a remedy in a court of law? The essence of the distinction between legal and political duties is that the former are enforced by courts whereas the latter are enforced through the political process.

While the Court’s discussion on this point is difficult to follow, it seems to suggest otherwise, namely, that although the duty to negotiate is a legal duty, the only remedy for breach is to be found in the political process. The Court explains that this is so because the courts have no “supervisory role over the political aspects of constitutional negotiations.” These “political aspects” seem to include virtually all aspects of the negotiations, including the determination as to whether the obligation to negotiate is triggered and reasonableness of the substantive positions to be taken by the parties :

*To the extent that the questions are political in nature, it is not the role of the judiciary to interpose its own views on the different negotiating positions of the parties, even were it invited to do so...The reconciliation of the various legitimate constitutional interests outlined above is necessarily committed to the political rather than the judicial realm, precisely because that reconciliation can only be achieved through the give and take of the negotiation process.*³⁶

But if all aspects of these negotiations involve political rather than legal considerations and if the courts will therefore not enforce the duty to negotiate, how can the duty to negotiate be said to be a legal duty? The answer that is offered is that although breach of the duty to negotiate will result in “legal repercussions”, these repercussions will be administered through the political process rather than the courts :

The non-justiciability of political issues that lack a legal component does not deprive the surrounding constitutional framework of its binding status, nor does

34. *Secession Reference*, *supra* note 9 at par. 92.

35. *Ibid.* at par. 98.

36. *Ibid.* at par. 101.

*this mean that constitutional obligations could be breached without incurring serious legal repercussions. Where there are legal rights there are remedies, but [...] the appropriate recourse in some circumstances lies through the workings of the political process rather than the courts.*³⁷

It is unclear, however, how the political process could administer or impose “legal repercussions”. Assuming that legislatures and governments are bound by the constitution and the rule of law, and assuming that secession requires a constitutional amendment (as the Court had earlier held), then how could even an outright refusal to negotiate secession lead to “legal repercussions” in the sense of changing the legal status of a province within Canada?

One possible answer is hinted at in the very next paragraph in the judgement, paragraph 103, in which the Court suggests that a refusal on the part of the federal government and other provinces to negotiate secession following a clear referendum mandate could prompt other states to recognize an independent Quebec, even if had declared sovereignty in a manner contrary to the Constitution of Canada :

*To the extent that a breach of the constitutional duty to negotiate in accordance with the principles described above undermines the legitimacy of a party’s actions, it may have important ramifications at the international level [...] thus a Quebec that had negotiated in conformity with constitutional principles and values in the face of unreasonable intransigence on the part of other participants at the federal or provincial level would be more likely to be recognized than a Quebec which did not itself act according to constitutional principles in the negotiation process. Both the legality of the acts of the parties to the negotiation process under Canadian law, and the perceived legitimacy of such action, would be important considerations in the recognition process. In this way, the adherence of the parties to the obligation to negotiate would be evaluated in an indirect manner on the international plane.*³⁸

The Court in paragraph 103 seems to be envisaging a situation in which, faced with “intransigence” on the part of the federal government and other provinces, Quebec would proceed to issue a UDI.³⁹ This declaration of sovereignty might be unlawful under Canadian law but the Court claims that it

37. *Ibid.* at par. 102.

38. *Ibid.* at par. 103.

39. Note that this UDI would be an attempt to achieve secession “unilaterally”, whether or not negotiations had occurred, since the purported accession to sovereignty would be without a duly-authorized constitutional amendment.

would have “perceived legitimacy” on the international level, since other countries would look favourably on the fact that Quebec had pursued good faith negotiations while the other domestic parties had behaved intransigently. According to the Court, in these circumstances other countries would be more likely to recognize the validity of the UDI which could lead, eventually, to the creation of a new Quebec state. In this way, the breach of the federal government’s duty to negotiate would have “legal repercussions”, albeit ones that arose through the political rather than the judicial process.

There are a number of questions that must be raised about this line of argument.

1. The International Community and Unilateral Secession

First, the Court’s predictions as to the likely reaction of international actors to “unreasonable intransigence” on the part of the federal government seem to be entirely at odds with the Court’s own analysis of the international law treatment of secession in its answer to Question Two. As the answer to Question Two makes plain, under international law there is no generalized right to secession. The bedrock principle of international law is the territorial integrity of states. States are permitted to defend their territorial integrity against both internal and external threats, and are not required to negotiate the secession of parts of their territory simply because a referendum supporting secession has been conducted by a subnational unit. As the Court further points out in answering Question Two, the limited exceptions to the territorial integrity principle, such as the situation of colonial or oppressed peoples or where a people is denied meaningful access to government, have no application to Quebec’s case. Therefore, as the Court’s discussion of Question Two makes crystal clear, there is no evidence to support the view that the international community would regard the failure of the Canadian government to enter into secession negotiations following a referendum as justifying a Quebec UDI, much less as providing a basis for international recognition of a new Quebec state over the objections of the Canadian government.

This conclusion is supported by the international practice since 1945, as discussed in the expert reports that were commissioned by the Attorney General of Canada and which the Court itself relied upon in answering Question Two.⁴⁰ Since 1945 no new state formed by way of unilateral secession outside the

40. See, particularly, J. Crawford, “State Practice and International Law in Relation to Unilateral Secession” (Expert Report, Supplement to the Case on Appeal, Appeal No. 25506, 1997).

colonial context has been admitted to the United Nations without the consent of the state from which it was seceding. The international community has been extremely reluctant to recognize an entity attempting to secede from an independent state against the wishes of that state, even where there has been concern over humanitarian issues (which of course raise far more serious considerations than a mere refusal to negotiate the terms of secession).

In short, there is simply no evidence whatsoever supporting the Court's claim in paragraph 103 that seceding units of an existing state are likely to achieve international recognition if the host state has refused to negotiate the terms of secession following a referendum. The key determinant in the recognition of new states through secession has been the willingness of the host or parent state to recognize the new state, not whether the host state has behaved "intransigently" in responding to demands from a subnational unit for political independence.

2. Legality Versus Legitimacy

Assume for the sake of discussion, however, that international practice were to evolve in the direction suggested by the Court. (Of course, this evolution is improbable for the simple reason that other states would fear the implications of having such a rule applied to them, thereby making themselves vulnerable to a UDI by any seceding unit that was able to obtain a political mandate for secession.)

Even if other states were for some reason to recognize a Quebec UDI as effective based on Canadian "intransigence" in response to secessionist demands, the fact would remain that under the domestic law of Canada, the secession would be unlawful unless authorized by a constitutional amendment. Thus what the Court seems to be tacitly approving is the issuance of an illegal UDI by Quebec, as long as the UDI is perceived as legitimate by the international community and eventually leads to international recognition.

Put aside for a moment the question of the appropriateness of the Court countenancing a breach of constitutional law based on the political legitimacy of the illegal conduct. The more fundamental difficulty with this suggestion is identified by the Court itself, this time just three paragraphs later in the judgment, in its discussion of the principle of "effectivity".

One of the main arguments made by the *amicus* was that if Quebec were to declare sovereignty unilaterally and be able to demonstrate "effective control"

over its territory, secession would eventually become legally effective regardless of the position of the government of Canada. But, as the Court pointed out in its reply to this effectivity argument, a distinction must be drawn between the *right* of a people to act and their *power* to do so. The concern of the Canadian constitution is with the rights and obligations of individuals not with whether, as a matter of fact, they have the power to perform an act. Given the importance of the later discussion of the effectivity principle in relation to the Court's own comments in paragraph 103, the relevant passage bears quotation at some length :

In our view, the alleged principle of effectivity has no constitutional or legal status in the sense that it does not provide an ex ante explanation or justification for an act. In essence, acceptance of a principle of effectivity would be tantamount to accepting that the National Assembly, legislature or government of Quebec may act without regard to the law, simply because it asserts the power to do so. So viewed, the suggestion is that the National Assembly, legislature or government of Quebec could purport to secede the province unilaterally from Canada in disregard of Canadian and international law. It is further suggested that if the secession bid was successful, a new legal order would be created in that province, which would then be considered an independent state.

Such a proposition is an assertion of fact, not a statement of law. It may or may not be true; in any event it is irrelevant to the questions of law before us. If, on the other hand, it is put forward as an assertion of law, then it 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.⁴¹

The Court's comments in paragraph 103 are essentially a modified version of the very "effectivity principle" that the same Court rightly rejects just four paragraphs later. The argument that is made in paragraph 103 is that a UDI, although illegal under the Constitution of Canada, might eventually become legally effective through international recognition on account of its perceived legitimacy. But whether a UDI has legitimacy at international law tells us nothing about its status under the domestic law of Canada. Such a claim, therefore, is nothing more than an assertion of fact, at least for purposes of the domestic law of Canada, which is the concern of Question One. It is another version of the claim that "the law may be broken as long as it can be broken successfully" which, as the Court points out, is "contrary to the rule of law, and must be rejected." If not rejected then, to recall those timeless words that ring as true today as when they were written almost two centuries ago, we have "reduced to

41. *Ibid.* at par. 107 & 108.

nothing what we have deemed the greatest improvement on political institutions, a written constitution.”⁴²

3. Filling in Gaps

Apart from the question of whether the perceived legitimacy of a UDI at international law has any relevance under the domestic law of Canada, there is still the question of the origins and legal basis of the duty to negotiate that is recognized by the Court. Recall that we had earlier discussed the circumstances in which a Court could legitimately make use of unwritten norms or principles to supplement the written text. Two key issues were identified : (i) what constitutes a “gap” in the constitutional text, such that it becomes appropriate to have regard to unwritten constitutional principles at all; and (ii) when the Court finds a “gap”, should it attempt to fill it by drafting wholly new constitutional obligations based on the Court’s own determination of an appropriate or ideal constitution, or should it attempt to ascertain and to give effect to the balance that has been struck between different constitutional values by the drafters of the text?

Turning to the first of these questions, I had argued that it would be wholly inappropriate for the Court to find a gap in the constitutional text merely on the basis that the constitution was silent on or failed to provide for a particular issue. This would give the Court free rein to add to the constitution at will, and dissolve entirely the distinction between constitutional enactment and constitutional interpretation.

In what sense can it be said that there is a gap in the constitutional text with respect to the legal effect to be given to a referendum on sovereignty? The Court addresses this issue in a single sentence, when it observes that “the Constitution does not itself address the use of a referendum procedure, and the results of a referendum have no direct role or legal effect in our constitutional scheme...”⁴³ In other words, there is a gap in the constitution on this point only in the sense that the constitution is silent as to the legal effect of a referendum. A referendum is “not provided for” under the constitution. Yet this is the very test that is clearly illegitimate for a court to use in determining whether a gap exists such that the courts can resort to unwritten principles in order to “fill the gap”.

42. *Marbury v. Madison*, *supra* note 25 at p. 178.

43. *Secession Reference*, *supra* note 9 at par. 87.

This approach invites the court to invent constitutional requirements on subjects that are wholly outside of the constitutional scheme of government. For example, the constitution is also silent on the legal effect of referendums on subjects other than secession. There is, in that sense, a “gap” in the constitution. If a referendum on sovereignty can create constitutional duties on the basis that it ascertains “the views of the electorate on important political questions”,⁴⁴ the same can surely be said of referendums on other subjects, whether it be the election of senators, the creation of a unified “mega-city” in the Toronto area, or the abolition of the monarchy. Governments are thus exposed to the possibility of being subjected to a constitutional duty based on a referendum which is organized and conducted by another level of government, a duty, moreover, that cannot even be overridden by statute. If, on the other hand, such is not the case and only referendums on certain subjects can create constitutional obligations, then we are left to wonder how there could be any principled distinction between those referendums which can create legal duties and those which cannot. (The distinction suggested by the wording of paragraph 87 — the “importance” of the political question that forms the subject-matter of the referendum — seems an entirely unsatisfactory and inappropriate criteria for distinguishing referendums that create legal obligations from those that do not.) This is not to mention the vast array of other subjects on which the courts have held that the constitution is silent, (including such matters as the duty of governments not to reduce social assistance payments,⁴⁵ the duty of politicians to fulfill their election promises,⁴⁶ or a guarantee for property rights, to name just a few) and which could, on the basis of the reasoning in the *Secession Reference*, be said to constitute a gap in the text that can be filled by judicial intervention.

What of the second question identified above — the manner in which a court should fill gaps that it identifies in the constitutional text? Given the fact that the Court is filling a gap upon which the constitution is wholly silent, it is obviously impossible to attempt to give effect to the existing constitutional text or its underlying purposes. Instead, the Court is engaged in a purely legislative exercise, in which it designs the constitutional obligation based on its own conception of what would be appropriate. This is reflected in the Court’s formulation of the duty to negotiate as only arising following a “clear” majority in favour of secession. While one may applaud as a political matter the

44. *Ibid.*

45. See *Masse v. Ontario (Ministry of Community and Social Services)* (1996), 134 D.L.R. (4th) 20 (Ont. Ct. Gen. Div.) (holding that the constitution makes no provision for an obligation not to reduce social assistance payments.).

46. See *Reference re Canada Assistance Plan*, [1991] 2 S.C.R. 525 (holding that there is no constitutional obligation to perform election promises.)

requirement that “the referendum result...must be free of ambiguity both in terms of the question asked and in terms of the support it achieves”, there is surely no basis for claiming that such a requirement was part of the constitution as it existed prior to August 20, 1998.

The other curious feature of the duty to negotiate recognized by the Court is that it does not, at present, entitle anyone to a remedy from a court of law. This is unlike all the other previous instances in which the courts have recognized and given effect to unwritten constitutional principles. In fact, as the Court had explained in the *Provincial Judges Reference*, in other cases where unwritten principles had been used this had been justified so that “the underlying logic of the Act can be given *the force of law*” (emphasis added). On the other hand, despite the Court’s good faith attempt in the *Secession Reference* to discourage future litigation based on the duty to negotiate, if there ever is a majority Yes vote in a sovereignty referendum it is a certainty that some aggrieved party will find it worthwhile to seek to obtain a legal remedy based on the duty to negotiate.⁴⁷ And quite apart from the secession context, litigants have already begun seeking judicial recognition of legal duties based on unwritten constitutional principles, leaving lower courts to struggle to explain why the reasoning in the *Secession Reference* should not be applied on a more generalized basis.⁴⁸

4. But Aren’t Judges Good Politicians?

A pragmatist might dismiss the concerns that have been identified thus far as mere technical or legalistic quibbles. True, the Court in the *Secession Reference* may have been acting as politicians rather than judges in formulating a duty to negotiate secession that applies following a “clear majority on a clear question”. But the pragmatist would respond that the Court had no choice but to play such a political role, given the high political sensitivity of the questions

47. As is discussed below, one issue that would appear to be ripe for future litigation is a determination of who has a legal obligation and/or right to participate in sovereignty negotiations. If the duty to negotiate is a legal duty, then it would seem that the courts will be compelled to determine the parties to whom such duty applies.

48. See, for example, *Hogan v. Newfoundland (Attorney General)* [1999] N.J. No.5 (QL) (holding that procedure for adopting constitutional amendment was governed by written constitution only and not subject to unwritten principles) : See also *Potter c. Quebec (P.G.)*, [1999] R.J.Q. 165 (S.C.) (rejecting challenge to procedure for constitutional amendment based on unwritten principles) and *Bacon v. Saskatchewan Crop Insurance Corp.*, [1999] S.J. No.302 (QL) (rejecting challenge to provincial legislation based on unwritten constitutional principles from the *Secession Reference*.)

before it. On this view, the Court would have been negligent had it responded only to the narrow legal issues that were presented without also considering their political dimensions. The only interesting question, from the pragmatist's perspective, is whether the court came up with a winning solution to the difficult political challenge it was forced to address.

Of course, the obvious question to be posed to the pragmatist is why any democratic society with properly functioning political institutions would turn over these most fundamental questions to the judiciary for resolution. Courts exist to resolve the legal aspects of disputes, not to opine on purely political matters such as the wording of referendum questions or the majority that should be required before initiating sovereignty negotiations. We expect democratically-elected and accountable politicians to resolve such political matters, not unelected judges.

(The pragmatist might accept these premises and for that very reason conclude that the original decision to refer issues dealing with Quebec secession to the Supreme Court of Canada was unwise. But, the pragmatist would respond, once the government decided to initiate the Reference, the only relevant concern became whether the Court was able to broker an acceptable compromise between opposing positions.)

On the pragmatist's scorecard, the clear verdict seems to be that the Court's "duty to negotiate" theory is a winning political formula. The Court has confirmed that unilateral secession is unlawful under the Canadian constitution, but it has also conferred legitimacy on the sovereignty project by stating that a clear mandate for secession would give rise to a legal duty to negotiate the terms of secession. The main virtue of this formula is that it gives something to both sides, thereby avoiding a scenario in which either party feels "humiliated".

The other point that is made by supporters of the decision is that there is really no harm in recognizing the existence of a legal duty to negotiate secession, since such a duty was already a political reality. In the oral argument before the Supreme Court, the lawyers for the federal government repeatedly emphasized that there would be no attempt to keep Quebec in Canada against its will. Consider the assessment of Dean Peter Hogg, the country's most respected constitutional lawyer, of the Court's decision to give legal effect to "political realities" :

Even without the court's ruling, the political reality is that the federal government would have to negotiate with Quebec after a majority of Quebec voters had clearly voted in favour of secession. It is safe to say that there would be little political support for a policy of attempted resistance to the wish of

*Quebec voters. The court's decision simply converts political reality into a legal rule. Indeed, it is not clear why it is a **legal** rule, since it appears to have no legal sanctions.*⁴⁹

It may be a little premature, however, to conclude that the Court's recognition of a legal duty to negotiate will not have any material impacts during a future referendum campaign or in any political negotiations following a majority Yes vote. Federalists in Ottawa and the other provinces have never stated clearly how they would react to a majority Yes vote. Even if the federal government would have been forced, as a matter of political reality, to respond in some fashion to a majority Yes vote, the commencement of secession negotiations was only one of a number of possible options. Other possibilities included holding a second referendum in Quebec or on a nation-wide basis, or establishing some form of independent national commission or other body with a mandate to develop proposals for a renewed federation. Thus the recognition by the Supreme Court of a legal duty to commence secession negotiations following a clear referendum mandate reduces materially the federal government's flexibility in this regard. It should also be emphasized that this reduced flexibility means that the federal government will have a much more difficult time extracting concessions in return for its agreement to commence secession negotiations. Thus even if, apart from the Court's opinion, the ultimate result of a positive mandate for secession would have been the commencement of secession negotiations, the recognition in advance of a legal duty to negotiate means that the scope, nature and timing of those discussions are likely be materially different.

The recognition of a legal duty to negotiate will not merely affect the conduct of any secession negotiations : it will also colour the referendum campaign itself. A key element of the federalist strategy in the previous referendum campaigns in 1980 and 1995 has been to emphasize the uncertainties associated with voting Yes. The existence of a legal duty to negotiate reduces this element of uncertainty significantly, thereby changing the dynamic of the referendum campaign. The Supreme Court opinion in hand, Premier Bouchard and other sovereigntist leaders will be able to rebut conclusively any claims that a majority Yes vote will plunge Quebec into a legal black hole. Instead, voting Yes will be portrayed as a way to force the federal government to commence negotiations over Quebec's legitimate demands. Finally, after forty years of dashed hopes and federalist "arrogance", Quebec has been handed the instrument it needs to force the federal government to listen.

49. P.W.Hogg, "The Duty to Negotiate", 7 Canada Watch 34-35 (Nos. 1-2, January-February 1999).

A plausible argument can be mounted to the effect that Quebec has everything to gain and nothing to lose from such negotiations. If the negotiations are successful, then Quebec will have gained new powers, either as part of an agreement whereby Quebec becomes sovereign or through a profound decentralization of the federation along the lines of the Quebec Liberal Party's 1991 *Allaire Report*. If, on the other hand, the negotiations fail, then is this not proof positive that Canadian federalism itself is a failure and that the time for Quebec to strike out on its own is at hand? One can almost hear Lucien Bouchard's voice on the campaign trail thundering : "Give Chief Negotiator Parizeau the mandate he needs so that he can begin negotiations now!"

Thus, converting "political reality" into a legal duty has in certain respects significantly strengthened the hand of sovereigntist leaders, particularly in the context of a future referendum campaign. But the news is not all bad; there are some compensating gains for federalist leaders from the Court's analysis. In particular, the Supreme Court has contradicted at least two key claims that have traditionally been advanced by sovereigntist leaders.

The first of these claims relates to who would be the parties in any future sovereignty negotiations. Sovereigntist leaders have traditionally maintained that the negotiations would be conducted bi-laterally, between Ottawa and Quebec City, rather than multilaterally, involving the other provinces, territories, aboriginal peoples and constitutionally-protected minorities. The Supreme Court in the *Secession Reference* clearly rejects the bilateral model. The Court refers at a number of points in its analysis to the fact that both the federal government and the other provinces would be directly involved in any secession negotiations :

*The corollary of a legitimate attempt by one participant in Confederation to seek an amendment to the Constitution of Canada is a obligation on all parties to come to the negotiating table. The clear repudiation by the people of Quebec of the existing constitutional order would confer legitimacy on demands for secession, and place an obligation on the other provinces and the federal government to acknowledge and respect that expression of democratic will by entering into negotiations and conducting them in accordance with the underlying constitutional principles already discussed.*⁵⁰

50. *Secession Reference*, *supra* note 9 at par. 88 (emphasis added). See also paragraph 92, where the Court states that the "clear expression of self-determination by the people of Quebec" would impose obligations upon "the other provinces [and] the federal government"; further, in paragraph 103 reference is made to the obligation of the provinces to respond to the request to negotiate.

The Court is less clear as to whether the negotiations would be limited to governments, or whether other constitutionally-recognized groups would have a right to direct participation. In paragraph 88 the Court states that in Canada, “the initiative for constitutional amendment is the responsibility of democratically elected representatives of the participants in Confederation” and that, “in legal terms, constitution-making in Canada, as in many countries, is undertaken by the democratically elected representatives of the people.” While one might argue that this reference to “democratically elected representatives of the participants in Confederation.” is intended to refer to governments only, the term “participants in Confederation” is not clearly defined. Could the aboriginal peoples of Canada not be regarded as a “participant” in Confederation and, on this reasoning, could their democratically-elected representatives claim a seat at the negotiating table? Later in its judgment, the Court emphasizes that the interests of aboriginal peoples must be “taken into account” in any secession negotiations, without specifying whether that mandates direct participation by their representatives, or merely that the federal government indirectly advocate on their behalf.

Clearly, the question of who has a right to participate in the negotiations, apart from the federal government and the provinces, is a matter that has not been finally resolved. One can therefore assume that in the event secession negotiations are contemplated, there is a high likelihood that litigation will be commenced to clarify who has a right to a seat at the negotiating table. Will the courts be able to resist determining such issues?

In the *Secession Reference*, the Court gave a clear indication that it did not want to be dragged into a supervisory role over the political aspects of future secession negotiations and implied that it would refuse to answer if such political questions were put to it. However, it seems difficult to conceive of how the Court could refuse to respond if asked to determine who has a right to participate in secession negotiations. Having declared that there is a legal obligation to negotiate secession, it would seem incumbent on the Court to identify the persons to whom such legal obligation applies. Otherwise, we would be confronted with an unprecedented situation where governments might well be conducting negotiations in breach of the Constitution of Canada without any mechanism for determining whether such breach was occurring. Such a situation would itself be contrary to the principle of the rule of law, which requires that citizens and their governments be able to determine the nature of their legal obligations.⁵¹

51. See *R. v. Nova Scotia Pharmaceutical*, [1992] 2 S.C.R. 606.

Legal disputes as to the conduct of constitutional negotiations have been raised in the past, and the courts have been able and willing to provide clear legal answers.⁵² But unlike in previous cases, the difficulty in this context will be that the Court will have to determine who has a right to participate in secession negotiations not on the basis of the text of the Constitution but, rather, on the basis of the four unwritten constitutional principles that it has identified. The determination of who gets to participate will depend upon the Court's subjective determination as to how to balance or trade-off these principles so as to ensure that no single principle "trumps" or "excludes" the others. It is difficult to see how such an analysis is suitable for the judiciary. The determination of who is included and who is excluded in constitutional negotiations has always been the responsibility of the political authorities rather than the judiciary. If the courts take on this role, they will be exposed to criticism no matter what decision they make. Moreover, the fact that the decision will be based on indeterminate unwritten constitutional principles as opposed to the text of the Constitution will call into question its legitimacy.⁵³

In addition to the question of who would have a right to participate, the Court in the *Secession Reference* sets out certain broad parameters for the negotiations themselves. In this regard, the Court makes the important statement that one of the issues that would need to be resolved would be the issue of the borders of an independent Quebec. The Court notes, in discussing the range of issues that would have to be addressed in sovereignty negotiations, that "arguments were raised before us regarding boundary issues" and it comments that "nobody seriously suggests that our national existence, seamless in so many aspects, could be effortlessly separated along what are now the provincial boundaries of Quebec." Later, the Court returns to the borders issue in the context of the rights of aboriginal peoples :

We would not wish to leave this aspect of our answer to Question 2 without acknowledging the importance of the submissions made to us respecting the rights and concerns of aboriginal peoples in the event of a unilateral secession,

52. See, for example, *Native Women's Association of Canada v. Canada*, [1994] 3 S.C.R. 627 (holding that failure to provide funding for purposes of constitutional negotiations did not violate Charter rights). *Quare* whether the claim in this case would have been more successful had it been based on the "unwritten principles" identified by the Supreme Court in the *Secession Reference*.

53. See, however, *Gitanyow First Nation v. Canada*, [1999] B.C.J. No. 659 (QL) in which Mr. Justice Williamson granted a declaration stating that the Crown in Right of Canada and the Crown in Right of British Columbia were under a duty to negotiate in good faith with a First Nation, although he declined to issue a further declaration stating that the Crown representatives were under an obligation to make reasonable efforts to conclude and sign a treaty.

*as well as the appropriate means of defining the boundaries of a seceding Quebec with particular regard to the northern lands occupied largely by aboriginal peoples. However, the concern of aboriginal peoples is precipitated by the asserted right of Quebec to unilateral secession. In light of our finding that there is no such right applicable to the population of Quebec, either under the Constitution of Canada or at international law, but that on the contrary a clear democratic expression of support for secession would lead under the Constitution to negotiations in which aboriginal interests would be taken into account, it becomes unnecessary to explore further the concerns of the aboriginal peoples in this Reference.*⁵⁴

The Court's reference to the "appropriate means of defining the boundaries of a seceding Quebec" is an express statement that the issue of borders would necessarily have to be addressed in the context of secession negotiations, at least in terms of the rights of aboriginal peoples. In my view, the same border issues would arise with respect to regions within Quebec that had voted by a "clear majority" not to secede from Canada : although the Court does not address this aspect of the matter directly, there is nothing in the Court's analysis of "unwritten principles" that would give the Quebec government a legal or political mandate to compel citizens in these regions to secede from Canada against their will and in violation of their rights under Canadian law. This is particularly the case given the Court's statement earlier in the judgment to the effect that no single political majority has the right to trump any other. In this sense, the fact that a majority of Quebec residents as a whole might have voted for secession would not justify overriding or disregarding a clearly-expressed preference to remain within Canada within a defined region of the province.

What is significant about the Court's express reference to the borders issue is that the Parti Québécois government has traditionally maintained that the question of borders would not be a subject for negotiations in the context of Quebec's accession to sovereignty. The official PQ position has been that, although Canada is divisible, Quebec is not.

In 1992, a committee of the Quebec National Assembly commissioned a legal opinion from five international law experts which concluded that, following Quebec's successful accession to sovereignty, the international law

54. *Secession Reference supra* note 9 at par. 139.

principle of the territorial integrity of states would apply to Quebec.⁵⁵ Therefore, according to the Five Experts Opinion, minorities within Quebec would have no right, after sovereignty had been achieved, to challenge the borders of an independent Quebec. This Five Experts Opinion has been regularly paraded out and relied upon by Parti Québécois politicians in an effort to rebut claims that the borders issue would need to be negotiated with the rest of Canada.⁵⁶ (The obvious anomaly in this position was that, even as the Quebec government invoked principles of international law in order to preclude Canada from raising the issue of borders, it was maintaining that the issue of whether it had a right of unilateral secession in the first place was an entirely political rather than legal question, and thus unfit for legal analysis.)

The Quebec government's insistence that international law would prevent Canada from effectively raising the borders issue has already been subject to extensive criticism by legal scholars.⁵⁷ With the Supreme Court having now expressly stated that under the Canadian constitution there would need to be "some appropriate means of defining the boundaries of a seceding Quebec", it is clear that Quebec could not refuse to negotiate the borders issue. In fact, a refusal to negotiate and adjust borders would mean that the Quebec government was not conducting itself in accordance with the negotiation framework mandated by the Supreme Court, which would "put at risk the legitimacy of that party's assertion of its rights, and perhaps the negotiation process as a whole".⁵⁸ Significantly, in his comments on the Supreme Court's opinion, Prime Minister Chrétien has focused on the fact that Court has stated that the borders of an

55. See T. 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 : Projet de Rapport (Annexe)* (September 1992) (hereinafter "Five Experts Opinion").

56. For example, a brochure published in November 1997 by the government of Quebec, which states categorically that "Quebec is indivisible", relying heavily on the Five Experts' Opinion: See J. Brassard, *Quebec and its Territory* (Quebec Ministry for Canadian Intergovernmental Affairs, 1997).

57. The most comprehensive and careful consideration of the international law principles in relation to the territorial question is: Grand Council of the Crees, *Sovereign Injustice: Forcible Inclusion of the James Bay Crees and Cree Territory into a Sovereign Quebec* (Grand Council of the Crees, October 1995.) See also P. J. Monahan, "The Law and Politics of Quebec Secession", (1995) 33 Osgoode Hall Law Journal 1.

58. *Secession Reference*, *supra* note 9 at par. 95.

independent Quebec would need to be negotiated and could be subject to change.⁵⁹

59. See, for example, the “year end” interview by Prime Minister Chrétien with Radio-Canada broadcast on 23 December, 1998, in which Mr. Chrétien noted that the Supreme Court had stated that “no one can guarantee to a province that at the end of negotiations, its borders will remain the same”. (Author’s translation of transcript of interview prepared by Bowdens Media Monitoring Limited, Ottawa.).

III. QUESTION TWO

Question Two asked whether international law, including particularly the right of self-determination of peoples, gave Quebec the right to secede unilaterally from Canada.

Although the argument of the *amicus* on the Reference was focused primarily on international law, he took a somewhat novel approach on these issues (at least in terms of how the arguments had traditionally been debated within Quebec circles). Sovereignists in Quebec had traditionally argued that, although secession might well be prohibited under domestic Canadian law, the international law principle of self-determination of peoples justified unilateral secession. Arguments relying upon the right of self-determination of peoples had been raised, for example, by the Attorney General of Quebec in his motions to dismiss the two Bertrand proceedings challenging unilateral secession.

The *amicus*, M. Joli-Coeur, placed almost no emphasis on the right of self-determination of peoples. This was largely because the international law experts retained by the *amicus* conceded that, even if the right of self-determination of peoples might give rise in some circumstances to a right of secession, these circumstances clearly did not apply to or exist in Quebec's case.⁶⁰ The *amicus* therefore chose to approach the analysis of Question Two from a different direction.

The *amicus*' argument on Question Two was based on two inter-related propositions. The first proposition was that, although international law did not grant any positive entitlement to subnational units to secede from their host states, neither did it prohibit attempts at secession. The issuance of a UDI was therefore not a breach of any rule or principle of international law. The second proposition advanced by the *amicus* was that the sole legal criterion according to which an attempted secession is judged at international law is its political success or effectiveness. Where a seceding unit is able to establish effective control of its territory and to oust the authority of the host state, the international community will eventually come to recognize the seceding unit as an independent state with full legal personality on the international stage. This latter principle was termed the "effectivity" principle, and was the focus of much of the *amicus*' argument, both in the voluminous briefs he filed and in oral argument.

60. The experts for the Attorney General for Canada, as well as most of the expert reports from the *amicus*, were agreed with the principle of self-determination of peoples. However, the *amicus* did file a brief by a Quebec politician, former Quebec Liberal leader Claude Ryan, who maintained that Quebec would have a right to secede based on the principle of self-determination.

In contrast with the vague and tentative character of its analysis under Question One, the Court made short work of the *amicus*' international law arguments under Question Two. The Court pointed out that, while international law did not contain a specific prohibition of secession, it did accord primacy to the principle of territorial integrity of existing states. International law expects that the right to self-determination will be exercised by peoples within the framework of existing sovereign states and consistently with the maintenance of their territorial integrity.

The Court was remarkably frank in making it clear that the limited exceptions to the territorial integrity principle, including the situation of colonial or oppressed peoples or cases where a people is denied access to government, simply had no application to Quebec. Emboldened by and relying upon the concessions in the briefs filed by the *amicus*, the Court drew attention to the fact that for close to 40 of the past 50 years, the Prime Minister of Canada has been from Quebec, and that at present the Prime Minister, the Chief Justice of the Supreme Court, the Chief of Staff of the Canadian Armed Forces and the Canadian ambassador to the United States are all from Quebec. The failure to reach agreement on constitutional amendments following the patriation of the Constitution in 1982, although "a matter of concern", did not place Quebec in a "disadvantaged position within the scope of the international law rule."

As for the so called principle of "effectivity", the Court expanded upon the initial discussion of this issue that it had set out under Question One. The Court pointed out that it may be that unilateral secession by Quebec might eventually be accorded legal status by Canada and other states, in the sense that if secession is "successful in the streets, [it] might well lead to the creation of a new state".⁶¹ But, added the Court, this does not support the "more radical contention that subsequent recognition of a state of affairs brought about by a unilateral declaration of independence could be taken to mean that secession was achieved under colour of a legal right".⁶² While a change in factual circumstances sometimes results in a change in legal status (as, for example, where an adverse possessor can eventually come to be recognized as the legal owner of land through the passage of time), it is "quite another matter 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".⁶³ The Court's concern is with whether there is an *ex ante* legal right to secede unilaterally, not with whether the

61. *Secession Reference*, *supra* note 9 at par. 142.

62. *Ibid.* at par. 144.

63. *Ibid.* at par. 146.

law might eventually accord legal effect to actions that were illegal at the time they were undertaken. Accordingly, the answer to Question Two is “No”.⁶⁴

CONCLUSION

Many commentators have observed that the *Secession Reference* may be the most important opinion ever handed down by the Supreme Court of Canada. That observation may well turn out to be true, although perhaps not in the way that those offering it intended.

In the period prior to the Court’s opinion being released, it was difficult to see how the federal government could possibly lose. After all, it had drafted the questions in such a way that the answers, particularly to Question One, seemed inevitable.⁶⁵ If there was any uncertainty as to the outcome, this uncertainty seemed limited to questions of international law and self-determination under Question Two. Arguments based on international law had been the focus of the *amicus*’ argument before the Supreme Court, as well as of the arguments advanced by the Attorney General of Quebec in the *Bertrand* proceedings. Even on the international law questions, however, the main risk appeared to be that the Court might refuse to answer, thereby leaving open, without directly legitimizing, political arguments about Quebec’s right to self-determination.

The Court surprised everyone, sovereigntist and federalist alike, by embracing a line of argument that had never been raised or tested by any of the parties before the Court. This is a bold but risky strategy for a country’s highest judicial tribunal to pursue, since it exposes the institution to the possibility of large and costly mistakes that are difficult to correct later.

With the Supreme Court having recognized the existence of a legal duty to negotiate secession following a clear mandate in a future referendum, the chances that such negotiations will actually occur someday seem materially higher now than they were prior to the Reference. At the very least, we know that

64. One unusual feature of the judgment is that, unlike its custom in all other previous Reference cases, the Court never clearly sets out answers to the questions that were posed. The answer to Question Two that is set out in the text above is thus my gloss on the Court’s analysis, and is not expressly stated in the judgment. The Court’s departure from previous practice in not directly answering the questions was apparently based on a concern that providing straightforward answers would be “misleading” (see *ibid.* at par. 31).

65. I note, however, that the wording of the questions was based on questions identified by Pidgeon J. in *Bertrand No.2*, *supra* note 5.

the Court's recognition of a duty to negotiate will play a prominent role in boosting the sovereigntist campaign in the next Referendum, even though the Court surely did not intend that their opinion be used in that way. Both René Lévesque in 1980 and Lucien Bouchard in 1995 attempted to define the referendum question as being whether to grant the province a mandate to negotiate a new political arrangement with Canada, rather than a straight up-or-down vote on sovereignty. Neither succeeded, although Mr. Bouchard came close in 1995. Armed with the Supreme Court's opinion stating that the federal government must sit down and negotiate following a clear majority Yes vote, Mr. Bouchard is now better positioned to obtain the mandate he will seek in the upcoming campaign.

Of course, the Court also provided important ammunition for federalists in any future referendum campaign. In particular, the Court declared that Quebec cannot dictate the terms of secession (par. 91, 151); secession is a legal act as much as a political one (par. 83); the *Constitution Act, 1982* is both legal and legitimate (par. 47); Quebec cannot rely on the right to self-determination to claim any right of secession (par. 138); and failure to reach agreement on amendments to the Constitution does not amount to a denial of self-determination for Quebecers (par. 137).⁶⁶ These pronouncements suggest that should a secession strategy be initiated Quebec would still face many difficult challenges, and some of the strategies that it has advanced in the past can no longer be relied upon.

One cannot resist contemplating the situation had the federal government ignored the gratuitous advice it received from this federalist, as well as others, advocating a Reference to the Supreme Court of Canada. The Quebec Superior Court had already declared in *Bertrand No. 1* that the 1995 referendum was, in law, an attempted legal revolution that was contrary to the rule of law and that threatened the *Charter* rights of Canadians in Quebec and elsewhere. The same court in *Bertrand No. 2* had identified the key legal issues arising from an attempted unilateral secession and ordered that those issues be tried and determined. It seems fair to assume that the conclusions that had been reached in *Bertrand No. 1* would have been confirmed in that second proceeding. Even though the Quebec government was refusing to participate and would obviously have ignored the result, and even though a judgment of the Superior Court of a province does not carry the weight of a unanimous decision of the Supreme Court of Canada, one would at least have had a clear and unqualified pronouncement confirming that unilateral secession was illegal.

66. I am particularly grateful to Paul Joffe for his suggestions respecting this paragraph.

Many of the same commentators that have applauded the Supreme Court's opinion have advised that continued pursuit of the so-called "Plan B" strategy,⁶⁷ the centrepiece of which was the Reference to the Court, should now be abandoned.⁶⁸ Yet if we heed this advice, we once again cede the advantage to the sovereigntists, who will be free to define not only the timing of the next referendum but the terms upon which it will be fought. Indeed, with the Court having stated that there is an obligation to commence secession negotiations following a clear referendum mandate, it appears all the more imperative that the federal government define the circumstances in which it would be prepared to begin such negotiations, as well as those in which it would not. The federal government must also clearly indicate, in accordance with the Court's declarations on this point, that the issue of border adjustments would be a necessary feature of any future secession negotiations. In short, our national political institutions, the Parliament and the government of Canada, must take the initiative and attempt to define the terms of the debate for the coming referendum.⁶⁹ The importance of this task, and the negative consequences from doing nothing, have been heightened rather than diminished in the aftermath of the Reference.

67. "Plan B" refers to efforts aimed at defining the implications and consequences of a Yes vote, as opposed to Plan A, which is directed at efforts to renew the existing federation.

68. See D. Drache and P. Monahan, "In search of Plan A" (January-February 1999) 7 *Canada Watch* 1 (summarizing the discussion at a November 1998 symposium convened at York University to discuss the Reference.)

69. For a discussion of possible options in this regard see : G. Bertrand and P. Monahan, *The Canada Insurance Plan* (Citizens for a Democratic Nation, February 1999).