

**HOW CANADA PLAYS RUSSIAN ROULETTE  
WITH THE SECESSION OF QUEBEC**

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## Chapter I: How the Chrétien Government Bungled the 1995 Referendum

Since Prime Minister Pierre Trudeau stepped down in 1984, no prime minister of Canada has dared to grapple head-on with the issue of Quebec's secession. Meanwhile, in Quebec, every premier, from Jean Lesage to Philippe Couillard, has assumed that Quebec has a right to secede if such is the expressed wish of its population. That consensus shows a grievous misunderstanding of the requirements of a true liberal democracy that recognizes the supremacy of the rule of law. The result has been that the people of Quebec have been constantly confused and misled about the true conditions required for a legal and therefore peaceful secession. And the April 2018 decision by Quebec Superior Court Justice Claude Dallaire in the case of *Henderson c. Québec (Procureur general)* only intensified the confusion. She declared as impeccably constitutional Lucien Bouchard's *Bill 99*<sup>1</sup>, the law that, on the face of it, grants Quebec the right to secede unilaterally based on a mere majority vote. And she condemned virulently the federal law<sup>2</sup>, passed after the close call of the 1995 referendum, to spell out the conditions for the federal government to agree to negotiate on the secession of Quebec. *Bill 99* was passed by a separatist Quebec government precisely to neutralize the intent of the *Clarity Act*. Canadians are now caught between two contradictory laws on the perilous issue of secession.

The people of Canada have the right to know the law. History, notably that of the American Civil War and of the separation of Pakistan from India, attests to the fact that miscalculations over secession can have catastrophic consequences. Therefore, our federal government has a clear duty to promulgate the requirements of the constitutional order, especially when so many people are confused, and the stakes are so momentous. Prime Minister Justin Trudeau, this is now your call.

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This essay aims to document the history of deception, evasion, misrepresentation, failure of vision and outright cowardice that has characterized the treatment of secession in Canada, particularly since Premier Jacques Parizeau launched his program for unilateral secession on December 6, 1994. On that day, the premier introduced a draft bill<sup>3</sup> in the National Assembly that announced the legislative structure of his proposed referendum on secession. It was titled *Avant-projet de loi sur la souveraineté du Québec*. In addition to proposing a future declaration of sovereignty if the referendum delivered a majority vote for independence, the draft bill included offering an invitation to the rest of Canada to conclude an economic association with

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<sup>1</sup> The *Act respecting the exercise of the fundamental rights and prerogatives of the Quebec people and the Quebec State*.

<sup>2</sup> The *Act to give effect to the requirement for clarity as set out in the opinion of the Supreme Court of Canada in the Quebec Secession Reference*. It is also designated as *Bill C-20*.

<sup>3</sup> In English: Draft Bill, *An Act Respecting the Sovereignty of Quebec*. It was titled a draft bill rather than a bill because the text left a blank space for a preamble to be filled in later, after public meetings had been held across the province to discuss sovereignty. Presumably the citizens would be writing down their aspirations to be included as a preamble in the actual bill.

the future sovereign Quebec. This offer, though, would not be included in the proposed referendum question, unlike the question put in the referendum of 1980 on “sovereignty-association.”

As a complement to the draft bill, Parizeau also unveiled an intricate plan to be carried out in the coming months, aimed at rallying the *Québécois* to the option of secession. The Premier described the plan as « *astucieux* »: crafty or cunning. It involved a large-scale populist mobilization, paid for by the public purse, the likes of which Quebec had never seen. He would set up 15 regional commissions, each presided by a minister of the government, to hold public hearings in different parts of the province, where the commissioners would receive suggestions from ordinary people as to what terms they wanted included in the preamble of the bill that would declare Quebec’s sovereignty.

In addition to those 15 regional commissions, the premier would also create distinct commissions for senior citizens and for youths. Also, a bus cavalcade of « *femmes pour la souveraineté* ». would tour the province. Finally, to cap all the commissions, a “national commission” would synthesize and formulate all the suggestions that came from the public through all the previous commissions. Eventually, too, the draft bill would be mailed to every household in Quebec.

What the draft bill proposed was clearly a unilateral secession, that is, that Quebec would become sovereign exclusively through a declaration by the National Assembly. The negotiations proposed with the rest of Canada would deal with the hypothetical economic association and various practical matters, but not with Quebec’s secession or sovereignty or independence. No amendment to the Constitution of Canada was envisaged as the key to Quebec’s independence.

Parizeau proposed, as he explained in the National Assembly, to have the draft bill adopted before the anticipated referendum on sovereignty, but the bill would actually be promulgated only after a referendum that received more than 50 per cent of the votes in favour of sovereignty. The draft bill stated:

Le parlement du Québec décrète ce qui suit :

De la souveraineté

1. Le Québec est un pays souverain.

Section 16 of the draft bill then explained when the sovereignty of Quebec would come into effect:

16. La présente loi entre en vigueur un an après son approbation par référendum, à moins que l’Assemblée nationale ne fixe une date antérieure.

Section 17 described the entire process that would lead to Quebec’s independence:

17. La présente loi est soumise à la consultation populaire.

Elle ne peut entrer en vigueur que si une majorité des voix exprimées par les électeurs lors d'un référendum tenu conformément à la *Loi sur la consultation populaire* s'est prononcée en faveur de la question suivante:

« Êtes-vous en faveur de la loi adoptée par l'Assemblée nationale déclarant la souveraineté du Québec? OUI ou NON ».

The entire process of achieving sovereignty was to take place within Quebec's legal structure. True, Section 2 of the draft bill anticipated offering Canada an economic association with Quebec, but this was simply an offer, not a condition for sovereignty, as it had been in René Lévesque's 1980 referendum on "sovereignty-association."

2. Le gouvernement est autorisé à conclure avec le gouvernement du Canada un accord consacrant le maintien d'une association économique entre le Québec et le Canada. Un tel accord doit, avant d'être ratifié, être approuvé par l'Assemblée nationale.

This was clearly a proposal for revolution. But Premier Parizeau, in his speech that introduced the draft bill, taunted the Liberal opposition with the fact that, in 1991, the Liberal government had introduced and adopted Bill 150<sup>4</sup>, that proposed precisely holding a referendum on the sovereignty of Quebec. That sovereignty, according to that Liberal bill, would supposedly come into effect one year after a successful referendum. The language then, Parizeau pointed out, was almost identical to the language he was now proposing in his draft bill.

**M. Parizeau:** M. le Président, la loi que nos amis d'en face ont passée et à laquelle je réfèrais tout à l'heure, la loi 150, définissait la souveraineté. La définition de la souveraineté qu'il y a dans cet avant-projet de loi, c'est la leur, M. le Président. C'est la même, M. le Président.

**Des voix:** Ha, ha, ha!

**Des voix:** Bravo!

**M. Parizeau:** Leur projet de loi, M. le Président, prévoyait un référendum sur la souveraineté, et on y disait même: « Et, si le résultat est favorable à la souveraineté, le Québec deviendra un État souverain un an jour pour jour après le référendum, le jour du référendum. » C'était leur législation, M. le Président. Ici, vous voyez, dans cet avant-projet de loi, on dit: « La présente loi entre en vigueur un an après son approbation par référendum, à moins que l'Assemblée nationale ne fixe une date antérieure. »

Si nos amis d'en face peuvent revenir sur leur loi 150, dire peut-être qu'elle avait un certain mérite, mais alors pourquoi eux et nous ne travaillerions-nous pas ensemble la main dans la main à élaborer une loi de la souveraineté du Québec qui fasse l'affaire de tout le monde?

Parizeau's proposal for secession was fundamentally different from what René Lévesque had proposed in 1980. Then, Premier Lévesque had set aside the official program of the Parti

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<sup>4</sup> An Act respecting the process for determining the political and constitutional future of Québec.

Québécois. He did not hold a referendum on sovereignty, Yes or No, but rather on a process of beginning negotiations for such a referendum with the rest of Canada. He asked for “a mandate to negotiate” sovereignty-association. And he promised that the link between sovereignty and association would be indissoluble, that is, that if the rest of Canada refused his proposed association, Lévesque promised that there would be no sovereignty. Implicitly, but factually, he granted the rest of Canada a veto on sovereignty. Moreover, he promised that, even should the rest of Canada accept both sovereignty and association, there still would be no sovereignty unless, in a second referendum, Quebecers voted for the successfully negotiated sovereignty-association agreement. So Lévesque’s 1980 referendum had explicitly ruled out unilateral secession.

Moreover, the entire constitutional structure of Canada had changed since 1980. On February 18, 1980, three months before Lévesque’s referendum, federal elections had been held and Pierre Trudeau had been returned to power with a Liberal majority government. His party won 147 seats out of the 282 in the Commons. A significant fact was that he obtained more than half of those seats from Quebec alone, taking 74 out of the province’s 75 seats. That gave him a strong moral authority to speak for Quebec, while also leading the country as Prime Minister of Canada.

After Lévesque lost his referendum of May 20, 1980, the following year, in November 1981, Trudeau had finally, after much controversy and several appeals to the court, won the support of nine out of ten provincial premiers to retrieve from Great Britain the power to amend the Constitution of Canada. This culminated an intense cross-country national debate on the Prime Minister’s proposals, made shortly after Lévesque’s referendum, to patriate the Constitution with the inclusion of a charter of human rights. The debate had raged in the news media, in the legislatures, in the courts, in private meetings between federal and provincial representatives, province by province, as well as in formal federal-provincial conferences.

A notable forum for such a debate was the Special Joint Committee on the Constitution, co-chaired by Senator Harry Hays and Member of Parliament Serge Joyal, which solicited opinions from the public at large on the proposed constitutional amendments. The committee was composed of 10 senators and 15 members of the House of Commons. Launched on October 2, 1980, it received submissions and held public hearings until February 1981. The Library of Parliament compiled a statistical report on its proceedings that began as follows:

This document is a statistical account of the written submissions concerning the “Proposed Resolution for a Joint Address to Her Majesty the Queen respecting the Constitution of C a n a d a ” r e c e i v e d by the Special Joint Committee on the Constitution as of 31 December 1980.

There were 323 groups and 639 individuals that made written submissions, for a total of 962.

It should be noted that of the 323 groups, there were 163 groups which submitted briefs, while the submissions of the remaining 160 groups were in the form of a telegram or letter only: many of these telegrams and letters amounted to a simple request to appear. In addition, a considerable number of group submissions seemed to be addressed to one issue, such as those in support of “denominational school rights”, “rights of the handicapped”, “native rights”, “sexual orientation rights”, “rights of the unborn child” and “women's rights<sup>5</sup>”.

The range of groups submitting critical comments, from all parts of the country, included 113 different aboriginal groups, the governments of Saskatchewan, Prince-Edward Island, Nova Scotia, New Brunswick, the Yukon and Northwest Territories; the Federation of Canadian Municipalities; political parties from several provinces; the Canadian Chamber of Commerce; the Business Council on National Issues; the Media Club of Canada; the Conseil d'Expansion Économique; Secor, Inc.; the Engineering Institute of Canada; the Association des commissaires d'école de langue française du Canada; the Société Nationale des Québécois des Cantons de l'Est; the Société St. Jean Baptiste du Montréal; the Institut Politique de Trois Rivieres; the Association Canadienne d'éducation de langue française; La Fédération des Francophones Hors Québec; the National Black Coalition of Canada; the Canadian Jewish Congress; the German-Canadian Committee on the Constitution; the Canadian Bar Association; the National Council of Women of Canada; the Catholic Women's League of Canada; the Advisory Council on the Status of Women; the National Action Committee on the Status of Women – and hundreds of others.

These interventions resulted in many changes and adjustments to the original Trudeau proposals, including notably what became Section 35. (1): “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.” The final package, approved by nine of the ten provinces, was adopted by a joint address from the Senate and the House of Canada which requested the Queen to submit the package for passage by the Parliament of the United Kingdom. It was duly adopted at Westminster on March 29, 1982. Section 2 of the *Canada Act* rescinded the British Parliament's authority over any future amendment to Canada's Constitution. The bill also contained as SCHEDULE B, the full text in both English and French of the *Constitution Act, 1982*, precisely as previously formulated by the Parliament of Canada. This also enacted constitutionally the *Canadian Charter of Rights and Freedoms*.

Canada now had a Constitution that was written in Canada by Canadians, although given constitutional effect by the British Parliament. This gave not only greater clarity and precision to the law of the land here, but also a more comprehensive constitutional structure than that which had existed in 1980. The new Constitution contained, notably, Section 52. (1):

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<sup>5</sup> Library of Parliament, Research Branch, “STATISTICAL ACCOUNT OF WRITTEN SUBMISSIONS TO THE SPECIAL JOINT COMMITTEE ON THE CONSTITUTION,” available at this link: <https://historyofrights.ca/wp-content/uploads/SJC/statistics.pdf>

The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

That, surely, granted a greater persuasive and coercive power for the rule of law – *la primauté du droit* – particularly because, for the first time, the Constitution of the land had now been introduced and adopted entirely by Canadians for Canadians.

Premier Lévesque had challenged in court the 1982 *Constitution Act*, claiming that it violated Quebec’s traditional power to exercise a veto over any change to the Constitution that affected Quebec’s powers as a province. The Supreme Court of Canada then delivered on December 6, 1982, its unanimous, crystal clear decision:

The *Constitution Act, 1982* is now in force. Its legality is neither challenged nor assailable. It contains a new procedure for amending the Constitution of Canada which entirely replaces the old one in its legal as well as in its conventional aspects. Even assuming therefore that there was a conventional requirement for the consent of Quebec under the old system, it would no longer have any object or force.<sup>6</sup>

Moreover, the Supreme Court, in that same decision of 1982, had expressed its scepticism about the claim that Quebec had previously held a power of veto. The court said:

We have been referred to an abundance of material, speeches made in the course of parliamentary debates, reports of royal commissions, opinions of historians, political scientists, constitutional experts which endorse in one way or another the principle of duality within the meaning assigned to it by the appellant, and there can be no doubt that many Canadian statesmen, politicians and experts favoured this principle. But neither in his factum nor in oral argument did counsel for the appellant quote a single statement made by any representative of the federal authorities recognizing either explicitly or by necessary implication that Quebec had a conventional power of veto over certain types of constitutional amendments

Until then, almost all members of Quebec’s political class had taken for granted that Quebec had an unconditional right to secede. Now, only the unenlightened or the deliberately deceitful could operate on the principle of a right to unilateral secession. And yet, even after that decision, public opinion in Quebec continued to take for granted that Quebec could secede unconditionally if that should be its clearly expressed will. And the parties at the National Assembly would all refuse to recognize the legitimacy of the *Constitution Act, 1982*, even though the Supreme Court had declared “its legality neither challenged nor assailable.”

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<sup>6</sup> Reference *Re Objection to a Resolution to Amend the Constitution*, 1982, 2 S.C.R. 793 at 806.

So, on that historic December 6, 1994, what was the response of Quebec's Liberal Leader of the Opposition to Parizeau's threat to overthrow the Canadian federation? Daniel Johnson Jr., who had been premier until his party's defeat in September<sup>7</sup>, three months earlier, found fault with the *timing* laid out in the draft bill: it really should have been introduced as a bill *after* the referendum, not before, he argued. He also denounced the many proposed commissions as utterly partisan, and therefore no federalist would want to attend them. But on the issue of the draft bill's constitutionality, Johnson had nothing to say when he replied to Parizeau's presentation that day in the National Assembly:

L'été dernier, tous les commentateurs ont dénoncé cet aspect du programme politique du PQ visant à faire adopter ici, à l'Assemblée, une déclaration solennelle de souveraineté avant que le peuple ne se soit prononcé sur ce projet. On voit aujourd'hui le premier ministre, comme chef du PQ et chef du gouvernement, qui utilise nos institutions pour convier les Québécois à une seule tâche: rédiger une déclaration de souveraineté. Même si tous sont invités, comment imaginer que des Québécois qui ne partagent pas le projet de séparation du reste du Canada vont se prêter à un tel exercice? Comment des fédéralistes québécois peuvent-ils participer à rédiger la Déclaration de souveraineté?

M. le Président, le projet de démarche suggéré par le premier ministre est entaché d'un vice de fond quant à sa légitimité démocratique en tentant de faire préciser aux Québécois un projet qu'ils n'ont pas encore accepté.

Canada's constitutional order and Canada's unity were both under attack by Jacques Parizeau's government, as laid out in the draft bill and in Parizeau's speech. But the Quebec Liberals were unable to denounce the proposed violation of the constitutional order because their own party had previously adopted resolutions at their conventions that had affirmed Quebec's right to implement any constitutional choice that the people preferred, including explicitly secession.

Jean Lesage, a firm federalist, nevertheless had implicitly threatened secession if he did not get what he demanded at a « *conférence de la dernière chance* ». After a successful such confrontation with Prime Minister Lester Pearson in 1964 over Quebec's insistence on setting up its own pension plan, Lesage told the Quebec Legislature: "For the past month I have lived a terrifying life. I have made use of all the means which Providence granted me... so that Quebec, at last, could be recognized as a province which has a special status in Confederation, and I have succeeded<sup>8</sup>." Pearson, for his part, commented later that this confrontation "could have broken up our country<sup>9</sup>."

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<sup>7</sup> The elections were held September 12, 1994.

<sup>8</sup> Quoted by Graham Fraser in *PQ: René Lévesque and the Parti Québécois*, Toronto: Macmillan of Canada, 1984, p. 34.

<sup>9</sup> *Ibid.*, p. 33.

René Lévesque, while a minister in the Lesage government, told students at *Montreal's Collège Sainte-Marie* in May, 1964: "Either Quebec will obtain a really special status – which I am not the expert called on to define – or Quebec will become independent<sup>10</sup>."

Lesage's successor, Daniel Johnson Sr., put his threat of secession into the title of his 1965 book, *Égalité ou Indépendance*. His book ended with these words: "*Canada ou Québec, là où la nation canadienne-française trouvera la liberté, là sera sa patrie.*"<sup>11</sup> He won the June 1966 provincial elections and, the following month, on July 29, 1966, now as Premier of Quebec, he said in a speech to representatives of French-language weeklies: "*Il n'y a pas de constitution qui tienne contre la vie d'une nation.*"<sup>12</sup> At a federal-provincial conference in October 1966, Premier Johnson demanded that Ottawa transfer jurisdictions and income taxes to Quebec. He then said in an interview with Radio-Canada: "*Si le gouvernement fédéral ne se décide pas à retourner aux provinces l'argent des impôts, le Québec devra se séparer du reste du Canada*"<sup>13</sup>."

When Claude Ryan led the Quebec Liberal Party, its convention of March 1980 adopted this resolution: "Resolved, that the Liberal Party recognizes the right of Quebec to determine its internal constitution and to express freely its will to maintain the Canadian federal union or to put an end to it. It recognizes, in a word, the right of the Quebec people to determine freely its own future." There was no ambiguity about that resolution. It explicitly claimed a right for Quebec to secede, and it stated so unconditionally. And now it was part of the official program of the "federalist" Liberal Party of Quebec.

Bourassa, back in power in 1985 after the PQ interlude between 1976 and 1985, soon negotiated with Prime Minister Brian Mulroney the Meech Lake Accord. He spoke on that accord when it was debated before the National Assembly, on June 18, 1987: "I will take the liberty to quote a resolution which was adopted by the Liberal Party, which still remains in effect, and which is part of the constitutional program of the Liberal Party... In this resolution, it is stated that the Liberal Party recognizes the right of Quebec to determine its internal constitution and to express freely its will to maintain the Canadian federal union or to put an end to it. It recognizes, in a word, the right of the Quebec people to freely determine its future. That's a resolution adopted by the Liberal Party in 1980 and which is still part of the program; it is in no way changed or affected by the adoption of the Meech Lake Accord."

After Meech foundered, Bourassa uttered on June 23, 1990 his famous cry of defiance that would be echoed so often in the future: « Le Canada anglais doit comprendre de façon très claire que quoi qu'on dise et quoi qu'on fasse, le Québec est aujourd'hui et pour toujours une société distincte, libre et capable d'assumer son destin. »

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<sup>10</sup> Reported in *La Presse*, May 11, 1964.

<sup>11</sup> Daniel Johnson, *Égalité ou indépendance*, Montréal, Éd. Renaissance, 1965.

<sup>12</sup> Paul Gros-d'Aillon, *Daniel Johnson : l'égalité avant l'indépendance*, Montréal : Stanké, 1979, p. 136.

<sup>13</sup> *Loc. cit.*

Bourassa then adopted Bill 150 in 1991, whereby Quebec would hold a referendum on “sovereignty” by October 26, 1992. This was the Liberal bill that Parizeau was now recalling as precedent to his own Draft Bill *An Act Respecting the Sovereignty of Quebec*. But, after opinion polls had shown in early 1992 a decline in support for secession, Bourassa had then decided to hold a referendum in October of 1992 on the Charlottetown Accord rather than on sovereignty. When, on September 9, 1992, he spoke in the National Assembly on this referendum, Bourassa again referred back to the 1980 resolution: “In my speech on the Meech Lake Accord in June 1987, I stated very clearly that the resolution of my party in 1980, establishing Quebec’s right to self-determination, remained entire, and in the discussion at the convention of my party last August 29, we reaffirmed that resolution on Quebec’s right to self-determination.” By the right to self-determination, he clearly meant the right to secede, because the 1980 resolution stated clearly Quebec’s right “to express freely its will to maintain the Canadian federal union or to put an end to it.”

When, in March 1991, the Quebec Liberal Party in convention had adopted a new constitutional policy (the “Allaire report”) it included this statement: “The existing Canadian Constitution will be replaced with a new constitutional pact integrating the right of the parties to withdraw [from Canada] after giving advance notice.” That threat to secede had been for more than three decades the ultimate weapon of last resort for both the Quebec Liberals and for the Parti Québécois. Now Premier Parizeau was preparing to carry out in fact the long-standing threat of unilateral secession. All he needed, he believed, was a majority OUI vote in the referendum and a proclamation by the National Assembly.

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In December 1994, such was the scenario being played out at the National Assembly. What would be the reaction in the House of Commons to Parizeau’s proposal for unilateral secession, thereby rupturing the Canadian federation? The sitting Prime Minister was Jean Chrétien, the very man who had been Pierre Trudeau’s most prominent collaborator in opposing René Lévesque’s 1980 referendum, and then in patriating the Constitution in 1981-82. Chrétien was thereafter reviled in Quebec by the nationalists, but highly esteemed in the rest of Canada, where it was felt that national unity was secure with Jean Chrétien as Prime Minister.

He happened to be absent from the Commons on the afternoon of the day that Parizeau introduced his draft bill. In his stead, Deputy Prime Minister Sheila Copps handled the questions put by the leaders of the opposition parties during Question Period.

Reform Party Leader Preston Manning asked her: “Does the Government of Canada agree that the *Draft Act Respecting the Sovereignty of Quebec* is beyond the legal powers of the government and assembly of Quebec?” Copps replied: “The Government of Canada has every confidence that the people of Quebec, when given the chance to vote on the real question of whether they want to become a part of a separate country or whether they want to stay in Canada, will vote an overwhelming yes to Canada.”

Astonishingly, she avoided the issue of constitutionality that Manning had raised and that Parizeau had threatened. Her answer seemed to imply that all was normal and that the Québécois would vote the way they should. So Manning returned to the question of the draft bill's constitutionality, and he was followed on the same theme by Stephen Harper. Again, the Deputy Prime Minister avoided the central issue and then she even went on to suggest that the questions from the Reform Party manifested some form of disloyalty. She responded to Stephen Harper: "He is on very dangerous ground when, at a very crucial point in Canada's history, he and his leader and other members of his party are more intent on attacking the federal government than on attacking the separatists."

The next day, with Chrétien still absent from Question Period, Manning again raised the issue of constitutionality: "The Charter says that Canada is founded upon the principle that recognizes the supremacy of law. If that principle is to guide federal government reactions, then at least it should be willing to put forward an opinion on the legality or illegality of separatist initiatives. Can the Deputy Prime Minister at least tell the House as a bare minimum what principles will guide federal reactions to separatist initiatives?"

Again, in reply, Sheila Copps refused to address the central issue of constitutionality. That was consistent with her past words and actions: she had cultivated Quebec's nationalists when she ran for the Liberal leadership against Chrétien and Paul Martin in 1990. Then, on June 6, 1994, for the 50<sup>th</sup> anniversary of D-Day, she had delivered a speech in the Commons:

Yes, I was proud this morning. I was proud to hear *O Canada*, which symbolizes democracy because of everyone who died 50 years ago. Very few of us will ever be called upon to display as much courage as our soldiers on the beaches of Normandy. [...] Very few of us will have to choose to give our lives for others' freedom. The liberty to speak out; **the liberty to separate**; the liberty to exercise democracy in a way that Canada has shown both at Dieppe and on D-Day and over the years that they did not die in vain. (Emphasis added)

The *Toronto Star*, in its report on her speech, noted that Copps stared straight at the Bloc Québécois members of Parliament when she uttered the words, "the liberty to separate." Copps believed that our soldiers had died for Quebec's right to separate. Now, six months later, faced with Parizeau's draft bill, she refused to decry Parizeau's proposal to secede unilaterally.

On that same December 7, in the National Assembly, Premier Parizeau defended the draft bill he had introduced the day before, as offering no cause for alarm: "It's a process that is absolutely normal, that conforms to our statutes, that conforms to our laws and to the spirit of our parliamentary system."

The next day, December 8, the Prime Minister was now back in the Commons. Questioned by the Reform Party leaders on Parizeau's plan for a referendum, Jean Chrétien chose to be evasive: "I do not want to debate what is in this project of law. We can have a long debate on that. The question is a very simple one. They should have the honesty to ask the Quebec people

first: 'Do you want to separate, yes or no?' To play games like that will lead nowhere. It is just a sign that they are afraid to be honest with the people and ask a very simple question: 'Do you want to separate from Canada, yes or no?'"

Chrétien, the storied defender of national unity, chose not to address the momentous threat of unilateral secession proposed in Parizeau's draft bill. He noticed no elephant in the room. Instead, he chose to attack the honesty of Parizeau's proposed referendum question. This seemed to imply that, with a more honest question, the proposed referendum, with all its implied consequences for secession, would be just fine by him.

On that day, the main subject of debate in the Commons was a motion introduced by the Bloc Québécois: "That this House enjoin the government to recognize the legitimacy of the democratic process initiated by the Government of Quebec in order to allow Quebecers to chart their own political and constitutional future." The Bloc speakers urged that "democracy" gave Quebec the right to separate if a majority approved the choice of sovereignty in a referendum. The debate went on for hours, but the MPs speaking for the government never once questioned the fundamental assumption underlying the Bloc motion: that Quebec could legitimately secede merely on the strength of a majority vote in a referendum held exclusively in Quebec. Government speakers mostly criticized the wording of the question.

On that same day, Stephen Harper appeared with host Pamela Wallin on a CBC television public affairs program. Harper insisted that the proposal put forward in Parizeau's draft bill was entirely unconstitutional and that the elected members of the Commons had a duty to defend the constitutional order:

I think in the immediate future our role is really to speak for the Parliament of Canada and for the rights of all Canadians through the Parliament of Canada. The Parliament of Canada and Canadians cannot be stripped of their power, and a province cannot redefine its constitutional status, as Mr. Parizeau asserts, without any reference to the rest of the country or its legal rights and obligations. And that's an important point to make. When a premier gets up and says, "I will negate all the powers of the federal Parliament, of the courts, I will do so just by passing an act in the Assembly, I'll negotiate it, if I feel like it," I think it's very important that a clear message be sent out that that will not happen. It is in nobody's interest to allow that kind of fantasy to go on.

The leader of the federal Liberal government, like the Liberal leader of the opposition at the National Assembly, refused to challenge the constitutionality of Parizeau's proposal for unilateral secession. A challenge then came from civil society. A group of strong federalists had come together in Montreal after the Parti Québécois came to power in September 1994. They operated under the name of the Special Committee for Canadian Unity. Its originators were Stephen Scott, professor of constitutional law at McGill University; Dr. Roopnarine Singh, organizer of the annual Canada Day parade in Montreal; Keith Henderson, a professor of literature at Montreal's Vanier College and leader of the Equality Party that had been founded to defend threatened English language rights; Brent Tyler, the lawyer who had gained a

reputation as the most prominent defender of English rights before the courts; and Reevin Pearl, a lawyer prominent in Montreal's Jewish community.

When Parizeau revealed his plan for unilateral secession on December 6, three days later, on December 9, the Special Committee for Canadian Unity posted a letter to Prime Minister Jean Chrétien, with a copy to each provincial premier, requesting that he send a reference to the Supreme Court of Canada to test the constitutionality of Parizeau's draft bill. The letter stated:

As you are aware, the premier of Quebec, Mr. Jacques Parizeau, has, on December 6th, 1994, tabled before the National Assembly of Quebec, a draft bill entitled *An Act respecting the sovereignty of Quebec*. This proposed Act will (once passed and assented to) purport to declare the Province of Quebec to be a sovereign country, with effect one year (or earlier if the National Assembly so orders) after approval is given in a referendum by the voters of the Province of Quebec.

This letter went on to discuss the harm that would befall the economy and the country if the draft bill were passed. It gave detailed citations from the Constitution to prove that the proposed bill was unconstitutional. The letter then made this proposal:

It is therefore of great importance to contest the validity of this proposed Act before the courts of law as promptly as possible. [...] With respect, it would therefore seem appropriate, and in the public interest of the entire country, that your government immediately submit a reference to the Supreme Court of Canada: *Is it within the legislative authority of a province of Canada, under the Constitution of Canada, to enact a statute declaring that province to be a sovereign state, and if such a statute is enacted, what is its force and effect?*

Prime Minister Chrétien, entirely confident that he had the situation under control, turned down the request of the Special Committee. His leisurely reply, arriving two months later, was dated February 7, 1995. He wrote, in part:

In your letter, you request that the Government submit a reference to the Supreme Court of Canada asking whether it is within the legislative authority of a province, under the Constitution of Canada, to enact a statute declaring that province to be a sovereign state, and if such a statute is enacted, what is its force or effect.

I am of the view that the central issue in the months ahead is whether or not the citizens of Quebec want to stay in Canada, and that we should not allow ourselves to be side-tracked into a discussion of how separation might occur. I strongly believe the best way to deal with the separatists is to make sure they bear the burden of proof to show why separating from Canada would be in the best interests of Quebecers. Therefore, although I understand the reasons why the *Committee for Canadian Unity* wishes to see the legality of the draft bill questioned, I do not agree that, in the present circumstances, the course you are recommending would be an advisable one for the

Government of Canada. Thank you for bringing your suggestion to my attention and that of the Premiers.

So it was that the Prime Minister turned down the best available measure to discredit legally Parizeau's revolutionary proposal – a reference to the Supreme Court of Canada. Had the Prime Minister adopted it, the court would almost certainly have found that Parizeau's proposed venture was unconstitutional. That would have neutralized the secessionist implication of the referendum, if indeed Parizeau still went ahead and held a referendum. It would then have been perceived simply as the occasion for a legitimate expression of public opinion. The referendum would be no more and no less, in legal terms, than a consultation on the preference of the population. It would yield information of political significance, but not a unilateral secession, because the people of Quebec would never knowingly join a revolution.

Instead, Chrétien's evasions conferred legitimacy on Parizeau's venture. His silence on such a momentous proposal as unilateral secession implied consent. And so it was understood in Quebec.

Chrétien had a partisan interest at stake. He benefited from his public image as the man to stare down the separatists. He knew that the referendum threat was enhancing his own stature in the rest of Canada (ROC) and raising his support in the opinion polls. A reference to the court would have been less rewarding for him personally. He preferred to fight before the public rather than in a courtroom. So he rejected the Special Committee's request that he declare Parizeau's undertaking to be unconstitutional. He also rejected the proposal to invoke the credibility and the authority of the Supreme Court. Chrétien implied in his response that the issue of secession should be decided by which side could win a public opinion debate on this subject: "why separating from Canada would be in the best interests of Quebecers." And the rule of law, *la primauté du droit*, would play hardly any role at all in his scenario for the referendum campaign. He did not seem to understand that he was playing with fire, playing Russian roulette, Quebec style. He was confident that, with himself as prime minister, the federalists would win the referendum. But he did not recognize that he was normalizing, the unilateral separation option for the future and reinforcing the mistaken view in Quebec that unconditional secession was a right. In even the best of circumstances, he was setting a dangerous precedent.

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On December 15, 1994, Justice Minister Allan Rock gave a speech in Ottawa at a dinner sponsored by the federalist magazine *Cité libre*. His subject was: "The Just Society 25 Years Later." He, the Justice Minister, in his speech given entirely in French, made not even a passing reference to the momentous draft bill introduced in the National Assembly just nine days earlier. So, during the question-and-answer period that followed, I went to the microphone and pointed out Rock that there was great confusion in Quebec as to the legality of the proposed UDI, and I asked Rock what he intended to do to "illuminate the consciences of the people of Quebec."

Rock chuckled. Here is his answer, as reported by Paul Wells in the *Montreal Gazette* of December 16, 1994:

“Clearly, there exists no provision in Canada’s Constitution” for one province to leave the federation, Allan Rock told a dinner crowd at an Ottawa restaurant. “But I wonder whether that’s the real question now,” he said in French. “Is everyone interested in these technical details?” Rock’s comments constituted the first public statement by a federal cabinet minister on the legality of Premier Jacques Parizeau’s plan to pass a law declaring Quebec a country, subject to ratification by referendum.

“To my mind, it’s not constitutional” for one province to decide unilaterally it can leave Confederation, Rock said. “But that’s a technical question. The real question is for Quebecers, in a referendum.” He added that he is confident Quebecers will vote against secession. “It’s possible to have debate on the constitutionality of (Parizeau’s) draft legislation – a very interesting (debate) for lawyers – but what matters more is the will of Quebecers,” Rock said.

After putting my question, I had returned to my seat. But when Rock gave that answer, I went back to the microphone to say: “I see that the Constitution is just a technicality.”

Rock’s nonchalance about the constitutional order was widely shared in the weeks following Parizeau’s unveiling of his referendum strategy. Lise Bissonnette, publisher of *Le Devoir*, wrote an editorial in which she denounced all those who claimed that what Parizeau proposed was unconstitutional. “The nonsense that one hears since Tuesday [December 6] on the supposed illegitimacy of the referendum procedure of the Quebec government should peter out on its own. Unless Canada has become a prison, it has no meaning,” she wrote. And she called the attacks on the legitimacy of the procedure “delirium” and claimed that “the debate about legitimacy (was) fabricated on the spot by parties at a loss for ammunition.”

Similarly, Joan Fraser, then editor-in-chief of the *Montreal Gazette* (later a Senator in the Parliament until 2018) published a signed column on December 21, 1994 in which she dismissed as irrelevant the issue of constitutionality: “Never mind the angels-on-a-pin arguments about whether Quebec has the legal right to separate from Canada. Quebec has the right to become independent if that is what a decisive majority of its people, freely and in full understanding, choose. There are grounds for debate on how to determine what the true will of the people is, and whether they have fully understood what is involved. But anyone who believes in democracy surely believes that if the people of Quebec genuinely wish to leave, they have the right to do so.” Fraser apparently believed that “anyone who believes in democracy,” like the Americans, the British and the French, would surely accept that a part of their people could secede if that was their genuine wish. Tell that to the Marines...

But that was the consensus then among the political elites. Former Prime Minister Joe Clark published a book in 1994 titled *A Nation Too Good to Lose*. He simply dismissed the issue of

constitutionality as irrelevant. “The issue once was whether Canadians would respect the right of Quebec to leave, if it made that choice. The clear answer is Yes.” He posed no condition.

Clark went on to blame the Trudeau government for the fact that all Quebec governments since 1982 refused to acknowledge the legitimacy of the 1982 *Constitution Act*: “The Trudeau government, which had excluded Quebec from the process of constitutional change in 1982, had neither the will nor the authority to repair that damage.” *Trudeau* had excluded René Lévesque “from the process of constitutional change?”

*La Presse* editorialist Pierre Gravel spurned any doubt about the legality of secession. “No matter what the defenders of federalism might say, if there is one question that transcends legal debate, it is surely the right of the current Canadian partners to decide whether or not they wish to continue working together.”

*La Presse* columnist Lysiane Gagnon took a similar view in the *Globe and Mail*. “In real life, the argument about constitutionality is irrelevant. In liberal democracies, secessions are political, not legal, matters.” She quoted with approval the words of *Gazette* editor Joan Fraser, who had settled the issue of legality in a few lines: “Never mind the angels-on-a-pin arguments about whether Quebec has the legal right to separate from Canada. Quebec has the right to become independent if that is what a decisive majority of its people, freely and in full understanding, choose.”

*La Presse*’s chief editorial writer Alain Dubuc joined the chorus: “It is true that the Canadian Constitution does not foresee the right to secede. So we are faced with a case where Canada, because it has its eyes fixed on its constitutional navel, would violate one of the most fundamental rights, a right recognized across the world.” Presumably, he meant the right to secede, a right recognized nowhere across the world, except in cases of colonies or of extreme duress.

There was no valid excuse for this collective blindness. In 1991-92, following the defeat of the Meech Lake Accord, Premier Robert Bourassa had proposed holding a referendum on declaring the sovereignty of Quebec. He set up a committee of the National Assembly to study the implications if Quebec were to “accede to sovereignty.” As part of its exploration, the committee solicited the legal opinion of a blue-ribbon panel composed of five internationally renowned experts on international law, none of them being from Canada. They were requested to give their opinion on what would be the boundaries of a seceding Quebec.

Their report was titled *The Territorial Integrity of Quebec in the Event of the Attainment of Sovereignty*, But the panel sprung a surprise on Premier Bourassa and the parliamentary committee by first answering a question that neither had raised: did Quebec have a right to secede under international law? Their answer to their own question, as the five experts stated unanimously, categorically and repeatedly, was that, in international law, Quebec did not have a right to secede from Canada. What Quebec – or French Canadians in Quebec – did have, they

said, was the right to self-determination. But they then explained that the right to self-determination was not a right to secede.

The right of peoples to self-determination is a very general principle, which has as a consequence always and everywhere the right for the community involved to participate in its future, but this does not suffice to provide a basis for the right of a people to accede to independence, to the detriment of the state to which it is attached, except in colonial situations<sup>14</sup>.

The right to self-determination, the panel also said, “implies the right for minorities to have their identity recognized, and since the right to self-determination is a principle protecting human rights, the right for each of the members of a minority to have its sense of belonging to it recognized. At the same time, the Commission [of Arbitration on Yugoslavia] excludes the right of minority peoples to independence<sup>15</sup>.”

The panel asserted repeatedly that only colonies can claim a right to become independent under international law, and Quebec, they said, was not a colony; therefore, they dismissed with a summary rejection the pretensions of Université de Montréal law professors Daniel Turp (then chairman of the Bloc Québécois’s policy commission) and Jacques Brossard, who both claimed, against the overwhelming consensus of legal opinion internationally, that Quebec had a right to secede<sup>16</sup>. Brossard had argued that the Québécois constituted a people and that this people enjoyed the right to self-determination, because it fulfilled all of the conditions which, according to him, were required, that is: a “political dimension” – a territory and its own structures; a viable future as a state; acceptance of the principles enunciated in the *Charter of the United Nations* and in international law; and a will to become independent.

The panel commented: “In any case, one cannot reasonably maintain that it is a colonial people nor that it is deprived of the right to its own existence within the Canadian whole, nor to participate in democratic life. The very existence, which can scarcely be questioned, of the first criterion set out by Professor Brossard is enough to attest the opposite.”

After turning Brossard’s own argument against him, the panel explicitly rejected that Quebec held a right to secede. “And therefore, the Quebec people effectively exercises its right to self-determination within the framework of the Canadian whole and is not legally well founded to invoke it to justify a future accession to independence<sup>17</sup>.”

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<sup>14</sup> Thomas M. Franck, Rosalyn Higgins, Alain Pellet, Malcolm N. Shaw, Christian Tomuschat, translation by William Boulet. *The Territorial Integrity of Quebec in the Event of the Attainment of Sovereignty*, p. 383. The full text can be found at this link: <http://tamilnation.co/selfdetermination/countrystudies/quebec/quebec2.htm>

<sup>15</sup> *Ibid.*, p. 424.

<sup>16</sup> *Ibid.*, p. 425.

<sup>17</sup> *Loc. cit.*

Furthermore, they added, “The right to secession does not exist in international law.” Even the right of a colony to independence is not strictly speaking a right to secede, since the colony was never a true part of the state from which it wishes to become independent<sup>18</sup>.

The panel pointed out that chaos would result if the principle of secession on demand were to be accepted internationally, that is, if every state could be dismembered at any time by the vote of a passing majority in one of its parts. “The generalization of the right to self-determination, understood as the right for a people to establish a state, would have dramatically destabilizing effects, which obviously cannot be countenanced by an international society made up in the first place of sovereign states<sup>19</sup>.” One of the members of the panel was quoted in their report, to confirm their shared opinion: “It can be concluded that the view that all peoples, in the sociological sense, are entitled under international law in the last resort to create independent states is clearly unacceptable as a matter of practice<sup>20</sup>.”

The five experts were tops in their field of international law. Christian Tomuschat, of Germany, was chairman of the United Nations Commission on International Law. The Frenchman, Alain Pellet, was a member of the United Nations Commission on International Law and a professor of international law at the Université de Paris and the Institut d’Études politiques. The American, Thomas Frank, was the editor-in-chief of the *American Journal of International Law*. Rosemary Higgins, from Britain, was professor of international law at the London School of Economics and a member of the United Nations Committee on Human Rights. Malcolm N. Shaw, law professor at the University of Leicester, had represented the United Kingdom at the 1990 United Nations Conference on Human Rights, at Kiev.

Their legal opinion, so clear in its explanation and so authoritative because of their outstanding reputations, should have been emblazoned across Canada. But, in fact, Bourassa and the parliamentary committee were displeased with the report that contradicted their pretensions that Quebec possessed a right to secede. The experts had been due to appear as witnesses before the committee. That invitation was cancelled. They never appeared. Their report was put on a shelf. Bourassa never referred to it. Parizeau did refer to it, but only to support his assumption that the frontiers of a seceding Quebec would remain intact. Jean Chrétien did make a vague reference to it once or twice, but he never incorporated it as a central part of his script when he was called upon to speak about the threatened secession of Quebec. Because it went against the prevailing conventional wisdom, it was practically ignored. A dead letter.

So it was that nearly all the members of the political and journalistic elites, from Parizeau to Chrétien to Daniel Johnson Jr., to Lise Bissonnette, Joan Fraser, Alain Dubuc and so many others, remained either ignorant of the true state and requirements of the law, or they deliberately ignored the volcano under the country that they were poking with such self-assurance.

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<sup>18</sup> *Ibid.*, pp. 428-29.

<sup>19</sup> *Ibid.*, p. 422.

<sup>20</sup> *Loc. cit.*

There was another important signal that should have alerted public opinion but was also generally missed. In the June 1995 issue of the *Canadian Bar Review*, an eminent law professor at the Université de Montréal published a careful analysis of *l'Avant-projet de loi sur la souveraineté du Québec*. Professor José Woehrling, himself favourable to Quebec's secession, recognized nevertheless that the draft bill violated the *Constitution* of Canada and was apt to lead to serious confrontations. What follows is from the executive summary of his article.

L'Avant-projet contrevient manifestement au droit constitutionnel canadien, celui-ci ne permettant pas la sécession unilatérale d'un État-membre de la fédération... Il constate que deux thèses peuvent être défendues, la première selon laquelle la sécession d'une province est possible en utilisant la procédure normale (qui exige le consentement des deux chambres fédérales et des deux tiers des provinces représentant la moitié de la population), la seconde selon laquelle il faut plutôt le consentement unanime de toutes les provinces.

De toute façon, quelle que soit la thèse retenue, la sécession du Québec avec l'accord du reste du Canada n'est guère vraisemblable. C'est pourquoi, dans une troisième partie, l'auteur examine si la sécession unilatérale du Québec serait possible en vertu du droit international public. Il en arrive à la conclusion que le droit international ne confère pas le droit d'accéder à l'indépendance aux peuples qui ne sont pas en situation coloniale ou victimes d'un régime discriminatoire, mais qu'il ne les empêche pas davantage de la revendiquer et de l'obtenir.

Dans le cas du Québec, il en résulte que le peuple québécois ne saurait fonder une éventuelle revendication à la souveraineté sur son droit à l'autodétermination, mais qu'il ne serait pas, pour autant, empêché d'y accéder par des motifs juridiques. Deux facteurs politiques l'emporteraient sur toute considération juridique : la volonté du peuple québécois qui, si elle était claire et démocratiquement exprimée, aurait pour effet de conférer à la sécession unilatérale du Québec une légitimité populaire incontestable; l'efficacité et l'effectivité de la sécession, c'est-à-dire la capacité des autorités québécoises d'exercer le monopole de l'autorité publique sur le territoire du Québec. En effet, une telle situation attesterait de la réussite de la sécession du Québec sur le plan interne. Sur le plan international, elle amènerait inévitablement les autres États, ou du moins un certain nombre d'entre eux, à reconnaître après un certain temps l'existence du Québec comme État souverain.

L'auteur [Woehrling] conclut son étude en examinant les problèmes soulevés par l'intégrité territoriale du Québec en cas de sécession unilatérale. Une menace sérieuse pourrait résulter de l'attitude des peuples autochtones – Inuit et Amérindiens – qui habitent le nord du territoire québécois. Ces peuples, qui sont les premiers occupants de ces territoires, pourraient prétendre exercer leur propre droit à l'autodétermination afin de continuer à faire partie du Canada et de se séparer du Québec, si celui-ci décidait de quitter la fédération canadienne. Pour rassurer les peuples autochtones, le Québec

devrait s'engager à faire bénéficier les peuples autochtones de toute amélioration de statut qui pourrait leur être reconnue à l'avenir par le Canada.

This was a masterful analysis. In summary, there was no legal right to secede. Legal secession required an amendment to the Constitution and must include the assent of two-thirds or all of the provinces. But secession by revolution was a possibility. The quality of Woehrling's analysis would be confirmed in 1998 when the Supreme Court of Canada delivered its response to the reference on the secession of Quebec. The court would follow the same logic as did Woehrling. Both asserted that, according to the law, secession must be obtained by an amendment to the Constitution of Canada; otherwise it would be a revolution. Both pointed to the special status of Aboriginal nations within Quebec's borders, which led to the suggestion that an independent Quebec might have to renounce these territories. And both recognized that a clearly expressed will of the people of Quebec for independence could not be ignored by the rest of the country, though it would not provide a legal right to secession. And both raised the possibility of an accession to independence by a successful revolution.

What the Supreme Court of Canada would find on August 20, 1998, in response to the reference on the secession of Quebec, was already there for anyone who cared to read Woehrling's acute and realistic analysis of 1995. So how, then, did it become gospel in Quebec that the province could secede on nothing more than a bare majority vote in a referendum carried out only in Quebec under terms set entirely by the Quebec government? Let us consider the responsibility of Jean Chrétien.

Chrétien, in fact, had something to hide. After Pierre Trudeau stepped down from the Liberal leadership in 1984, Chrétien had campaigned to succeed him as party leader and prime minister, but he was bested by John Turner. The following year, Chrétien published his political memoirs *Straight from the Heart*, in which he made a boast that would come back to haunt him and to haunt Canada:

At a town meeting in Alma, Quebec, in the early 1970s, a very intelligent Liberal got up and said, "Chrétien, when will you tell the separatists that there will never be independence, that the federal government will never allow it to happen?..." All the federalists applauded him wildly. But I didn't agree. "We'll put our faith in democracy," I said. "We'll convince the people that they should stay in Canada and we'll win. **If we don't win, I'll respect the wishes of Quebecers and let them separate.**" (Emphasis added)

These pretentious words would later be taken by pundits and politicians in Quebec to confirm that the 1980 referendum had established a precedent whereby Pierre Trudeau (and Jean Chrétien) had recognized Quebec's unconditional right to secede following a OUI majority in a referendum on secession called by the government of Quebec. That was the implication propagated by Chrétien's historical chest-thumping. Chrétien, even after he became prime minister, never had the courage or the integrity to take back those words and confess that they were empty posturing. As a junior minister in the early 1970s, Chrétien had no authority to say:

“I’ll let them separate.” The only man who did hold decisive authority over the government at that time, Prime Minister Pierre Trudeau, never said, “I’ll let them separate.” He said the opposite, as the historical record shows.

In fact, when, on the night of November 15, 1976, René Lévesque’s Parti Québécois won a majority in the elections, Pierre Trudeau spoke to the cameras: “I am confident that Quebecers will continue to reject separatism because they still believe their destiny is linked with an indivisible Canada.” The next morning, in the Commons, he was even more decisive: “I am sure the statement I made last night, and which I would willingly repeat today, is a clear indication that this government is dedicated to an inseparable Canada, a Canada which is indivisible. And we have only one mandate: it is to govern the whole country, including Quebec ... This will continue to be our mandate and we do not intend to negotiate any form of separatism with any province.” Could anything be clearer?

Then, on May 14, 1980, six days before René Lévesque’s referendum on sovereignty-association, Trudeau gave a powerful speech in Montreal’s Paul Sauvé Arena. There, he made clear that he would refuse to negotiate sovereignty-association regardless of what the eventual vote count would prove to be. Trudeau told his audience and the country:

Mr. Lévesque has asked me what my attitude would be if the majority of Quebecers voted Yes. I have already answered this question... Mr. Lévesque will be welcome to come to Ottawa, where I will receive him politely, as he has always received me in Quebec City, and I will tell him that there are two doors. If you knock on the sovereignty-association door, there are no negotiations possible.

Trudeau then addressed Lévesque’s assumption that “democracy” would require the rest of Canada to accept the will of Quebecers, if a Quebec majority voted Yes.

It is like saying to Mr. Lévesque, “The people of Newfoundland have just voted 100 per cent in favour of renegotiating the electricity contract with Quebec. You are obliged, in the name of democracy, to respect the will of Newfoundland, are you not?” It is obvious that this sort of logic does not work. The wishes of Quebecers may be expressed through a democratic process, but that cannot bind others – those in other provinces who did not vote – to act as Quebec decides.

I recall these facts and these words at some length because Jean Chrétien’s vain boast did immense harm, especially after he became prime minister. He had revised the historical record and thereby gave an undeserved credibility to the separatist scenario of a right, by precedent if not by law, to a unilateral secession. He seemed to confirm the unfounded myth pervasive in Quebec that the “right to self-determination,” recognized by the United Nations, also included the right to secede on the strength of a majority vote in a referendum. Many Quebecers were convinced by Chrétien’s account that he had spoken both for himself and for the Prime Minister, that both had said: “I’ll respect the wishes of Quebecers and let them separate.”

Chrétien thereby created a fictitious precedent for recognizing Quebec's unconditional right to secede.

It was an angry period in Quebec politics. With the failure of the Meech Lake Accord, Premier Robert Bourassa and Prime Minister Brian Mulroney interpreted it as a rejection of the distinctiveness of Quebec, a rejection of Quebec's identity. Support for secession surged. On the weekend of August 11, 1991, Quebec's Young Liberals held their annual summer meeting and adopted a separatist resolution, voting that the province should declare "full political autonomy for Québec," after which it would delegate certain powers to a "Québec-Canada economic community." Canada would cease to function as a federation. There was no suggestion that such a change would require an amendment to the Constitution.

In November 1990, the Bélanger-Campeau commission<sup>21</sup> began its public hearings to define Quebec's constitutional future. Chrétien, now Liberal leader, appeared as a witness on December 17. His opening statement, recorded in the transcript of the commission's hearings, gave no indication of a concern for the constitutional order, should Quebec undertake to secede:

Québec, at this time, to my mind and the minds of my colleagues, has a fundamental choice to make. The choice is either to quit the federation, to become an independent state that determines over its territory all the laws that will apply to the citizens of Québec, while on the other hand it has the choice of remaining a member of the federation, of remaining a member of Canada; and for my part, I wish that people would understand that the time has come to make very clear definitions, to leave confusion behind and establish clearly what is the future and what is the choice. I have concluded that we have only two choices.

His presentation gave equal legitimacy to either choice, "to quit the federation," or "remaining a member of the federation," and it raised not the slightest condition if the choice were "to quit the federation." Lucien Bouchard, who had been the first person to be appointed to the commission by Premier Bourassa, now asked Chrétien point blank what he would do "if Québec declared itself sovereign and gave Mr. Bourassa this mandate to achieve sovereignty?" Chrétien's reply was evasive. It wandered all over the map.

Bah, as for me, I said in my brief [to the commission], Mr. Bouchard, that there would be serious difficulties in making the transition. If people are tired of constitutional negotiation, I think that the negotiations for separation will be very complicated and they will cause very serious economic instability for Québec, and *The Economist* last week said so.

He cited the complications that would necessarily arise in the process of negotiating secession, but he omitted any clear reference to the constitutional requirements for secession to be

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<sup>21</sup> La Commission sur l'avenir politique et constitutionnel du Québec, 1990-91.

achieved legally. He raised the Constitution as a complicating factor rather than as the obligatory framework within which the actions of a government and a people must be carried out.

As for me, if I am prime minister of Canada at that time, the Constitution does not grant to any prime minister of Canada the possibility of negotiating the separation of the territory. Moreover, in the Constitution, one cannot create new provinces without the consent of seven provinces representing 50 per cent of the population. So the inverse should also be true... As for me, I am convinced that it would be extremely complicated.

The moment of truth arrived when Chrétien was asked by the commissioner and union leader Gérald Larose: "You say yourself that you are a Québécois, which implies that you already know what your position will be when Québec has decided. Will you respect the decision of Québec?" Chrétien replied: "**I am a democrat and I said it in 1980 and in many speeches in that regard. If we had not recognized that Québec could make a decision to separate, we would have acted otherwise.** There were powers that we could have exercised. We didn't exercise them. As for that moment [the future decision invoked by Larose], I say that you are asking me a hypothetical question. I explained in my brief the difficulties that we will encounter." (Emphasis added)

His evocation of 1980, his pretention that "*If we had not recognized that Québec could make a decision to separate, we would have acted otherwise,*" were total falsehoods, historical revisionism at its worst. Then, his flat answer was that Chrétien was a democrat, with the implication that a democrat must logically accept a referendum result in one part of the country as binding on the entire country.

Chrétien, before the Bélanger-Campeau commission, undermined the rule of law and thereby sabotaged the foundations of Canadian unity. He prepared the ground for the near-disaster that would occur on his watch with the 1995 referendum on secession.

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When Jean Chrétien was sworn in as prime minister on November 4, 1993, much had changed from the conditions that had prevailed during most of the time when he had occupied the post of minister in the Trudeau government. The 1982 patriation of the Constitution and the subsequent *Constitution Act* had created a framework in which the requirements for amending the Constitution were now explicitly spelled out. The federal government could not act alone, by requesting the Parliament of the United Kingdom to adopt an amendment to the British North America Act. Now the provinces had to be partners in any amendment to the Constitution that affected them. No one, no federal government, no Parliament of Canada, and certainly no minister, not even the Prime Minister, could henceforth say: "I will let them separate."

But Prime Minister Chrétien never seems to have internalized the logic of the new *Constitution Act*. He continued to speak and act as though he controlled the Constitution when in fact the Constitution controlled him.

In the Commons, the Leader of the Opposition since the elections of October 25, 1993, was Lucien Bouchard. He made his views clear on this issue when he spoke in Paris on May 19, 1994. Here is what he said then, as reported in *La Presse* the next day:

S'il y a une date précise incluse dans la question référendaire, comme l'a souvent annoncée M. Parizeau, elle prévoira un laps de temps raisonnable pour régler entre Québec et Ottawa les questions techniques liées à la souveraineté: la dette, l'actif, etc. Une période de transition de quelques mois, pas davantage.

Je n'imagine pas un instant que le gouvernement canadien, face à une décision parfaitement démocratique, refuse de s'asseoir avec le Québec pour discuter des modalités pratiques. Bien que certaines personnalités brandissent la menace d'une « réaction irrationnelle » du Canada anglais, ça ne me semble pas possible. Bien sûr, certains à Ottawa pourraient essayer de faire traîner les choses, d'utiliser le temps. Mais Ottawa ne dispose pas d'une grande marge de manœuvre. **Si Ottawa ne nous reconnaît pas, nous proclamerons nous-mêmes notre souveraineté, tout simplement parce que le monde entier nous reconnaîtra.** (Emphasis added)

For Lucien Bouchard, the democratic principle trumped everything else. The discussions required with the government of Canada at the time of secession would deal with “practical matters,” not an amendment to the Constitution. If, after a few months, “Ottawa does not recognize us,” then “we will proclaim our sovereignty,” and, of course, the whole world will recognize the new independent state.

Lucien Bouchard brought that frame of mind to his role as opposition leader in the Commons. His foremost objective was to trap Chrétien into a commitment that he would recognize as definitive and binding any future referendum which gained a majority vote for independence. Bouchard claimed that the democratic principle would confer a right to unconditional secession should Quebec deliver a majority vote for sovereignty. He would return to that theme again and again in the two years leading up to the referendum of October 30, 1995.

So, on May 24, 1994, Bouchard opened Question Period in the Commons with this sally:

Last week, the Prime Minister stated that since the Canadian Constitution is silent on the matter, the issue of Quebec's sovereignty is, and I quote: “purely academic.” This statement raised some doubts about the Prime Minister's position, that is to say, whether or not he recognizes Quebec's right to decide on its own sovereignty. I want to ask the Prime Minister to remove these doubts as to his position on the subject and to tell this House whether or not he recognizes Quebec's right to self-determination.

Chrétien, in his reply, displayed the constant ambiguity and evasion that would be his trademark throughout the entire period leading up to the referendum of October 30, 1995.

In 1980, we allowed a referendum to be held on the question of Quebec's separation. As I said several times last week, and I say it again today, only 5 per cent of Quebecers see the issue of separation and the Constitution as a priority. It is my duty to deal with the nation's real problems instead of spreading political and economic uncertainty in this country, and to make sure that Quebec remains in Canada. And I am convinced that Quebec will remain Canadian.

Bouchard was not satisfied with that answer. He returned to the attack:

I asked a fundamental question which requires a clear answer. My question is whether the Prime Minister of Canada, of this country, respects Quebec democracy. Will the Prime Minister tell us clearly, and I will repeat my question, as head of state and prime minister, whether or not he recognizes Quebec's right to self-determination?

Instead of correcting Bouchard on the limited significance of the "right to self-determination," Chrétien again gave an equivocal answer: "Since 1980, we have permitted a referendum on the question of the separation of Quebec." But he then recalled that, five days earlier, Parizeau had quoted the five international law experts to the effect that Quebec's frontiers would be intangible in the event that Quebec became sovereign. The same principle protected Canada's territorial integrity, Chrétien maintained. He then raised in passing the issue of constitutionality. "Under international law, Quebec cannot separate without the consent of Canada." But then he immediately weakened that clear statement.

**We permit a vote on the question. That is what we did in 1980.** I was the one who worked for the federal side during a democratic vote and the Québécois decided to remain in Canada. (Emphasis added)

"We permit a vote on the question." Given the context, that statement was entirely ambiguous and misleading. It made no distinction between a vote as an expression of preference and a vote as a justification for unilateral secession. Here, the suggestion seemed to be that the government could stand firm on the constitutional order but chose not to so in 1980, and presumably would be equally generous again – if a clear question were put to the voters.

But Bouchard tried to trap Chrétien into a clearer concession. "How can he reconcile an attitude that is so equivocal with his behaviour and that of his leader, Mr. Pierre Elliott Trudeau, in 1980, when, by both participating fully in the Quebec referendum campaign, they showed deference to the democratic will of Quebec?"

Both Bouchard and Chrétien were playing a dishonest game. Both were presuming an equivalence between the referendum of 1980 and that now proposed by Parizeau. But René Lévesque's referendum did not promise to violate the Constitution, it did not promise a

unilateral secession, or even any secession at all. There was no question of breaking the law. That was entirely different from what Parizeau was now proposing. Moreover, it was flagrantly untrue that Pierre Trudeau had bound himself to comply with the result of the referendum.

Another incongruity: Chrétien was speaking here as though he had a choice on whether to defend the constitutional order or to comply with Parizeau's pretensions. A prime minister of Canada has no such choice. He had to, by his oath of office, defend the constitutional order. And this is what Chrétien was failing to do. His answer was a grave dereliction of duty.

The very next day, in Quebec City, Mr. Parizeau pushed the same scam even further: « La participation très remarquée des autorités fédérales, financièrement et à titre personnel, notamment messieurs Chrétien et Trudeau, lors du référendum de 1980, sert de précédent et établit la légitimité du processus, » Parizeau told a press conference. He, like Bouchard and Chrétien the day before, created a false equation between the constitutional issues in 1980 and 1994. And he continued, as reported in *La Presse* on May 26, 1994:

M. Chrétien dit « le Québec ne deviendra pas souverain sans que je ne l'accepte... » Ce n'est tout simplement pas vrai; il faut lui dire que c'est faux... Nulle part dans l'étude des cinq experts internationaux on ne retrouve l'exigence d'un consentement du Canada pour que le Québec puisse accéder à la souveraineté.

Parizeau's statement was, at best, misleading. The five experts had acknowledged that Quebec could possibly achieve independence through a revolution. But that was not the issue in debate.

The following day, the familiar fraudulent claim for a right to secede based on precedent was made in the National Assembly by Premier Daniel Johnson Jr.: « Il m'apparaît extrêmement clair qu'au Québec...nous avons déjà exercé, en 1980, le droit à l'autodétermination. Alors, je ne vois pas pourquoi, tout d'un coup, ce serait disparu. » More ambiguity, more disinformation, both in the Commons and in the National Assembly.

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On October 10, 1994, Bloc Québécois Leader Lucien Bouchard met with *Montreal Gazette* journalists at the newspaper's office, with the account of the meeting appearing in the paper the next morning. Bouchard was asked: "Is 50 per cent plus one enough?" "Yes," he replied. "If we have 51 per cent support – I would like to have more – but if we have 51 per cent, well, we have a democratic mandate to go further. This is democracy."

Bouchard was then asked what he meant by "going further." This was the question put to him: "If the referendum goes Yes and the federal government drags its heels, would you then support a unilateral declaration of independence?" He replied: "Yes, at the date announced in the question. Because the date would be part of the mandate given to the government."

The following day, Chrétien was interviewed by Anne-Marie Dussault, then a public affairs host at Radio-Québec. She cited Bouchard's words and asked the Prime Minister what would happen if the federalist side lost the referendum. His reply: "I don't know. The Prime Minister has a Constitution to respect and there is no mechanism in the Constitution permitting the separation of any part of the Canadian territory." This statement, so totally different from his usual evasions, caused a shock in Quebec where it was considered a scandalous perspective.

*Le Devoir* blared at the top of the front page: "Chrétien entrouvre la porte à une réforme du fédéralisme / Il met en doute le droit du Québec à l'autodétermination. »

The article was signed by journalist Pierre O'Neill, who had at one time served as press secretary to René Lévesque. O'Neill wrote:

Pressé de questions par l'animatrice Anne-Marie Dussault, il a par ailleurs mis en doute le droit à l'autodétermination du Québec, dont pourraient se réclamer les souverainistes dans l'hypothèse d'une victoire du OUI.

Un doute qui repose sur le fait que, selon lui, il n'y a rien dans la Constitution canadienne qui confère ce droit à une province. « Le premier ministre du Canada a une Constitution à respecter et il n'y a aucun mécanisme dans la Constitution qui permet la séparation de quelque partie du territoire canadien. D'ailleurs, je n'envisage pas ce désagréable scénario qui va causer beaucoup de troubles. Et ça ne changerait rien. »

À la sortie du studio de télévision, lorsque les journalistes lui ont demandé de préciser le sens de ses propos, s'il fallait y voir un refus de respecter la portée d'une éventuelle victoire référendaire du OUI, il a laconiquement répondu : « Je ne sais pas quelle serait la question. Et ça ne veut pas dire qu'il y aurait une séparation. Je dis simplement qu'il n'y a pas de mécanismes qui prévoient ça dans la Constitution. »

This was bad reporting. Chrétien had not spoken about "Quebec's right to self-determination." He had spoken precisely of "the separation of some part of the Canadian territory." He was talking about secession. Pierre O'Neill, like so many other separatists and even federalists, still did not grasp the difference in international law between the right to self-determination within the state and the right to secede from the state. And the Prime Minister was doing nothing to enlighten public opinion, perhaps because he himself did not grasp the difference.

And so, on October 17, the Monday following the just-quoted statements of Bouchard and Chrétien, Stephen Harper put this question to Marcel Masse, the Minister of Intergovernmental Affairs:

Last week, the Prime Minister was quoted as saying: "A prime minister of Canada has a Constitution he must respect and there is no mechanism in the Constitution permitting the separation of any part of Canadian territory." We know that separation would require substantial constitutional amendment. Will the Minister of Intergovernmental Affairs commit to the House, on behalf of the government, that it is the position of the

Government of Canada that any change to the constitutional status of a province would have to be done legally and would require, under the amending formula, the consent of all the provinces?

Marcel Masse's reply was a replay of the usual evasions: "This is a hypothetical question on which the Prime Minister commented in general. I certainly do not intend to go any further than that."

Two days later, on October 19, Harper returned to the subject. He voiced his disagreement with Chrétien's assumption that "there is no mechanism in the Constitution permitting the separation of any part of the Canadian territory." Harper countered:

While that is very narrowly true, in fact the Constitution does have provisions relating to amendment of various things that would be required in the event of the separation of a province. These are things as elementary as the transfer of the legitimate powers of the federal government to a province which would, generally speaking, require the consent of two-thirds of the provinces representing 50 per cent of the population. In other cases, where it actually involves institutional change, it would require unanimous consent. These clauses are laid out in Part V, sections 38 through 49, of the *Constitution Act, 1982*.

Harper's analysis was entirely consistent with what the Supreme Court of Canada would declare four years later. He then pursued with his question:

My question to the government [put on Monday, October 17] was merely that it affirm that it is the position of the Government of Canada that the constitutional status of a province could only be changed legally, and would be done through this amending formula. This would of course not apply simply with a separation scenario but to any constitutional change. I would maintain that it is the duty of the federal government which purports that national unity is its highest priority **to recognize that it does have an obligation to uphold the Constitution.** (Emphasis added)

But the response from the Liberal Government was, as usual, bereft of statesmanship. It was delivered by John English, the Parliamentary Secretary to Minister Masse:

The Minister of Intergovernmental Affairs for whom I am answering believes that the *Constitution Acts* do not provide any rules or procedures for secession of one of the provinces. [...] It seems to us that the premise of the member's question is that we should say: "You cannot leave unless we let you go." That does not seem to be a very helpful approach at this time. Our approach is to argue to Quebecers that the case for secession cannot be sustained. It involves costs and risks that are unnecessary, and that this country is too precious to be destroyed. We want the question to be put fairly and quickly. I do not intend to talk on behalf of the Leader of the Opposition [Lucien Bouchard], but I believe he said this morning in Toronto that he is a democrat and we

are all democrats. Certainly, we in this Chamber are all democrats and a democratic decision is appropriate, and will occur, we hope, promptly, and with a clear question.

This was, once again, a total abdication of the responsibility to defend the constitutional order. “We are all democrats” was offered as justification for not defending the rule of law. Mr. English’s answer seemed to suggest that there was nothing wrong with Parizeau’s proposed procedure, except that he was asking the wrong question. This seemed to legitimate the fundamental procedure, that is the proposal for a unilateral secession, on the sole condition that the question posed be appropriate. So the referendum became simply a debate between two sides and the federalist side proposed to win.

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Though most people in the political class did not grasp it, Jacques Parizeau understood perfectly that the Constitution did not grant him a right to secede unilaterally. He had been persuaded, finally, in September 1995, to change the wording of the referendum question so as to include a reference to an offer of an economic and political “partnership.” But Parizeau himself did not believe that such an offer would be taken up by a spurned and dismembered Canada. He knew that Quebec would have to rely on the recognition of its sovereignty by the international community for its secession to become effective. And that would require persuading the international community that Quebec had a right to secede because the Constitution of Canada was illegitimate, and so, not binding on Quebec.

And so, in the summer of 1995, the premier published an article in the American magazine, *Foreign Policy*, that made precisely the argument that Canada’s Constitution no longer bound Quebec. It was titled: “The Case for a Sovereign Quebec<sup>22</sup>”

More than just a breach of contract, the 1982 Constitution brought about a change in the nature of Canada. It embodied and propelled a strong Canadian national will that now negates the very existence of Quebec as a nation.

...

The Quebec issue has been eating at the heart of Canadian politics for decades. Tremendous amounts of time, energy, and money have been spent and wasted on endless debate that has failed to produce a viable resolution within the Canadian framework. It has been unproductive and irritating. Even the leader of the pro-unity debate in Quebec, Liberal party leader Daniel Johnson, acknowledges that a “sovereigntist fiber” lies in every Quebecer, including himself. And, like almost every Quebecer, he describes himself as a “Quebec nationalist.” Quebec’s quest for independence can be postponed or sidetracked, but at some point it will succeed, if only because a nation cannot endure forever in a country that denies its very existence. The conditions are right for an orderly, democratic transition to sovereignty in the months to come. The “determining factor” indeed is and must be the will of the people of Quebec.

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<sup>22</sup> Jacques Parizeau, “The Case for a Sovereign Quebec,” *Foreign Policy* vol. 99, Summer 1995, p. 6976.

Then, on July 5, 1995, the premier delivered a speech in London, U.K., before the Royal Institute of International Affairs. It was titled, “Modern Québec and its search for sovereignty<sup>23</sup>.” and it was even more explicit in its denunciation of the 1982 *Constitution Act* as illegitimate. He began by enunciating the familiar myth that Canada was founded as a compact between two peoples.

The British North America Act of 1867 founded the country of Canada as a sort of joint venture and covenant between two different nationalities and cultures seeking to forge a common destiny. Québec was partner to an enterprise that, in effect, reflected Québec’s place as one of two founding nations.

Over the decades, this historic notion of two founding nations began to erode in a number of ways, as the federal government became the “national” government of all of Canada, and as the notion of equality of the provinces took hold outside Quebec. In this view, Québec could not even claim to be a distinct society. In 1980, you will remember, Québécois were asked in a referendum whether or not they wanted to stay in Canada; the majority said they did, but only after all federalist leaders, many in good faith, promised that Canada would be revamped to bring back in a forceful and concrete way, the vanishing duality of the two nations. They were to be disillusioned.

This paragraph contained four obvious falsehoods. Parizeau suggested that Canada became more federally centralized over the decades. In fact, the Canada of 1867 was unquestionably much more federally centralized than the Canada of 1995. But Parizeau’s suggestion went further than complaining about federal decentralization. He was suggesting that Canada was founded as a confederation, but then had illegitimately transformed itself into a federation. He said that “Quebec could not even claim to be a distinct society,” now in this illegitimate federation. In fact, Canada was created as a federation rather than a unitary state precisely in recognition of the fact that Lower Canada was very different from Upper Canada or New Brunswick or Nova Scotia. Quebec alone was recognized as having two official languages and a distinct civil code. To refute Parizeau’s misrepresentation here, one need only quote the Supreme Court of Canada in its 1982 reply to the *reference Re: Objection by Quebec to a Resolution to amend the Constitution*:

In the context of this reference, the word “duality” covers all the circumstances that have contributed to making Quebec a distinct society, since the foundation of Canada and long before, and the range of guarantees that were made to Quebec in 1867, as a province which the Task Force on Canadian Unity has described as “the stronghold of the French-Canadian people” and the “living heart of the French presence in North America”. These circumstances and these guarantees extend far beyond matters of language and culture alone: the protection of the *British North America Act* was extended to all aspects of Quebec society—language, certainly, but also the society’s

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<sup>23</sup> Jacques Parizeau, “Modern Québec and its search for sovereignty.” Royal Institute of International Affairs, Chatham House, London, July 5, 1995.

values, its law, religion, education, territory, natural resources, government and the sovereignty of its legislative assembly over everything which was at the time of a “local” nature.

The third falsehood was that the question posed in the 1980 referendum was: “Do you or do you not want to stay in Canada?” In fact, as noted earlier, the 1980 question asked whether the people of Quebec wanted the Quebec government to begin negotiations on establishing “sovereignty-association.” Whether they wanted or not to remain in Canada would be the subject of a second referendum, if the first brought a Canada-Quebec agreement on sovereignty-association. But that second referendum never did occur.

Fourthly, Pierre Trudeau, who led the successful campaign for constitutional change as prime minister from 1967 to 1982, certainly would never have promised to bring back “two nations.” He always opposed that concept, offering instead “one Canada with two official languages.”

Parizeau continued:

Two years later, the Constitution of Canada was changed, further reducing the powers of Québec. Québec’s right of veto on further constitutional changes was removed and this entirely eliminated the two nations’ concept. Even the Canadian Supreme Court ruled that such unprecedented action would breach the basic procedural conventions of federalism as enshrined in the 1867 act whereby any fundamental amendment to the Constitution required the consent of the provincial legislature affected.

Premier Parizeau again larded one paragraph with several misrepresentations. Parizeau here claimed that Quebec had had a veto on constitutional change but had been deprived of it in 1982. But the Supreme Court of Canada was very sceptical about the claim that a power of veto had ever existed before 1982, as was cited above.

Then Parizeau was dishonest when he said that “Even the Canadian Supreme Court ruled that such unprecedented action would breach the basic procedural conventions of federalism as enshrined in the 1867 act whereby any fundamental amendment to the Constitution required the consent of the provincial legislature affected.” Parizeau did not give any reference for that statement attributed to the Supreme Court. But he was obviously referring to the court ruling in September 1981, that to request the British Parliament to patriate Canada’s Constitution when the federal request was supported by only two provinces would not be illegal, but it would violate a constitutional convention. To enact such a fundamental change would require a consensus of the provinces, the court held.

But that is exactly what Trudeau then obtained the following month, in November 1981. Nine premiers then supported Trudeau’s constitutional venture. He had complied totally with the standard set by the Supreme Court. To imply, as Parizeau did here, that Trudeau’s action, and therefore the *Constitution Act, 1982* was rebuked by the Supreme Court was a shameful

misrepresentation. On the contrary, the Supreme Court declared, as quoted above: “The *Constitution Act, 1982* is now in force. Its legality is neither challenged nor assailable.”

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Jacques Parizeau was not the only one concerned about the legality of secession. In December 1994, a legal opinion was prepared that was then submitted to Prime Minister Chrétien’s own ministry, the Privy Council Office. It was titled, “Quebec Separation: Legal Issues.”

Though the document was not made public, I managed to obtain a copy and published an analysis of it in the *Montreal Gazette* on October 20, 1995, just 10 days before the referendum. Given Chrétien’s constant reluctance during the referendum campaign to face the issue of constitutionality, the legal opinion obtained by his own Privy Council offered some interesting insights and particularly the following:

Most experts agree that, whatever may be the scope of the right to self-determination, it would not provide a legal basis for Quebec secession. Under both international law and Canadian constitutional law, it appears that Quebec does not have the legal right to secede.

How is that Canadians, and the Québécois in particular, never once heard the Prime Minister express that clear opinion before the referendum vote? The legal opinion cited various international-law experts, the 1966 *United Nations Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights*, and the 1970 *UN Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Between States*, all in support of the conclusion that Quebec could not claim the right to secede under international law.

As for the legality of secession under Canadian law, the document offered this conclusion:

Were Quebec authorities to try to claim the secession attempt had legal effects, the courts would likely rule the action unconstitutional because it would be, in effect, a unilateral amendment of Canada’s Constitution.

Again, Chrétien should have been constantly reiterating this notable conclusion, shortly before the actual referendum on secession.

The document went on to consider what would happen if the Quebec government did attempt secession without first obtaining an amendment to the Constitution of Canada.

Were Quebec authorities to attempt to claim that Quebec’s secession had legal effects, the courts would likely pronounce the action unconstitutional, since it would be, in effect, an attempt to amend the Constitution without using the amending formula.

If Quebec tried to secede unilaterally, the brief pointed out, Canada could use political and diplomatic measures “to oppose recognition of a Quebec UDI [Unilateral Declaration of Independence] by other states.” Canada’s opposition to illegal secession would then be likely to prevail with other countries: “For example, Canada and other states declined to recognize Biafra, which broke away from Nigeria in 1967.”

Within Canada, several possible strategies were evoked in the document, to counter illegal actions in the context of an attempted secession:

There are three legal recourses potentially available to the federal government to respond to measures – outside the Constitution – that Quebec might take leading up to a unilateral declaration of independence. These steps include:

- Challenging in court, actions of the Quebec government.
- Federal legislation - based on the “peace, order and good government” powers – to intervene in areas normally under provincial jurisdiction.
- “Disallowance” or striking down by the federal government of offending provincial legislation.

The document examined some of the alternatives, including challenging the actions of the Quebec government in Quebec Superior Courts and the Supreme Court of Canada. Then, there were the immense residual powers given the federal government by the Constitution.

The use of the peace, order and good government provisions would be unprecedented in circumstances of constitutional disregard by Quebec. It would be also the most drastic legal recourse Parliament could take. Consequently, it probably would be justified only to meet a wholesale invasion of federal competence, or where it was clear that the Quebec government was openly defying Parliament’s less drastic measures.

The power of disallowance had not been used since 1943, but it could be invoked now, if required.

Today, the only appropriate situation for the exercise of the disallowance power would appear to be where the interests of the country generally are affected. In a national-unity situation, “disallowance” could only be used by the federal government if, in proceeding outside the Constitution of Canada, Quebec was enacting legislation.

This document provided an arsenal of measures that the Prime Minister could threaten or implement, in the face of an attempt to secede unilaterally. It concurred with the legal opinion provided by the five international law experts consulted by the Quebec government, while going one step further by exploring the legal expedients available under Canadian law. Unfortunately, the Prime Minister of Canada ignored the advice coming from his public service. He preferred to rely on his own judgment and strategy.

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## SETTING THE STAGE

Jean Chrétien's abdication of his responsibility as Prime Minister to assert and defend the constitutional order was the second of three factors that would define the 1995 referendum. The first, of course, was Jacques Parizeau's patrician determination to achieve the secession of Quebec from Canada unilaterally, and its rebirth as an independent country. Parizeau was a true revolutionary, ready to pay any price to achieve his dream.

The third factor was the charismatic personality of Lucien Bouchard. The combination of these three factors turned the referendum into an essentially theatrical performance. The central postulate was a make-believe: that Quebec could secede freely without the consent of the rest of Canada.

The stage was set by two events. First, in April 1995, at the convention of the Bloc Québécois, with Jacques Parizeau attending in the front row, Lucien Bouchard delivered a rousing speech in which he called for a *virage*, a change of course, as the PQ government prepared to set the date for the referendum. Parizeau had proposed a referendum in the spring, to cap the conclusion of the many commissions and the proposals each submitted to be in the preamble of the declaration of sovereignty. But the expected surge of separatist fervour had not materialized, and the opinion polls showed the separatist proposal headed for a defeat. Lucien Bouchard had raised the possibility of postponing the referendum indefinitely. Bernard Landry warned that he did not want to march into the valley of death like the Light Brigade. So Parizeau had been persuaded to put off the referendum until the fall.

Part of his problem was that Parizeau was a Premier without the common touch. When he addressed crowds, he came across as smug and self-satisfied, like the caricature of a British banker. He communicated no passion. He spoke of sovereignty, he even used the forbidden word, "*indépendance*." But though the offer of a free trade agreement with Canada was part of the official party program, Parizeau had mostly kept silent about it. As he later admitted, he did not believe it possible in the aftermath of a breakup of the country.

So Bouchard, on that Friday evening of April 7, spoke passionately about a "new partnership" with Canada. He evoked "common institutions, and even institutions that are political in nature" between the future independent Quebec and a truncated Canada. He mentioned four such institutions: a "community council" made up of ministers of the two countries; a secretariat to carry out the orders of the community council; a court of justice to settle trade disputes and to interpret the treaty between the two countries; and, finally, a "parliamentary conference" bringing together members of the two parliaments to discuss common interests. The hall came alive. Parizeau frowned. Over the next several days, Quebec's news media were abuzz with talk of the new "*virage*." For some observers, it seemed that Bouchard, leader of the auxiliary sovereigntist party in Ottawa, was staging a coup for the leadership of the entire

separatist movement. *Le Soleil* of Quebec City splashed across the top of its front page: “A turn toward sovereignty-association. Bouchard calls for a return to the (PQ’s) origins.”

In his *virage* speech, Bouchard justified Quebec’s need for independence by claiming that “we” are a “people” - the word “people” recurred some 27 times, while other synonyms, such as “nation,” also provided the subtext of his ringing nationalistic appeal.

In a word, [sovereignty] is necessary because we are a people, we have always felt and behaved as one, we live on a territory where our ancestors settled almost 400 years ago, we are among the most prosperous nations in the world, we have a culture that is distinctly ours and we have, as official language, French, sacred heritage of the struggles, the fidelity and the courage of 12 generations.

To achieve his nationalist goal, what Bouchard was suggesting was that the attention be turned away from secession to concentrate on the offer of a partnership with Canada.

The second event that set the stage for the referendum was a formal meeting on June 12 at which three party leaders, Parizeau, Bouchard and Mario Dumont, signed an agreement according to which the referendum question would not just bear on sovereignty, but also on a formal economic and political partnership with Canada, post-independence. This was a great concession for Parizeau. When, earlier, Lucien Bouchard had proposed that the referendum propose a partnership and be followed by a second referendum to ratify the deal, Parizeau had rejected the proposal. Now, Parizeau compromised: a partnership would be offered, but it would not be a condition for achieving sovereignty, as it had been in the 1980 referendum. So everything seemed in place now to launch the referendum.

Then, suddenly there appeared a *deus ex machina*. When Chrétien wouldn’t defend the constitutional order, an unlikely private citizen stepped forward and went to Quebec Superior Court to have Parizeau’s venture declared unconstitutional and to have it halted. Guy Bertrand was a lawyer in Quebec City who had previously been a separatist in a hurry. Back in 1971, when I had just been posted to the Montreal Bureau of the *Globe and Mail*, I interviewed him as leader of a group of separatists who were trying to set up a “Bloc Québécois.” Yes, that was the name they chose, and their objective was exactly the same as what Lucien Bouchard would achieve 23 years later: to replace federalist members of Parliament by members committed to Quebec only. The enterprise came to nothing in 1971, but it succeeded in 1991 after Brian Mulroney and Robert Bourassa together had created the right conditions.

Guy Bertrand had been a firebrand of the separatist movement, impatient to bring about Quebec’s secession as soon as possible and pushing his convictions to their logical conclusions, sometimes in opposition to Lévesque’s more confederalist views. In 1985, when René Lévesque was forced to resign, Bertrand had run for the leadership of the Parti Québécois, but it was won by Pierre Marc Johnson.

In late December 1994, I received a surprising phone call: Bertrand invited me to visit him in Quebec City the next day, which was New Year's Eve. He had something important to tell me. I flew to Quebec City and there, Guy Bertrand confided to me that, after long reflection, he had come to the conclusion that separatism was a dead-end and that what Parizeau now proposed was a violation of the constitutional order. He told me that he would now be fighting against separation. I was astounded.

It was this same Guy Bertrand who, seven months later, shocked the country when, in the summer of 1995, he launched a court action against Parizeau's plan for unilateral secession. He sought to have Parizeau's referendum declared unconstitutional and requested an injunction to put a halt to the referendum process.

Bertrand based his case on Section 24(1) of the Canadian Charter of Rights and Freedoms: "Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances."

In his brief to the court, Bertrand, "the petitioner," argued that the court had the responsibility to protect the rights of the citizen against abuse: "The *Canadian Charter of Rights and Freedoms* grants to the petitioner and to the public in general the right to demand that the government of Quebec govern itself in accordance with the rule of law." Bertrand argued that the Quebec government intended to violate the rule of law by introducing a bill on Quebec's sovereignty, and by the tripartite agreement reached in June by Premier Parizeau, Lucien Bouchard and Mario Dumont.

In brief, the petitioner intends to demonstrate that the conduct of the government of Quebec, as well as its actions with respect to the draft bill on sovereignty and the agreement of June 12, 1995, constitute a true parliamentary and constitutional coup d'état, a fraud toward the Canadian Constitution and a misuse of power, the consequences of which will be to violate and deny the rights and freedoms of the petitioner and those of all Quebec taxpayers.

Before going to court, Bertrand had written on July 31 to Parizeau, asking him to abandon his project leading to a referendum, or, alternatively, to ask the Quebec Court of Appeal for a judgment on its legality. Parizeau scoffed. Bertrand also wrote to Prime Minister Chrétien and to Justice Minister Allan Rock, "asking them if they intended to obtain the advice of the Supreme Court of Canada by a reference on the draft bill on sovereignty." Rock, in his answer, sidestepped the legal issue and, in effect, condoned the validity of the referendum.

We think at the present time that the real question is not how separation could eventually come about but whether Quebecers still want to be part of Canada. We firmly believe that, if the question is put clearly and unequivocally to Quebecers, they will always choose to remain part of our country.

Jean Chrétien replied to Guy Bertrand on August 14, 1995, and the tenor was the same. He, also, refused to defend the constitutional order. The Prime Minister wrote:

La présente fait suite à votre lettre du 31 juillet dernier dans laquelle vous soulignez que le processus référendaire du gouvernement du Parti Québécois et l'avant-projet de loi sur la souveraineté visant la séparation du Québec sont inconstitutionnels.

Dans votre lettre, vous me demandez si le gouvernement compte inviter la Cour suprême du Canada à déterminer si l'avant-projet de loi déposé devant l'Assemblée nationale du Québec, *Loi sur la souveraineté du Québec*, entre dans le champ de compétence provincial aux termes de la Constitution canadienne. Vous avez aussi demandé aux autorités québécoises de saisir la Cour d'appel du Québec de l'avant-projet de loi afin de faire trancher cette même question.

Je considère que la question centrale est la volonté des Québécois de faire partie du Canada. J'ai la ferme conviction que la meilleure stratégie face aux tenants de la séparation du Québec est d'insister qu'ils fassent la démonstration que la séparation est dans les meilleurs intérêts des Québécois et d'exiger qu'ils posent une question sans équivoque.

Je crois comprendre les motifs pour lesquels vous voulez contester la légalité de l'avant-projet de loi. Je ne crois cependant pas, à l'heure actuelle, que le gouvernement du Canada ferait bien d'agir dans le sens que vous lui conseillez.

Chrétien, to justify his refusal to take part in a court action, invoked "la meilleure stratégie." He was unable to comprehend that he was endangering the long-term peace and unity of the country by refusing to challenge Parizeau on constitutional grounds.

In opposing Bertrand's petition, Premier Parizeau's lawyers argued that the referendum was a political issue, not a legal issue, and that the court had therefore no jurisdiction over the issue of secession. They asked the court to dismiss Bertrand's action. When Justice Lesage refused to do so, Premier Parizeau called his cabinet into emergency session and then ordered his lawyers to withdraw from the hearing. It was Parizeau's way to deny legitimacy to the court action.

On September 6, Premier Parizeau reacted to Justice Lesage's decision that Bertrand's petition was justiciable with a statement that repudiated the authority of the Constitution over his referendum. He did not consider the judge's decision as binding on his government:

Nous, peuple du Québec, déclarons que nous sommes libres de choisir notre avenir. Nous avons été trompés en 1982, quand les gouvernements du Canada et des provinces anglophones ont modifié la Constitution en profondeur et à notre détriment. En 1990, l'échec de l'accord du lac Meech a révélé le refus de reconnaître jusqu'à notre caractère distinct. Parce que nous avons perduré en dépit des tractations et des marchandages

dont nous avons été l'objet, nous, peuple du Québec, par la voix de notre Assemblée nationale, proclamons ce qui suit: « Le Québec est un pays souverain. »<sup>24</sup>

Then, the next day, September 7, Parizeau unveiled what would now be the question put in the referendum:

Acceptez-vous que le Québec devienne un pays souverain, après avoir offert formellement au Canada un nouveau partenariat économique et politique, dans le cadre du projet de loi sur l'avenir du Québec, et de l'entente signée le 12 juin 1995, oui ou non?

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

This was no longer the simple, clear question that he had promised the year before: "Do you want Quebec to become a sovereign country as of such a date?" It was also more complicated than what he had proposed in December 1994: "Are you in favour of the law adopted by the National Assembly declaring Quebec's sovereignty?" But this was the way of politics in Quebec in 1995. Winning a majority in the referendum was the primary objective, at any cost.

The question had two fundamental problems. It was too complicated, with too many elements, so it was confusing. And it was very biased.

Switzerland is the very mother country of referendums and of people's initiatives. The Swiss have held as many referendums as all the rest of the world combined. So it is worth looking at one Swiss experience with an initiative launched in 1992.

The initiative is one of the means recognized in the Swiss federal Constitution for amending the Constitution. Article 121 of that Constitution says, in part: "The popular initiative consists of a request, presented by a hundred thousand Swiss citizens entitled to vote, aiming at the introduction, setting aside or modification of specified articles of the federal Constitution." So, in 1992, more than 100,000 signatures were gathered and presented to trigger a popular initiative "for fewer military expenditures and more peace policy." The proposal was to cut military expenditures by half, and devote the money saved to social expenditures and the promotion of peace.

In the event, though, it never came to a vote. The initiative was disallowed for an interesting reason: it was ruled that it did not deal with a single matter, as the law required, but rather with two. Cutting military expenditures, and allocating the savings to peaceful pursuits, should have been the subject of two separate initiatives, each with the required 100,000 signatures.

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<sup>24</sup> <http://ici.radio-canada.ca/nouvelles/dossiers/pointDeRupture/1995-09.shtml>

The Swiss, with their vast experience of consulting the people, insist that a referendum deal with one clear question at a time. If a question has several disparate elements, the answer does not lend itself to a simple yes or no, and the result is confused.

Under Quebec's referendum law, there was no protection against a question with disparate elements, no shield against a trick question, a misleading question, a demagogic question. Think of the long-winded question in Quebec's 1980 referendum: 109 words. The 1995 question had 43 words. The more words, the greater the confusion.

The 1995 referendum question contained at least two disparate elements: "Do you agree that Québec should become sovereign," and "after having made a formal offer to Canada for a new economic and political partnership..." In addition, the question was biased. The wording stressed "partnership" and "agreement," two loaded words, rather than secession or independence. The question didn't explain that the June 12 "agreement" was between three separatist leaders, not between Quebec and Ottawa. And, as in 1980, it raised the prospect of an "economic and political partnership" with the rest of Canada – but the scope, the terms, even the possibility of such a partnership were left hypothetical. Call it bait and switch.

Polls have shown that the complexity of the question had led to misunderstanding, with many Quebecers believing that there would be no sovereignty unless a partnership had been negotiated, and others believing that the "agreement signed on June 12, 1995" to which the question referred, was a deal struck between Quebec and Canada, rather than an agreement between three political leaders. Then, any reference to an "accord," an "agreement," words found in both the 1980 and the 1995 referendum questions, projected a bias in favour of Yes.

In contrast, the issue in Scotland's 2012 referendum was made clear: independence. Equally clear was the referendum question, just 10 words long: "Do you agree that Scotland should be an independent country?"

Scotland's referendum was held under terms and conditions that were entirely negotiated between the two governments<sup>25</sup>. Their agreement of October 15, 2012 covered nine pages of text detailing what could, could not and must be done, before, during and after the referendum campaign. Here are a few of those requirements.

Regarding the Question:

5. Both governments agree that the referendum question must be fair, easy to understand and capable of producing a result that is accepted and commands confidence.
6. The Order enables the Scottish Parliament to legislate for a referendum with one question on independence. The wording of the question will be for the Scottish Parliament to determine and will be set out in the Referendum Bill to be introduced by

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<sup>25</sup> AGREEMENT between the United Kingdom Government and the Scottish Government on a referendum on independence for Scotland. Edinburgh, 15 October 2012.

the Scottish Government, **subject to the Electoral Commission’s review process, as set out in the paragraphs which follow.** (Emphasis added)

7. For the referendums delivered by an Act of the UK Parliament, section 104 of the *Political Parties, Elections and Referendums Act* requires the Electoral Commission to review the proposed question and any statement that precedes the question and to report to the UK Parliament on the intelligibility of that question. Section 10 of PPERA also provides that the Electoral Commission can provide advice and assistance to the Scottish Parliament and Scottish government.

8. Consistent with the provisions in PPERA, the Scottish Government will refer the proposed referendum question and any preceding statement to the Electoral Commission for review of its intelligibility.

In the event, the initial question proposed by the Scottish government was found biased by the Electoral Commission, which proposed a simpler alternative. That is the question that was actually put in the referendum.

There is another section of the Scottish agreement that deserves noting for its contrast with the referendums held in Quebec:

#### **Referendum campaign regulation**

16. Both governments agree on the importance of ensuring that the referendum campaign is subject to regulation that ensures that the referendum is fair and commands the confidence of both sides of the debate. The *Referendum Bill* introduced into the Scottish Parliament by the Scottish Government will include provision for the referendum rules.

There followed several sections dealing with such topics as “Referendum campaign broadcasts,” “Ensuring impartiality of broadcasters,” “Free-of-charge mail-shot,” “Campaign finance,” and “Government activity during the 28 days before the referendum.” The contrast with the extremely biased conduct of the 1995 referendum by the government of Quebec is flagrant.

But the most fundamental difference of all is that Scotland’s referendum was held under the rule of law. Quebec’s referendum campaign was conducted after a Quebec Superior Court justice had found the process proposed by Parizeau to be unconstitutional.

On September 8, 1995, Mr. Justice Lesage delivered his declaratory judgment. He did not issue an injunction against holding the referendum as Bertrand requested because, as he explained, all the parties involved apparently wanted it to proceed.

Le tribunal est informé judiciairement que ni l'Opposition officielle au Québec, ni le gouvernement fédéral n'entend faire obstacle à la tenue du référendum. Il faut comprendre que la population désire s'exprimer. Émettre une injonction contre la tenue du référendum risquerait de créer un tort plus grave que celui que l'on veut prévenir.

But he did deliver a ringing condemnation of the proposed referendum: *Draft Bill 1*, he declared “constitutes a grave threat to the rights and freedoms guaranteed by the Canadian Charter of Rights and Freedoms” and is “manifestly illegal.”

Le tribunal ne peut cautionner une violation de l'ordre constitutionnel. Les événements qui ont été enclenchés par le gouvernement du Québec peuvent amener une telle violation. Il ne s'agit pas d'une pure spéculation. Le gouvernement met des moyens énormes en œuvre pour y arriver. Il cherche à renverser l'ordre constitutionnel en utilisant son pouvoir politique et les deniers publics. Le demandeur s'oppose à cette démarche. La tension que lui et d'autres citoyens vivent ne peut que s'aggraver de jour en jour. La menace est sérieuse. Il en va de l'ordre public. Le préjudice est irréparable.

Dans un tel scénario, la stabilité de l'ordre juridique est compromise. La prépondérance des inconvénients commande indiscutablement, dans l'intérêt public, de prescrire dès à présent un redressement d'une portée pratique et efficace.

Les privilèges parlementaires ne peuvent placer l'Assemblée nationale au-dessus de la Constitution du Canada. Les députés peuvent discuter de n'importe quel sujet et adopter n'importe quelle mesure, même invalide et illégale, mais il y a une limite: ils ne peuvent attaquer la Constitution d'où ils tirent leurs pouvoirs. Les tribunaux doivent, dans leurs interventions, dénoncer une mesure anticonstitutionnelle.

The next day, Parizeau commented: “We are not going to subject the right to vote of Quebecers to a decision of the court. That would be contrary to our democratic system.”

The Parizeau government never appealed that damning judgment. Instead, it made some modifications to the bill authorizing the referendum. But, above all, it denounced the Constitution of Canada. Quebec's Justice Minister Paul Bégin issued a statement: “We do not feel bound by the 1982 Constitution.”

On September 10, Radio-Canada television broadcast an interesting exchange between Premier Parizeau and interviewer Jean-François Lépine:

*LÉPINE*: Est-ce que ça veut dire que, pour l'instant, vous partagez ce que dit votre ministre de la Justice, M. Bégin, quand il dit, “On ne se sent pas lié à la Constitution de '82 ”?

*PARIZEAU*: On ne l'a jamais signée. La Constitution de 1982, que le juge, là, nous reproche, je ne sais pas, de ne pas suivre dans toutes ses dispositions, cette Charte-là a été refusée par René Lévesque; ensuite elle a été refusée par Pierre Marc Johnson, comme premier ministre; elle a été refusée par Robert Bourassa; elle a été refusée par Daniel Johnson; elle est refusée par moi.

*LÉPINE*: Mais, on l'a respectée, avec la clause nonobstant et tout ça, qu'on a renouvelée...

PARIZEAU: Non, mais c'est qu'on n'avait pas le choix sur certaines dispositions, mais vous comprendrez qu'aujourd'hui, invoquer cette Constitution pour nous dire, « et pourquoi ne l'acceptez-vous pas? » Ben, on va dire: « Écoutez, on l'a jamais acceptée, on l'a jamais signée. »

Public opinion had been so corrupted by years of uncontested nationalist misrepresentation and weak federalist response that editorial writers, commenting on that clear declaratory judgment, either distorted it or dismissed its significance. Veteran political journalist Gilles Lesage, in an editorial in *Le Devoir* on September 11, 1995, presented the judgment as meaning the exact opposite of what Justice Lesage had said:

La démarche est légitime... Le magistrat reconnaît que le litige soumis par M<sup>e</sup> Bertrand ne peut être tranché, ultimement, que par le peuple, et lui seul. C'est le tribunal du peuple qui doit décider en bout de ligne, dit-il en substance, et aucun jugement de cour ne peut aller à l'encontre de la volonté populaire... La volonté populaire doit être souveraine.

This was an absolutely dumbfounding misrepresentation by a reputable senior journalist. The next day Alain Dubuc, then editorial page editor at *La Presse*, gave a less erroneous but similarly dismissive view of what the judge had said. He called the issue of legality “une considération technique.” It was of little significance, he argued, and he invoked the silence of the federalist lambs.

Les forces fédéralistes s'entendent en effet avec les souverainistes pour reconnaître la valeur démocratique de l'exercice référendaire et souhaiter que l'avenir du Québec repose sur le choix du peuple plutôt que sur des considérations techniques. La principale contribution de ce jugement est d'illustrer les limites du droit et de rappeler que l'approche constitutionnelle a la fâcheuse tendance à ne nous mener nulle part. Ce sont des coups de toge dans l'eau.

Dubuc invoked the consent of “the federalist forces” to the proposition that they “hoped that the future of Quebec should be decided by the people rather than by technical considerations.” This testified to the misunderstanding of the constitutional order that Jean Chrétien was conveying to all Canadians.

*Journal de Montreal* columnist Michel C. Auger said the judge's remark could provoke a backlash among Quebecers “who believe, correctly, they have no lessons to learn in this regard.” At *Le Soleil*, editorial page editor Jean-Jacques Samson assailed Justice Minister Paul Bégin's statement that he was untroubled by the ruling as “an invitation to (lawyer Guy) Bertrand, and to other citizens or groups, to pursue judicial guerrilla tactics. It is provocation.”

The statements by Justice Lesage should have been trumpeted by the federal government to educate at last public opinion on the real legal requirements of a secession. A formal press conference should have been held, with the Prime Minister and his Minister of Justice

explaining in detail what the judge had said, and what light this shed on Parizeau's unconstitutional undertaking. But the federal reaction was silence.

On September 12, four days after the decision, Minister Lucienne Robillard made the first comment by a federal cabinet minister. Chrétien had named her, a former cabinet minister in the Bourassa government, to be the lead minister representing the federal government within the umbrella No Committee set up under Quebec's Referendum Act to wage the campaign against the Yes committee.

As Robillard was about to enter a cabinet meeting, she was asked by a reporter for a comment on the Lesage decision. In effect she repudiated it. The journalist then asked: "Are you saying the federal government must accept the outcome of the referendum, no matter what?" She replied: "Nous avons toujours dit que les Québécois avaient le droit de se prononcer par vote sur leur avenir – à l'intérieur ou à l'extérieur du Canada. Et nous sommes dans un pays démocratique, donc nous respecterons le vote."

Chrétien himself, when asked subsequently to comment on Lesage's finding, dismissed its significance. He assured reporters that the No side would win and that questions about recognizing a Yes victory were purely hypothetical. "Don't waste your time with the if, if and if," he responded. Allen Rock, the Justice Minister, also evaded responding to the court decision on the same grounds.

The silence of the Prime Minister and of his Minister of Justice on the Lesage decision confirmed to the public that the federal leaders either accepted the legitimacy of the referendum process or simply would not contest its legitimacy. Quebec's Justice Minister Paul Bégin commented: "Remember that Mr. Rock said a few months ago that legality was one thing, but what counted is the votes. That's much more respectful of the process in which we are involved."

And so the stage was set for a make-believe referendum on unilateral secession that a judge had just found unconstitutional, that five international law experts had already established as unfounded in law and that would necessarily be confronted eventually with the *Constitution Act*, according to which the courts would certainly declare it unconstitutional.

This referendum, then, was pure theatre. Appropriately, the Grand Théâtre de Québec was the site on September 6 for a formal recitation from the stage of the "Préambule" to le *Projet de loi sur l'avenir du Québec*. The performance was by singer-songwriter-poet Gilles Vigneault, and actress-playwright Marie Laberge. They declaimed solemnly:

*Voici venu le temps de la moisson dans les champs de l'histoire. Il est enfin venu le temps de récolter ce que semaient pour nous quatre cents ans de femmes et d'hommes et de courage, enracinés au sol et dedans retournés.*

*Voici que naît pour nous, ancêtres de demain, le temps de préparer pour notre descendance des moissons dignes des travaux du passé.*

*Que nos travaux leur ressemblent et nous rassemblent enfin.*

The very lengthy lyrical preamble ended, many paragraphs later, with a triumphant declaration: **« Nous peuple du Québec, par la voix de notre Assemblée nationale, proclamons: Le Québec est un pays souverain. »**

But this was pure populist theatre. The future – the history of Quebec that was in the making – could never be that simple, given the sentence of unconstitutionality hanging like a guillotine over the entire performance. The legal framework could not be wished away by reciting touching poetry.

The performance at the Grand Théâtre got mixed reviews. The standing-room-only audience of specially invited guests gave it a standing ovation, and it brought tears to the eyes of an emotional Jacques Parizeau. But, the next day, in the newspapers and on the air, most comments were unfavourable. Some found the performance long, bucolic, old-fashioned.

The show moved on Thursday, September 9 to the National Assembly. Premier Parizeau, with presidential solemnity, declaimed the “explanatory notes” accompanying the bill which, according to the script, was to turn Quebec into an independent country.

There was much make-believe in Parizeau’s soliloquy. “The bill authorizes the National Assembly [...] to proclaim the sovereignty of Québec and to give effect to the Declaration of Sovereignty appearing in the Preamble.” Parizeau and Opposition Leader Daniel Johnson jostled as though this exercise were for real. For Johnson, the most important objection was that the proposed referendum question, also unveiled that Thursday, did not contain the word “country” after the word “sovereign” in the question that began: “Do you agree that Quebec should become sovereign after having made a formal offer to Canada for a new economic and political partnership...”

The bill contained several fictions; the most notable was that of the “economic and political partnership” to be offered Canada after the breakup. Taking it seriously, the bill offered a second fiction as a mirage for the people who, at that time, depended on the federal government for their living: “The government shall favour the establishment in the Outaouais region of the seat of the institutions created under the partnership treaty.”

The bill was most notable for ignoring the glaring realities that would be created by an attempted secession, including the fact that the National Assembly had no authority to do most of what was being proposed, such as firing the federal government, or eliminating the Supreme Court of Canada from Quebec’s system of justice. There was nothing about dealing with the problems that would certainly arise should two levels of government come to an impasse over the Quebec government’s seeking to impose its exclusive jurisdictions in areas of government that the Constitution assigns to federal authorities – in such matters, for example, as taxation, licensing, communications, air traffic control, and foreign affairs. Then, there was the horrendous problem of dealing with the debt. Parizeau had declared that Québec would not pay down any part of the

debt, but only make payments on the interest for the debt. And, if the federal government did not come quickly to terms with Quebec, Parizeau threatened, even those payments would be withheld.

And no one asked, on that Thursday, what would happen if the yes vote in a referendum ended in the range of 50 to 60 per cent. That could turn into a real nightmare scenario for all Canadians. In their campaign to win public opinion to their cause, the Yes Committee had avoided precise terms like separation, secession or independence. It used the ambiguous word, “*sovereignty*,” when the Province of Quebec was already sovereign within its own spheres of jurisdiction. The publicity campaign, in print and in broadcasts, spoke of “*OUI AU CAMP DU CHANGEMENT*,” and “*OUI ET ÇA DEVIENT POSSIBLE*.” Everything desirable became possible with three magic letters: OUI. So the separatist side was presented primarily as the side of change rather than that of independence.

Here, for example, is one campaign commercial broadcast in October 1995 on several television networks. It pronounced four desirable objectives, shown in writing on the screen, that are then howled down by a chorus of leading federalist figures saying “No.”

“We want a Quebec more open to the world,” is the first message, in French, in letters that grow larger. Then we see Prime Minister Chrétien on screen rasping out – in English, always in English: “No!”

Then Daniel Johnson Jr. appears: “Non!” Then André Ouellet: “Non!” Then Lucienne Robillard: « C’est non, non! »

Second message: “We want a stronger Quebec.” Robillard: “Non!” Chrétien: “Not!” Chrétien again: “No!” Robillard again: “Non!” Preston Manning: “Noooo.” (Manning’s No is played at slow speed).

Third message: “We want a French Quebec.” Again one hears the barked No! from Robillard, Chrétien and Johnson.

Fourth message: “We want a Quebec with full employment.” This time, four rapid shots of Chrétien, each time saying (in English): “No!” Then Robillard, Ouellet and Johnson all appear, each saying “Non!”

Then, without the images, we hear Chrétien: “No!” followed by Johnson and Ouellet saying “Non!” and then Robillard appears: “C’est non, non!”

As a chorus of “No” and “Non” is heard in the background, a calm, authoritative male voice says: “Those who say No today, they will tell us No again tomorrow.” The voice is followed by an explosion of “No, non, non, no.” Then the calm voice: “It’s not with Nos that we will move things forward. It’s by saying Yes!”

Then, on the screen, against a soothing teal background, white letters form: “Oui. . . et ca devient possible.” With a Oui, everything becomes possible. That was the slogan of the campaign, with the initial O formed, first, by a daisy, then by the other usual symbols: a loony, a globe with Quebec delineated, showing a man at work. This was not a campaign for the independence of Quebec but for change – every desirable change imaginable.

For another testimony to the themes of the separatist campaign, I offer my column that appeared in the *Montreal Gazette* on August 22, 1995:

OTTAWA - Friday, I found a postcard in my mailbox in glorious color. On the front, one sees Mario Dumont, Jacques Parizeau and Lucien Bouchard, posing side by side, smiling seated at a table, a Quebec flag behind each, pen in hand, about to sign their June 12 agreement on a referendum strategy.

“*OUI AU CAMP DU CHANGEMENT*” is written across the bottom. Oui, not to independence, not to secession, not even to the ambiguous concept of sovereignty, but OUI to change, OUI to the camp of change. Anyone who wants change must vote Oui.

On the back of the postcard is a message from “*Le Conseil de la souveraineté du Québec*,” the semi-official non-governmental body promoting a YES vote. It focuses on the June 12 agreement signed by the three leaders, the thrust of which is that the referendum question will bear on sovereignty, along with the offer of a new economic and political partnership with the rest of Canada.

Again, the highlighted slogan was the same: “*OUI AU CAMP DU CHANGEMENT*”, and the message to “Madame, monsieur,” ended as it began, with a reference to the June 12 agreement. All were invited to phone an 800 number to get a complete copy of the agreement.

The thrust of the secessionist campaign is such as to leave in doubt the significance of votes eventually cast for a YES: were they votes for secession, or votes for change, and for those who embody change?

The significance of Yes votes will further be tainted by the campaign of disinformation now waged in public opinion by prominent secessionists. Last week, Quebec City lawyer Guy Bertrand went to court to have a Quebec referendum on unilateral secession declared unconstitutional and a violation of his constitutional rights.

To counter his effect on public opinion, six Quebec law professors sent a joint public letter to the news media arguing that, whatever Canadian law held, international law granted Quebec the right to secede. Their opinion, taken up uncritically in all the news media, was an example of misleading argumentation that these professors could offer to their students as a model for shysters.

The professors quoted the legal opinion of five outstanding experts on international law who provided a joint legal judgement to the Quebec government in 1992 on the legality of secession by Quebec. They were unanimous and categorical: “The Quebec people effectively exercises its right to self-determination within the framework of the Canadian whole and is not legally well founded to invoke it to justify a future accession to independence.” But the Quebec professors, ignoring that weighty judgment, quoted an irrelevant passage in the experts’ legal opinion, thus leaving it to be understood that these experts backed their own unfounded argument, exactly contrary to the facts.

What is surprising and distressing is that the political elites, including pundits and editorial writers – the same who backed the Meech Lake and Charlottetown accords – seem to have concluded an elitist pact not to contradict those who so blatantly misinform the public on a matter of such fundamental importance: the legality and legitimacy of secession.

The chief culprit is the man who, as Canada’s attorney-general and minister of justice, has the greatest responsibility to uphold the law and the Constitution: Allan Rock. It was he who said publicly last December: “It’s possible to have a debate on the constitutionality of (Parizeau’s) draft legislation - very interesting for lawyers - but what matters more is the will of Quebecers.”

For the minister of justice to imply that the Constitution is merely of interest to lawyers – and in a matter where a legal vacuum could have portentous consequences for everyone – is properly shocking.

In an essay published in June for the Institute of Research on Public Policy, constitutional law professor José Woehrling quoted Rock to argue that, even though there was no clear right for Quebec to secede under international law, that didn’t matter because Joe Clark, Allan Rock and others have accepted that what counted was a vote in the referendum, not the legality of the matter.

Rock has a duty to all citizens to explain at length what he meant. What would follow a majority Yes vote? Would the Constitution then become irrelevant?

The bill officially launching the referendum campaign was adopted on September 20. The next day, *La Presse* columnist Lysiane Gagnon took Jean Chrétien to task for saying that he would not dismantle the country on the strength of a bare 50 percent plus one Yes vote. Gagnon waxed indignant. “This is a position which brutally contradicts the previous position of the federal government,” she claimed. “In 1980, Prime Minister Trudeau stated flatly that he would never accept to negotiate the “association,” but that he would recognize the victory of the sovereigntist camp.”

There, of course she was dead wrong, as we saw earlier. Trudeau had said he would not negotiate sovereignty-association no matter what the vote count turned out to be. And he certainly would not have accepted a unilateral secession.

But Gagnon went on to defend the 50 per cent plus one threshold as having been set as a precedent. “The recognition of a simple majority, even on so capital an issue, is a principle that has been accepted by the whole political class for the past 15 years, including by all the spokesmen of the federalist camp. It’s not once the referendum campaign is under way that one can arbitrarily change the rules of the game.”

Oh? Everyone accepted 50 per cent plus one? In a CTV interview with Bruce Phillips on Jan. 1 1978, Trudeau said this: “What I am saying basically is that if ever Quebecers **by an overwhelming majority** decide they no longer want to be part of this country, then they’re going to sit down and **negotiate with the rest of the country how they can be kept in...** I do say that somebody will have to sit down and negotiate with them and it won’t be me.” He always said he would resign rather than negotiate sovereignty with Quebec.

Five days earlier, Gagnon had defended in her column Lucienne Robillard’s statement that the federal government would recognize the right of Quebecers to choose by a referendum to be inside or outside of Canada. “By accepting to participate in the NON campaign, the federalists have implicitly recognized the legitimacy of the process,” according to Gagnon.

That was a strange argument. Ottawa could, perhaps, be bound by the results of a referendum in which it had participated fully, that is, if it had declared that it would be bound by the result of the referendum vote, had participated in setting the question and in setting the rules of the campaign, including the percentage of the vote that would be accepted as decisive. That was the model accepted for the Scottish referendum of 2012, but nothing like it characterized the Quebec referendums of 1980 or 1995. If you see someone being raped and you rush out and try to talk the rapist out of it, you have not “implicitly recognized the legitimacy of the process.”

On that same day of September 21, in *Le Devoir*, Publisher Lise Bissonnette also expressed outrage at Chrétien’s suggestion that he would not break up the country on a vote of 50 per cent plus one for sovereignty. Bissonnette claimed that such a stance would provoke an international scandal.

But Bissonnette, before making that outlandish claim, should have consulted the white paper, *La Consultation populaire au Québec*, that the Lévesque government published in August 1977 to announce and explain the forthcoming bill to govern referendums, the *Loi de la Consultation populaire*. The white paper made clear the difference between a consultative plebiscite and a binding referendum. The referendum in Quebec was to be a consultative plebiscite. Here is what the white paper said:

The referendums that will be held under the law that the government has the intention of presenting would have a consultative character. Indeed, under the present

Constitution, it is impossible to confer a direct legislative power to a referendum process, because that would go against the powers and functions that are reserved for the lieutenant-governor.

This means that, to give legal effect to a referendum, it would be necessary to make use of the processes already available to amend laws, whether these be constitutional in nature or ordinary.

A government can always commit itself to accept the results of a referendum. Moreover, **this consultative character of referendums means it would serve no purpose to include in the law special clauses with respect to the majority required or to the required level of participation.** (Emphasis added)

The 1995 referendum was held precisely under the aegis of la *Loi de la consultation populaire*. It set no threshold for victory whatsoever. Bissonnette, like most people in Quebec, was simply ignorant of the real state of the law when it came to discussing secession. Incidentally, article 356 of the Quebec Civil Code states that “a legal person may be dissolved by consent of not less than two-thirds of the votes.” A legal person could be, for example, a corporation or a condominium.

The unreality of the 1995 referendum is demonstrated by a significant fact: neither the Liberals in Quebec nor the Liberals in Ottawa defended the constitutional order; nor did the No Committee, headed by Daniel Johnson Jr. The Quebec Referendum Law was very rigid. To spend money as a group, on one side or the other, one required the permission of the leaders of the Yes or the No Committees.

When the Special Committee for Canadian Unity applied to participate in the campaign within the No Committee, to have the authorization to campaign in defense of the constitutional order, its application was rejected, and therefore it was prevented from campaigning.

The Special Committee for Canadian Unity asked to operate as a distinct entity, with its own budget, within the umbrella No Committee, because its members felt that they had a distinct point of view to express that was different from the views expressed by leaders of the No. They expressed their distinct view in a submission to the No Referendum Committee:

Dress it up as they will, with superstructures or joint, powerless parliaments, separatists' plans for the future amount to a Quebec Unilateral Declaration of Independence, inconsistent with the Constitution of Canada, and therefore illegal, null and void.

The National Assembly can no more declare Quebec a sovereign country than it can ban the practice of certain religions. . .

Separatists say a 50-per-cent + 1 victory in a Quebec-only referendum is enough to break up Canada. During the referendum campaign, the Special Committee will make

clear that you can change a government with a 50-per-cent + 1 majority, but not a country.

The argument of the Special Committee was fully concordant with the decision just rendered by Justice Robert Lesage. But, in the judgment of the No Committee, to say this out loud on the hustings or to publish it in a newspaper was, apparently, politically incorrect. So the application of the Special Committee was turned down.

This meant that the Special Committee was barred from participating in the referendum campaign. A message in the Voter's Manual, that was distributed to every household in Quebec, laid down the rule: "At a referendum, it is by way of a national committee that each option submitted to the electors is represented and that the fund in favor of an option is constituted and used."

So the Special Committee for Canadian Unity had lost its freedom of speech and freedom of association. It then applied to the *Conseil du Referendum*, set up specially under the *Referendum Act* to hear complaints. The case was eventually heard by the three judges of the *Conseil du Référendum*, and the Special Committee won its plea. But by then, it was the last week of the referendum campaign and the Special Committee was able to hold only one public meeting.

As significant as the No Committee's refusal to recognize the Special Committee's freedom of speech was how the news media handled the story. After the Special Committee called a press conference to complain of its exclusion from the campaign, its issue of free speech was treated in the *Montreal Gazette*, not as a news story, but as an amusing "Notebook" item which began: "In the spirit of the classic Mad Magazine feature, Spy vs. Spy, we present Federalist vs. Federalist, starring the Equality Party's Keith Henderson and the gentle, earnest cardiologist Roopnarine Singh."

*Le Devoir* did not report the story at all. *La Presse* ran stories on two consecutive days, both treating the subject seriously. The first story reported that John Parisella, a major spokesman for the No Committee, claimed that the Special Committee was turned down "because the group of Mr. Henderson decided to campaign against the very legitimacy of the referendum, in accordance with the principles put forward by lawyer Guy Bertrand." Parisella then added, according to *La Presse*: "There is an incompatibility in the principles and the positions. It is impossible for us to grant them affiliated status." It should be noted that Justice Lesage had precisely recognized the validity of Guy Bertrand's challenge to the legitimacy of the referendum, and that was now repudiated as an unacceptable proposition by the No Committee.

But the Special Committee for Canadian Unity was not the only significant voice that was marginalized during this campaign. Pierre Trudeau, the most influential federalist personality in Quebec, was never invited to speak publicly during the referendum campaign. That was at the request of Daniel Johnson Jr. That, too, proved that the referendum was a theatrical

performance in which the principal players had no understanding of the logic of liberal democracy, of free speech or of the rule of law.

Early in the campaign, it seemed that 1995 might be a replay of 1980. Polling experts like separatist Pierre Drouilly, professor of sociology at the Université du Québec à Montréal, were warning that secession was headed for certain defeat. That was also the guiding assumption of Jean Chrétien until the final two weeks of the campaign and so he proved himself grossly imprudent and complacent. The combination of his inept performance and the stellar campaigning of Lucien Bouchard soon turned around the respective prospects of the Yes and No options.

On October 7, Bouchard was appointed as “chief negotiator” to represent the Quebec government in the supposedly anticipated negotiations for an “economic and political partnership” with Canada after a winning referendum. Everyone knew that the title was a fiction to cover the embarrassment of Premier Parizeau. Bouchard had campaigned so outstandingly, Parizeau so uninspiringly, that Parizeau was persuaded to let Bouchard take over the leadership of the campaign in his stead. That was Bouchard’s real role now.

Bouchard projected magic with his tongue, his eyes, his hands. His was a passionate personality whose emotional vibrations stirred the crowds, and they turned out in growing numbers at his rallies. He himself evoked the referendum as having magic powers. “A Yes does something magic, in the sense that, with a wave of the wand, it will completely transform the situation,” Bouchard told an adoring crowd on October 15. And now, it was his magic on the platform and on television that worked. People flocked to see him, to speak to him, to touch him. The empty halls filled. The half-hearted volunteers were suddenly inspired. Indeed, the man seemed marked by destiny. It was as though his extraordinary political career was guided by an invisible hand rather than by human calculations.

When, in November 1994, he was being devoured by flesh-eating disease, the whole country had gone into a state of intense compassion, especially in Quebec. He lost a leg but gained a heartfelt adulation, unique, for a while, for a politician in Canada. And now Bouchard drew on that adulation to communicate a tribalistic appeal: it was about *us* versus *them*. It was a call to naked ethnic domination presented as a defence against the threat of losing one’s identity, one’s language, one’s culture. And *les Autres*, the others, *les Anglais*, were presented as those who denied Quebecers’ identity and their very existence as a distinct people. The others had humiliated and isolated Quebec in 1981-82 by the *Constitution Act* and again in 1990 by the rejection of the Meech Lake Accord. It was a powerful message.

Now it was the turn of the No camp to panic. The evening of October 19, just 11 days before the referendum, as Chrétien would recall in his memoirs, “I received a phone call from John Rae, telling me that an overnight poll showed a dramatic reversal of fortune: the Yes forces

were now in the lead, 54 per cent to 46 per cent, and the No side was in free-fall. No one had a clue how to stop it<sup>26</sup>.”

Chrétien had a self-justificatory explanation for the stunning reversal: “The world turned upside down on Saturday, October 7, the day after our rally in Shawinigan, with the surprise appointment of Lucien Bouchard as the ‘chief negotiator’ for the new partnership with Canada that the referendum question was promising to achieve. I could not have done anything to predict or control the bizarre phenomenon that was soon unleashed. Bouchard returned from Ottawa to Quebec like a prophet descending from the mountain to lead his people to the Promised Land.”

Bouchard, after replacing Parizeau as the OUI side’s chief spokesman, left no doubt on October 19 that this was not 1980, when René Lévesque granted a veto to the rest of Canada against sovereignty-association. Campaigning in Rivière-du-Loup, Bouchard declared: “The mandate requested by the government of Mr. Parizeau and by the sovereignists is that **Quebec make itself sovereign and then, on the strength of that sovereignty, that it attempt afterwards to negotiate a partnership agreement**<sup>27</sup>.” (Emphasis added)

That removed any possible doubt: Parizeau’s objective, shared by Lucien Bouchard, was a unilateral declaration of independence, and Bouchard had just confirmed it. But still no appropriate response came from the Prime Minister to fulfill his obligation to defend the constitutional order.

Two days later, while Chrétien was in New York at a session of the United Nations, the news had now turned catastrophic. “I received a call from John Rae, informing me that the Yes lead was holding and we had dropped seven points in a week – a loss of more than a quarter of a million voters<sup>28</sup>.” Now, surely, faced with the likelihood of a victory for the OUI, it was imperative for the Prime Minister to dispel the illusion that was rampant in Quebec, to tell them at last, in plain language, that the federal government would not condone a unilateral declaration of independence. But no such statement was made.

On October 25, with the vote on secession just five days away, Chrétien met his Liberal caucus and he was tearful. “I addressed a very emotional caucus meeting. Some MPs started to cry because they knew of my love for Canada. I too choked up...<sup>29</sup>”

Were the MPs crying for *him*? They, like Chrétien himself, should have been crying for Canada. Or, better still, they should have worked out a plan to disillusion the people about a seamless unilateral separation. But no counter-attack was planned, only another form of surrender.

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<sup>26</sup> Jean Chrétien, *My Years as Prime Minister*, A Ron Graham Book (Toronto: Alfred A. Knopf Canada, 2007), p. 137.

<sup>27</sup> *La Presse*, October 20, 1995.

<sup>28</sup> *My Years as Prime Minister*, p. 138.

<sup>29</sup> *Ibid.*, p.145.

It was then, as the referendum campaign approached its climax, that Chrétien did a pirouette. He now promised, not only to reopen negotiations on the Constitution, which he had until now constantly refused, but he also promised to vest in the Constitution the recognition of Quebec as a distinct society – the very Meech Lake vision of the country that he had opposed when he returned to politics four years earlier. Even as late as October 21, 1995, just nine days before the referendum, he had refused to discuss constitutional change when he was interviewed in New York. But now, faced with disaster through his own complacency and irresponsibility, he scrapped the policy that had won him the Liberal leadership and his position as prime minister.

On Tuesday, October 24, he attended a mass rally for the NO in Verdun, a suburb of Montreal. There he made three promises. “First I would assure Quebecers that their province would have a veto power over any future constitutional changes.” That would require a constitutional amendment to change the amending formulas that had been adopted under Pierre Trudeau in 1982. Second, he promised to recognize Quebec as a “distinct society.” He later explained: “The phrase had become an important symbol for many Quebecers and if it was what they needed to feel more respected and comfortable within Canada, it wasn’t much of a problem for me to offer it to them.<sup>30</sup>” Unlike Trudeau, Chrétien could run for office on one vision and then, in good conscience, shift to the opposite vision: it wasn’t much of a problem for him.

His third promise was to decentralize the federation.

The next afternoon, October 25, Chrétien recorded two television messages to the country, one in French, one in English, to be broadcast that evening. How different this was from Pierre Trudeau’s clear strong message before the 1980 referendum. Then, Trudeau had warned that he would not under any circumstances negotiate sovereignty-association. Now Chrétien spoke words to the Québécois that could have only one meaning. His whole speech presented the choice to be made five days later as between remaining in Canada or separating from Canada. He uttered not the slightest hint that the Constitution did not permit such an unqualified dichotomy and that he had no authority to permit it.

Bien sûr, je m’adresse en particulier à mes compatriotes du Québec, parce qu’ils ont en ce moment l’avenir de notre pays entre leurs mains.

...

Le Canada, notre pays et notre héritage, sont en danger. Briser le Canada ou le bâtir, demeurer Canadiens ou ne plus l’être, rester ou partir, voilà l’enjeu du référendum.

...

Un OUI mène à la destruction irréversible de l’union économique et politique que nous avons actuellement, rien de plus.

...

La dissolution du Canada serait l’échec d’un rêve. Ce serait la fin d’un pays qui fait l’envie du monde entier.

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<sup>30</sup> *Ibid.*, p. 143-144.

...

Pensez-vous vraiment qu'on peut briser des liens d'amitié et de compréhension... qu'on peut briser des liens de confiance réciproque et de respect mutuel sans provoquer d'amertume?

Enfin, avez-vous trouvé une seule bonne raison, une seule pour briser le Canada?

Pensez-vous vraiment que ça vaut la peine de renoncer au pays que nous avons bâti ensemble et que nos ancêtres nous ont légué?

Ce pays représente l'héritage accumulé pour léguer à nos enfants et nos petits-enfants. Sa destruction aurait-elle un sens?

Almost his entire speech projected that dichotomy that had absolutely no basis in reality. There was only one paragraph that dealt with a policy for the future rather than a life or death choice. He repeated the promises made at Verdun:

Et je répète ce soir ce que j'ai dit hier à Verdun : il faut reconnaître que le Québec forme une société distincte de par sa langue, sa culture et ses institutions. Et aucun changement constitutionnel qui affecte les pouvoirs du Québec ne se fera sans le consentement des Québécois.

No prime minister of Canada in the history of this country ever committed such an abysmal dereliction of duty as Chrétien did in that night's address to the Québécois. His failure to grasp what the situation really required remains simply inexplicable and inexcusable.

In 2005, Radio-Canada and the CBC would join forces to produce a two-part, four-hour series reconstructing the 1995 referendum. A book was then published on their findings, titled *Point de rupture* (Breaking Point<sup>31</sup>). It documented the disarray in the federal government during the referendum campaign's final days.

The ministers as a whole were champing at the bit, under orders to keep out of sight and not to intervene, and unaware of any change of strategy on the part of Jean Chrétien and his entourage. According to Allan Rock, who was Minister of Justice at the time: "There were no general discussions after mid-October about formal contingency planning, not that I'm aware of."<sup>32</sup>

A pathetic scene in *Point de rupture* describes Rock holding an emergency meeting with a few ministers and constitutional experts the very day before the referendum vote, to consider what they would do if the Yes side won. Would a majority OUI vote be binding? What majority would

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<sup>31</sup> Mario Cardinal, *Point de rupture Québec/Canada. Le référendum de 1995*. Société Radio-Canada – Bayard Canada Livres, 2005.

<sup>32</sup> *Ibid.*, p. 271.

be persuasive? What would the Constitution require? Rock explained: “These are questions that we had not had to ask ourselves until mid-October, but for which, on October 30, we had no answers.<sup>33</sup>” The reckless improvidence that the Chrétien government had displayed is almost beyond belief.

Chrétien, in his second book of memoirs, transferred to his ministers the responsibility for the lack of preparation, for the absence of any plan to assure the country’s security in what threatened to be the greatest crisis in Canada’s history: “I presumed that the ministers were getting their departments ready to meet any and every eventuality: Paul Martin the financial and budgetary consequences, Allan Rock the legal and judicial possibilities, André Ouellet the diplomatic and treaty implications, and so forth. These weren’t unusual measures – they were routine precautions for any government<sup>34</sup>.” Routine, in the face of secession? Chrétien obfuscated the fact that the situation was, rather than routine, the greatest challenge a country could face short of war. And Chrétien had insisted throughout the campaign that he, alone in the government, should play the lead role. He had even discouraged the intervention of provincial premiers. So he alone should be held responsible for what was to come. As he himself declared, “Keeping Canada united is the single most important responsibility of every national government and every prime minister.” By that standard, Chrétien and his government had failed disgracefully.

On referendum day, October 30, 1995, a confident Premier Parizeau, buoyed by the opinion polls, had recorded a televised message to Quebecers to be broadcast that night in the event of a OUI majority. It left no doubt as to his intentions.

The Québécois people, by its majority vote today, has just declared to the world that it exists. That declaration, serene and democratic, nothing and no one can now erase. A simple and strong decision was taken today: Quebec will become sovereign. Let a place be prepared for Quebec at the table of the nations.

Parizeau then invoked Chrétien’s own words as recognizing the decisiveness of the vote for independence. “Several times during the campaign he [Chrétien] indicated to the Québécois that today’s choice is capital. At Quebec, on October 18, he declared that the referendum – and I quote: ‘is the definitive and irreversible choice of a country.’ Last week, in his address to the nation, he indicated that it constituted ‘a definitive decision without appeal.’” And Parizeau had concluded triumphantly: “We agree with him. And so now we can turn the page, respect the democratic verdict of the people and proceed to the new dialogue that must now begin between Canada and Quebec.”

On October 30, judgment day, Chrétien was saved from disgrace – and Canada from catastrophe – only by the luck of the draw. The vote was split almost equally between the OUI and the NON, with the OUI leading the NON in the count during most of the evening. In the

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<sup>33</sup> *Ibid.*, p.353 and 356.

<sup>34</sup> *My Years as Prime Minister*, p. 131.

end, the NON came back from behind and edged slightly ahead. The final score was 49.4 per cent for the OUI, 50.6 per cent for the NON. The whole country was in shock. And no one knew what to do. This was probably Canada's worst hour.

Jacques Parizeau resigned as Premier the next day, to be replaced within two months by the charismatic Lucien Bouchard. Everyone expected another referendum soon to follow and, next time, the OUI seemed bound to triumph with Lucien Bouchard as premier. On December 25, 1995, *Maclean's* published its year-end poll on the state of the nation and declared the country to be in shock at the outcome of the referendum: "To a degree that is unprecedented in the 12 years that this magazine has been taking its annual year-end sampling of the nation's mood, the 1995 *Maclean's*/CBC News poll finds that Canadians view their country's future with a pessimism that borders on outright despair." Then, on January 15, 1996, Peter C. Newman published in *Maclean's* "A DOOMSDAY SCENARIO FOR CANADA IN 1996." He stated: "The new year began with a wave of insider speculation about how Canada's future would unfold in the next 12 months, and the prevalent predictions left those who heard them feeling a distinct chill in their hunkered-down Canadian souls. ... Many Canadians – particularly in British Columbia and Alberta – have begun to take it for granted that Quebec will decide to go its own way, sometime in the next 18 months."

In fact, as I said above, the whole referendum was unreal theatre and it was only Chrétien's blindness or cowardice that allowed the theatre to turn into a grave threat in the real world. Chrétien was entirely mistaken when he said that he could accept the result of the referendum as decisive. Under the Constitution, the Prime Minister did not and does not have that power. Only an amendment to the Constitution can enable a province to depart the federation, and that decision must be taken collectively by all the partners in the federation. But, like Chrétien, almost all of Quebec's political class failed to understand that Quebec can only separate by obtaining an amendment to the Constitution. The only alternative is revolution, and the Québécois would never knowingly engage in revolution. But would the consciences of the Québécois ever, in future, be enlightened? The past suggested pessimism: the belief that Quebec had an unconditional right to secede was encrusted in Quebec's national consciousness. It had become a matter of faith.



## Chapter II: How the Chrétien Government Bungled the 1996-98 Reference

Scorched by the near-fatal outcome of the 1995 referendum, Prime Minister Jean Chrétien prepared at last for war. He brought into his cabinet that rarity, a prominent academic who was also a federalist. Stéphane Dion was named Minister of Intergovernmental Affairs on January 25, 1996. He had defended the federalist option on Radio-Canada television during the 1995 referendum campaign, debating with Laval University political scientist Guy Laforest. Dion had consistently bested Laforest.

Then, on February 27, 1996, the prime minister opened a new session of Parliament with a Speech from the Throne that carried this promise to the people of Canada:

As long as the prospect of another Quebec referendum exists, the government will exercise its responsibility to ensure that the debate is conducted with all the facts on the table, that the rules of the process are fair, that the consequences are clear, and that Canadians, no matter where they live, will have their say in the future of their country.

This was Jean Chrétien reborn, no longer the man who had claimed to have said: “I’ll let them separate.” Now, that decision was no longer to be taken solely by the Québécois, as had been his suggestion during the 1995 referendum campaign. In future, “Canadians, no matter where they live, will have their say in the future of their country.” But there was still no insistence on the rule of law.

How far would his conversion take him? Much of the answer would lie with his new Minister of Intergovernmental Affairs, Stéphane Dion. A professor of political science at the Université de Montréal, Dion was also a far more prestigious academic than Guy Laforest. He was the son of Léon Dion, the Laval political scientist who was known for his influence on Quebec’s politicians, notably on Robert Bourassa. Indeed, it was Léon Dion, a nationalist even though a federalist, who had suggested to Bourassa the policy of “*le couteau sous la gorge*,” a knife to the throat of Canada, after the failure of the Meech Lake Accord. Accordingly, Bourassa then threatened Canada with secession if it did not meet Quebec’s terms for revamping the Constitution.

Stéphane Dion grew up in a prominent family in Quebec City where politics was a daily preoccupation. Then, in his own right, Dion became illustrious for having obtained at a young age France’s “*doctorat d’État*” in sociology, after studies at the prestigious *Institut d’Études Politiques* in Paris. The doctorate conferred by the state was far more prestigious than the more common “*doctorat d’université*” conferred by a French university. In addition, Dion spent the academic year 1990-91 as a guest scholar at the prestigious Brookings Institution in Washington, D.C. This plugged him into the American tradition of sociology and political science, to complement his experience with the more philosophical, less empiric French tradition.

Earlier, while studying political science for a master's degree at Université Laval, Dion had for a time backed the Parti Québécois's objective of achieving Quebec's sovereignty along with an economic association with the rest of Canada. But, eventually, he came to the conviction that federalism was a better option for the Québécois than secession.

Several months before the 1995 referendum, Stéphane Dion had given a talk at a dinner in Montréal sponsored by the federalist magazine, *Cité libre*. His speech was later published in that magazine. It would cause a commotion when Dion was appointed to the cabinet and his views became the object of scrutiny. Dion had declared:

Secession is a bad idea, notably because it creates an uncertain, explosive situation, likely to exacerbate the tensions between individuals and groups.

A separation declared unilaterally, by a small majority, would certainly cause grave difficulties and disputes. It would have no legal basis, either in Canadian law or international law.

To those who will say that the majority of a people has the right to secede, others will reply that nothing grants one the right to reserve for oneself the title of people or of nation, that if Canada is divisible, Quebec is also, that if a Canadian minority has the right to withdraw from Canada, then a Quebec minority has the right to withdraw from a secession which it does not accept.

The Prime Minister, questioned about Dion's utterances, backed up his new minister. "It's the logical answer," Mr. Chrétien said. "If Canada is divisible, Quebec is divisible."

Stéphane Dion was not the first to question the assumption that a seceding Quebec would retain its current boundaries. Marc Lalonde was a senior minister in the government of Pierre Trudeau in the 1970s. During the 1995 referendum campaign, he had spoken at a *Cité libre* dinner on October 18, less than two weeks before the referendum:

The notion that what would remain of Canada, without Quebec, could continue to operate, cut in two, with the Atlantic provinces on one side, the rest of Canada on the other side of an independent Quebec between the two, is not an easy concept to draft nor to implement.

I know that many Quebec politicians have said that Quebec is indivisible. That is true for a Quebec within the Canadian Confederation because, under the constitution, one cannot change the boundaries of the provinces without their consent. But, from the moment when you leave constitutionality behind by a unilateral declaration of independence, you are in a free-for-all.

If Canada is divisible, how can anyone maintain that Quebec is indivisible, after we have placed ourselves in a situation where the debate is no longer legal in nature? It is mere logic that if one is divisible, the other is also.

Moreover, Lalonde's leader, Pierre Trudeau had said memorably more than once during the 1980 referendum campaign: "If Canada is divisible, Quebec is divisible." But, though Dion and Pierre Trudeau agreed on that principle, Dion's federalism was far different from that of Trudeau. Dion supported the Charter of the French Language as "a great Canadian law." He had supported the Meech Lake Accord, opposed by Trudeau. And he held strongly to one principle that was soon to have a lasting effect on the evolution of Canada.

At a scrum on January 26, 1994, the day after he was appointed to Cabinet, Dion acknowledged that Canada was in bad shape. "I am not naive, I know very well that the country is in a bad state in regard to its unity. We are facing a crisis, and that is why I have come here."

Then, the very next day, the new Minister of Inter-governmental Affairs granted an interview to reporter Huguette Young of *la Presse canadienne*. There, he made a statement that he has repeated proudly many times since, even two decades later.

"Constitutional law does not recognize the possibility for a province to secede unilaterally," he told the reporter. "But, nevertheless, I have a fundamental principle in democracy: it is that one cannot retain a people against its will. So, if a people wants to withdraw from a country, it must be able to do it. This principle, which holds for Mr. Chrétien and his government, is equally valid for [Quebec Premier Lucien] Bouchard and his people."

The sentence that came next is what he would repeatedly bring up again: "And so if Quebec voted unfortunately in favor of secession, with a solid majority and on a clear question, I judge that the rest of Canada has a moral obligation to negotiate the division of the territory."

The reporter asked: "So it would be out of the question to send the Canadian army to prevent [Quebec's] sovereignty following a clear victory for the YES?" He replied: "Never... One has not the right to use force in a democracy."

He then applied the same principle to a seceding Quebec, concluding that a minority of Quebec's population should be permitted to refuse to be part of a Quebec separating from Canada: "It is a question of natural justice. I cannot grant myself a law and withhold it from others. I cannot consider Canada as divisible and the territory of Quebec as sacred."

Remarkable. This statement was not made in the insulated security of an ivory tower. He, the new minister charged with national unity, offered this assurance of a *laissez-passer* for secession just three months after the shock of Jacques Parizeau's October 30, 1995 referendum. And now, with the charismatic Lucien Bouchard set to take over as leader of Quebec's Liberal Party the next day, on January 27, and then as Premier on January 29, it was expected that Parizeau's successor would soon call snap elections and precipitate a new

referendum that would likely return a majority for the OUI. And here was Dion signaling that a clear majority should result in the territorial division of Canada. And he claimed that Prime Minister Chrétien shared this “fundamental principle in democracy.”

The paradox that Dion formulated then and there would define the Chrétien government’s public stance thereafter. On the one hand, “Constitutional law does not recognize the possibility for a province to secede unilaterally.” But, on the other hand, that would not prevent Quebec from seceding with the permission of Canada if that was what it really wanted. And no condition was attached to this promise, other than the implicit permission for dissident minorities in Quebec to remain part of Canada.

The first part of the paradox was rendered academic and purely theoretical by the second part, which had immense practical implications and consequences. And so, down the years from 1996 to the present, Quebecers have dismissed as inconsequential whether secession is or is not a legal right. They have remembered only that they were repeatedly promised a green light to independence on just one single condition: that they demonstrate that independence was what they really and clearly wanted. Only the will of Quebecers counted. The rights of all other Canadians weren’t worth mentioning. Other provinces in the federation would have no say in the break-up of their country: they were bound to assent to it. They would have a moral obligation to acquiesce to Quebec’s desire, with no moral authority to object or to counter by insisting on their own interests and rights that would be destroyed, sacrificed, by Quebec’s secession. It was a very one-sided concept of federalism, to say the least.

But Stéphane Dion offered a consolation prize as part of his political doctrine: the Aboriginals with territories in Quebec, and possibly some dissident minorities (such as English speakers in Montreal?) could also claim a moral right to leave a Quebec that was seceding from Canada. Paradoxically, it was this second part of Dion’s doctrine, the *divisibility of Quebec*, that caused an uproar. The divisibility of Canada was just taken for granted by almost all opinion leaders in Quebec.

On January 29, after Lucien Bouchard was sworn in as Premier of Quebec, succeeding Jacques Parizeau, he sent a message to the rest of Canada, but also to Stéphane Dion and Jean Chrétien. He spoke this part in English. His message was that there are two peoples, two nations in Canada, and the rest of Canada will come around sooner or later to recognize that fact and draw the right conclusion.

“To conduct oneself like a people is a line of behavior which we shall adopt towards our Canadian neighbors, who have begun to reflect deeply on their own future and on the ties which they will maintain with us,” Bouchard said. “Last October 30 was a kind of collective wake-up call for Canada. Amid the current search for new definitions, there are, yes, some harsh and vindictive voices being heard; but, mainly, what we are hearing is a new recognition of the existence, here, in the northern part of the American continent, of two profoundly different nations who, shortly, must decide upon their destiny.”

Two days earlier, when he took over officially as the leader of the Parti Québécois, Bouchard had said this: “Canada is divisible because it is not a real country.” In contrast, he insisted that Quebec was not divisible: “There are two peoples, two nations and two territories and this one is ours. It will never, never be partitioned.”

Bouchard returned obliquely to the subject on January 29, when he referred to “some harsh and vindictive voices being heard.” He clearly meant, without naming anyone, those who, like the new Minister of Intergovernmental Affairs Dion, maintained that, if Canada was divisible, Quebec was also divisible. Bouchard insisted that the only way for Quebec and Canada to get along was for everyone to take as their starting point that Canada contained two peoples.

“No fruitful dialogue can begin without that recognition,” he said. “Canada is in the process of resigning itself to that notion.” In a burst of generous optimism, he even anticipated some promising developments in “Canada,” i.e., English Canada, outside Quebec. The eyes of Canadians were at last opening. “I wouldn’t be surprised if, in the not too distant future, we begin to hear voices from many parts of Canada asking if sovereignty and partnership, would that not be the best solution after all?”

The most reassuring message that Premier Bouchard conveyed in his address was that he would concentrate on the economy in the coming year. He invited Quebec’s federalists to join with secessionists in building the economy together, leaving aside their political differences until later. He also said he would take up the invitation extended by Prime Minister Chrétien on the night of October 30, right after the referendum results were known. Chrétien had invited the Premier of Quebec to work together with him to develop the economy of Quebec.

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The close referendum result had shocked everyone across the country. It resulted in the sudden emergence of multiple grass roots groups that sprang up to defend Canada.

On January 21, 1996, a public meeting was sponsored by the Special Committee for Canadian Unity, at McGill University’s Moot Court, on the theme, “Countering a Third Referendum.” It drew a surprising overflow crowd of 1,200 people to hear several speakers declare that, if Canada was divisible, Quebec was also divisible; that if Canada was to be divided, Quebec would also be divided. The speakers at the event, carried live on RDI, then later also broadcast on CPAC, included Guy Bertrand; Max and Monique Nemni, the co-editors of *Cité libre*; McGill constitutional law professor Stephen Scott; Diane Francis, editor of the *Financial Post*; columnist Andrew Coyne; civil rights lawyer Brent Tyler; Keith Henderson, leader of the Equality Party, Céline Martin-Flynn of the Reform Party and myself, journalist William Johnson.

The statement that, if Canada was divisible, so was Quebec, should not have been particularly controversial. Quebec, on the one hand, did not have a right to secession, as the five experts in international law had unanimously and clearly declared in their 1992 legal opinion to the Quebec legislature. José Woehrling, the professor of constitutional law at the Université de

Montréal, had made clear, also in a submission to the National Assembly committee studying the accession to sovereignty, that, should Quebec attempt to secede unilaterally, Canada would have the right to defend its territorial integrity and the result could be a failed attempt at secession or a Quebec that managed to secede with only part of the territory it had held as a province.

Woehrling was not alone. In 1992, Daniel Turp, a professor in the law faculty of the Université de Montréal, contributed a chapter in a book published by the C. D. Howe Institute<sup>35</sup> that had various authors studying the legal factors that would come into play if Quebec opted for secession. Turp, a future separatist politician, was committed to Quebec's independence. He argued in his chapter that Aboriginal nations within Quebec did not have a right to secede from Quebec under Canadian law, but they did enjoy that same right as Quebec did under international law:

The relationship between the right to self-determination of the Québécois and that of the native nations raises highly complex legal and political issues. [...]

Although one can argue that Quebec's right to self-determination and secession is based on domestic Canadian law and rooted in a constitutional convention, I do not believe that any such claim may be made by the native nations. There is no precedent for such an agreement, the Canadian and the Quebec states not yet having recognized the existence of such a right<sup>36</sup>.

The native nations are in a position similar to that of the Québécois when it comes to invoking international law in support of the claim that they have the right to self-determination. In view of the "nation" status of the native communities, unequivocally affirmed by their representatives and explicitly recognized by Quebec in the resolution of its National Assembly (and implicitly by Canada, excluding Quebec, in the Constitution Act, 1982, where the term "peoples" rather than "nations" is used), they may justifiably invoke for their own benefit the same international instruments as the Québécois – that is, the U.N. *Charter* and the international human rights covenants – to affirm their right to freely determine their political status and ensure their economic, social and cultural development. The native nations of Quebec may thus claim that they meet the sole condition for enjoying this right and that they may therefore invoke the right to self-determination for their own benefit<sup>37</sup>.

Such a right would allow the native nations to decide their political and constitutional future as freely as the Québécois, whether they choose creation of free and independent sovereign states, association or integration with an independent state, or

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<sup>35</sup> Daniel TURP, "Quebec's Democratic Right to Self-Determination," in Stanley H. Hartt et al., *Tangled Web: Legal Aspects of Deconfederation*, C.D. Howe Institute, The Canada Round: A Series on the Economics of the Breakup of Confederation - No. 15, 1992.

<sup>36</sup> Turp, *op. cit.*, p. 116.

<sup>37</sup> Turp, *op. cit.*, p.117.

acquisition of some other freely decided political status. In other words, by virtue of their right to self-determination, the native nations of Quebec could decide to attain sovereignty, to remain integrated with Canada, to stay with Quebec if it becomes sovereign, or to remain within Canada even if Quebec chooses sovereignty.

But such was the climate of opinion in Quebec at the time, among federalists as among separatists, that the speeches delivered at the meeting in the Moot Court provoked shock and outrage from all of Quebec's pundits.

On the day before that Sunday evening meeting, *La Presse's* Alain Dubuc, in his paper's Saturday edition, described the prospective participants as "desperados" and "weirdos," with those two words written in English. Lysiane Gagnon wrote in the *Globe and Mail* after the event: "The partition idea is now being brandished by a cohort of irresponsible opinion leaders who believe that threats, blackmail and sheer arrogance are the way to convince Quebecers that Canada is a great country to live in."

Michel C. Auger in the *Journal de Montreal* referred to "the sophistry that if Canada is divisible, so must be Quebec." He drew attention to the meeting, he said, only because "extremists bring out extremists." Michel David, in *Le Soleil*, could hardly believe that "solutions so extreme could be seriously contemplated."

Most interesting, perhaps, among the chorus were Lise Bissonnette of *Le Devoir* and Don Macpherson of the *Montreal Gazette*. Bissonnette compared those who "made a public spectacle of themselves" at the Moot Court meeting to the *Mouvement de Libération Nationale du Québec*, headed by former FLQ convicted terrorist and murderer Raymond Villeneuve. She assured everyone that this Anglo movement, which "is steeped in a kind of mental extremism on an ethnic base, which is foreign to the average Canadian," would "remain marginal."

The *Montreal Gazette's* Macpherson came away from the meeting horrified. "The list of speakers was dominated by anglophone personalities generally reputed in the francophone community to be hostile to French-speaking Quebec. They included *Gazette* columnist William Johnson, *Financial Post* editor Diane Francis and several prominent members and supporters of the English-rights Equality Party, including its leader, Keith Henderson."

To read Macpherson, it was an Anglo-Anglo affair. "The event was conducted mainly in English. [ . . . ] Most of the speakers barely acknowledged the opinions, sensibilities and very existence of francophones." He failed to mention that the star of the evening, who was given a standing ovation as he entered the hall, was Guy Bertrand. He spoke only in French, as did Max Nemni, Monique Nemni and William Johnson. Macpherson did not mention that Céline Martin-Flynn, a francophone, spoke in French with some English. Henderson spoke mostly in English, with some French. Only three of the nine speeches were in English only. The introductions were bilingual, or in the language of the speaker. The thanks at the end were given in French, English and Italian by the evening's moderator, lawyer Giuliana Pendenza. So, Macpherson notwithstanding, far more French than English was spoken at that meeting.

Such was Macpherson's determination to discredit the participants and their message that he systematically misrepresented the entire character of the event. He called the participants "would-be Ian Paisleys who would express their love of Canada by giving it a Northern Ireland of its own."

He grossly misrepresented the words of one of the speakers: "Keith Henderson [...] would go to the point of absurdity; he would guarantee the right of every single Quebecer to remain a resident of Canada without moving, which would turn apartment doors into border crossings." What Henderson had actually said was this: "Loyal Canadians in Quebec must be given the assurance by their federal government that they will have the choice to remain Canadian *in the territories of Quebec where they form majorities*, just as the Cree up North have already been promised."

On January 25, 1996, the editorial page editor of the *Montreal Gazette*, Jennifer Robinson, dismissed the idea of "partition" of Quebec as superficially attractive, but dangerous and unworkable. "Partition might sound good. But the more you examine it, the more problems and empty promises you find. English Quebecers have good reason to worry. But grasping at straws or putting their faith in partition is not the solution."

Ms. Robinson's examination included such thoughts as these; "It's hard to draw parallels but history reminds us that many of the variations on partition – India, Palestine, Jerusalem – have involved violence and death at some stage. These are questions that the promoters of partition prefer to avoid." Clearly, Robinson did not consider the secession of Quebec as a "partition" of Canada.

On January 31, just 10 days after the meeting in the Moot Court, it was the turn of Jeffrey Simpson, premier columnist for the *Globe and Mail*, to express his weighty disapproval, based on his considerable experience with partitions in other parts of the world. His column was headlined: "The country is full of loose talk about an unimaginable idea."

OTTAWA- As a journalistic veteran of Belfast's scarred streets and an amateur student of two countries which experienced partition (India and Ireland) and another where it failed (Israel), I'm feeling profoundly uneasy about this current, loose talk about partition in Canada and Quebec.

Partition is one of those grand ideas easy to talk about by bar-stool experts or Mountbatten wannabes, but almost impossible to achieve without severe social disruption. It's also politically counterproductive, in the sense that it will drive more francophone Quebecers away from federalism rather than attracting them to it.

The mere thought, for example, of partitioning Montreal defies imagination, quite apart from common sense.

Strangely, all of these wise commentators failed to apply their analysis to the most obvious partitioning being proposed and which, alone, provoked the prospect of partitioning Quebec: the partition Canada by the secession of Quebec.

It was easy for the scribes to dismiss the speakers at the Moot Court as weirdoes and Ian Paisleys. But the situation changed when a top-flight intellectual, now the Minister in the government who was precisely entrusted with responsibility for national unity, Stéphane Dion, pronounced the same principle that a seceding Quebec could be partitioned, and Dion was immediately supported by the assent of the Prime Minister.

A further change in attitude of the federal government was evident when the federal Liberal caucus met in Vancouver on January 30 and 31, 1996. This was followed by a retreat in Ottawa on the two following days to set the course for the following 18 months. In Vancouver, Prime Minister Chrétien caused a commotion by backing his new Minister of Intergovernmental Affairs on an issue germane to secession. Mr. Dion spoke about a Plan A – the means of satisfying Quebec’s aspirations within Canada – and Plan B – setting the conditions for secession.

Quebec politicians of both major parties were aghast at the outrageous possibility that the federal government could set conditions for Quebec’s secession. Sylvain Simard, Quebec’s new Minister of International Relations, asked whether “English Canadians are ready, for years, to occupy Quebec militarily to impose a partition.” Opposition leader Daniel Johnson Jr., after several days of waffling, denounced as “absolutely off the track” the public recognition by Chrétien that, if Canada was divisible, then Quebec was also divisible (that was part of “Plan B”). When push came to shove, Johnson backed the secessionists’ scenario according to which it is this federal response, not secessionism, which threatens the peace of the land.

Commentators, such as Lysiane Gagnon and Rosemary Speirs, treated Chrétien’s and Dion’s words as gaffes. “PM blundered with partition remark,” stated the headline on February 1 over Speirs’ *Toronto Star* column. Gagnon, in *La Presse*, attributed Dion’s comments to his inexperience. “An intellectual who speaks only for himself can readily speculate on what comes after sovereignty, and play with abstract concepts,” she wrote. “But, between the speculations of an independent intellectual and the statements of a minister vested with political responsibility, there lies a gulf – the gulf which separates speculation from blackmail, theory from practice, cold logic from the heat of action.”

On February 6, 1996, an open letter appeared in the *Montreal Gazette* signed by 60 English-speaking Quebecers. It denounced the very idea of “partition” (meaning the partitioning of Quebec) and claimed that those who propagated such an idea were sowers of discord:

We firmly disagree with advocates of partition. Their words and actions only sanction intolerance by promoting cultural and linguistic division between us. We abhor all forms of prejudice. There is no place in Quebec or the English-speaking community for those

who promote division to achieve their political ends. The rhetoric of intolerance must be avidly rejected by all Quebecers.

This rallying of Anglos opposed to “partition” had been organized by Dermod Travis, a man who came to Quebec from British Columbia and who had served as a spokesman in 1995 for the Commission on Sovereignty. A gun for hire, he had previously worked for the Equality Party, but had since moved up in the world to defend the separatist interests of the Quebec government.

The statement claimed that “democracy” meant that a vote in Quebec was sufficient to justify its secession from Canada.

Our future will be decided by Quebecers through a referendum called by Quebec’s National Assembly, on a question that reflects the political will of the Assembly. In a democratic society, these issues are resolved by the judgment of its citizens. In accordance with democratic principles, we believe that regardless of the future Quebecers choose, Quebec is indivisible without the consent of the National Assembly.

So, once again, Canada was divisible while Quebec was indivisible. The open letter also suggested that those who had spoken out at the Moot Court were attempting to destabilize Quebec: “Those who exploit the current political uncertainty to destabilize our society and deter economic growth must be denounced. All Quebecers have a moral and social duty to promote the best interests of Quebec, locally and internationally.” So those who destabilized the economy were not the Quebec separatists, but rather the federalists who chose not to accompany a seceding Quebec.

The Dermod Travis letter also proclaimed that, for Quebec to remain part of the federation or to secede, these were two equally legitimate options. No condition for secession was envisaged. Some of the 60 who signed the document were more known to the public than others. They included historian and author Elizabeth Abbot, Dean of Women at St. Hilda’s College, University of Toronto, who was a graduate of Montreal’s McGill University; theologian Gregory Baum, Arabella Bowen (soon to be a *Montreal Gazette* columnist), sociologist (and Péquiste) Gary Caldwell, Anne Michèle Meggs, a prominent English-speaker who favoured Quebec’s secession; political scientist Henry Milner, journalist Philip Preville.

On February 7, 1996, law professor Julius Grey was quoted in *La Presse* as denouncing a dangerous “slide toward extremism.” He meant, as extremists, not the Quebec separatists, but people who said that a secessionist Quebec could not keep its existing boundaries. In the same piece, the world-famous philosopher Charles Taylor called “highly irresponsible” both McGill constitutional law professor Stephen Scott and William Johnson – presumably unlike the proponents of unilateral secession who, of course, were not extremists.

Professor Grey later published a piece in the May-June 1996 edition of *Cité libre* in which he argued that Canada was divisible because, unlike Quebec, it was not unitary. Quebec, on the other hand, was indivisible because it was unitary.

Les partitionnistes s'éloignent de la réalité en postulant tout d'abord que le Québec et le Canada sont des entités semblables. Le Québec n'est pas un pays; par contre, il est une entité unitaire. Qu'on l'appelle nation, province ou société, il n'en reste pas moins que la subdivision ne peut s'opérer que par une chirurgie très douloureuse. (p. 25)

Granted, Canada is not a unitary country. But neither is Quebec a unitary entity. It is pluralist in its political, sociological and national dimensions. Not only does it have politically two dimensions of government, federal and provincial, but there is a third dimension that cannot be reduced to these two: that of the Aboriginal nations. They have, according to the courts, an inherent right to self-government. They also own collectively lands in Quebec over which the federal government has a fiduciary responsibility, but which it does not own nor have a right to dispose of in its own interest or that of Quebec. So, Quebec, which contains in its provincial borders the lands of the Inuit, Cree, the Mohawks, the Montagnais, the Algonquins and several other Aboriginal nations, can hardly pretend to be unitary.

Moreover, Mr. Grey, the law professor, airily dismissed for all intents and purposes the significance of the Constitution and the rule of law.

Parfois les partitionnistes se cachent derrière un légalisme rigoureux et se basent sur la prétendue illégalité de la sécession. Bien sûr, la souveraineté peut être perçue comme illégale sous la Constitution actuelle. Ceci dit, quelle est la place à donner au droit positif dans ce débat?

On February 9, 1996, *Montreal Gazette* columnist Gretta Chambers viewed with alarm the talk of partitioning Quebec. "A heavy price is already being paid for the credulity, mischievousness or misplaced self-interest of those who are talking it up," she wrote.

In *Le Devoir*, on the front page, on that same day, philosopher Charles Taylor, historian Desmond Morton, novelist Neil Bissoondath and six others, brought intellectual power to crush partitionist stirrings. "La partition, no thanks!" went the headline above the story about their open letter, published in *Le Devoir* and then the next day in the *Montreal Gazette*. "Neuf intellectuels anglophones font front commun contre les partisans du morcellement du Québec." Their open letter was also summarized in a report in *Le Devoir*:

Un deuxième pavé de taille vient d'être lancé dans la mare des partisans du morcellement d'un Québec éventuellement souverain. Neuf intellectuels anglophones québécois, dont des noms aussi prestigieux que le philosophe Charles Taylor, l'historien Desmond Morton et le romancier Neil Bissoondath, ont en effet lancé un appel au calme sur cette question, hier, dans une lettre envoyée au *Devoir*. Plus tôt cette semaine, une lettre signée par 65 intellectuels anglophones du Québec, aux accents par ailleurs beaucoup plus autonomistes, avait été publiée en ces pages, en réaction à la vague qui avait commencé à déferler lors d'un colloque tenu à l'Université McGill, il y a près de trois semaines. La vague serait-elle en train de se transformer en vaguelette?

The nine celebrities sought to dissipate any mistaken impression that those who had declared Quebec divisible on January 21 were representative of public opinion among English speakers. The nine intellectuals knew better.

Voulant faire contre-poids à « la fausse impression qui se répand actuellement selon laquelle les déclarations en faveur de la partition reflètent l'opinion de la plupart des Québécois non francophones, » les neuf signataires s'opposent « fortement » à l'idée que le territoire québécois puisse être morcelé. Si l'obsession des scénarios apocalyptiques persiste, ajoutent-ils, « l'intransigeance prévaudra et nuira inévitablement à la quête de solutions constructives. Toute action visant à accroître les chances d'un règlement démocratique et à assurer que l'avenir des Anglo-Québécois soit mieux protégé ne sera possible que si l'on met un terme à la représentation fallacieuse véhiculée ces dernières semaines dans les médias, qui suggère que l'idée du morcellement territorial du Québec dispose de l'appui écrasant de la communauté anglophone. En tant qu'Anglo-Québécois désireux de demeurer dans un Québec pluraliste, nous avons la responsabilité de participer à la recherche de solutions. Nous refusons de rester muets à écouter les autres, dont plusieurs du Canada hors Québec, parler en notre nom. »

Novelist Neil Bissoondath was quoted in the story as saying about the “partitionists”: « Ce sont des gens qui ignorent complètement l'histoire du monde. En regardant l'histoire, on voit qu'il y a certains chemins qu'il faut refuser: et pour moi, la partition en est un. » Again, for Bissoondath, the secession of Quebec was not a partition of Canada; only letting the Inuit and the Cree of Northern Quebec remain part of Canada, for example, was partition. The P word was used selectively.

The *Devoir* account went on:

Charles Taylor, professeur à l'Université McGill, se dit pour sa part convaincu que si la majorité des gens actuellement favorables au morcellement réfléchissaient vraiment aux conséquences d'un tel geste, ils changeraient d'opinion. S'il dénonce, avec les autres signataires, les déclarations de Stéphane Dion et Jean Chrétien sur le possible découpage du Québec, M. Taylor se console du fait qu'on ne parle plus de cette question à Ottawa.

The same letter was published in the *Montreal Gazette* under the headline: “Talk of partition must be countered. The following is an open letter on the subject of partitioning Quebec.”

We are deeply concerned that, since the recent statements by Intergovernmental Affairs Minister Stéphane Dion and Prime Minister Chrétien, the legitimation of the idea of partitioning a sovereign Quebec has led to a dangerous polarization of public debate about the future of Quebec and Canada.

We believe it imperative to counter the growing and fallacious impression that statements supporting partition accurately reflect the voice of non-francophone Quebecers. As strong opponents of the idea that Quebec could be carved into bits and pieces, we are also convinced that the coming months will require that our best energies be devoted to strengthening the democratic processes that will determine the future of Quebec and relations between its majority and minority communities. If the current obsession with doomsday scenarios continues, inflexibility will prevail and stand in the way of constructive solutions...

The letter was signed by Neil Bissoondath, Marion Dove, Jane Jenson, Andrew F. Johnson, Antonia Maioni, Margie Mendell, Desmond Morton, Alex Paterson, F. Leslie Seidle, Charles Taylor. They were all very prominent people in English Quebec's intelligentsia. Jane Jenson was a professor in the Department of Political Science of the Université de Montréal; Antonia Maioni was a professor in the Department of Political Science at McGill University.

In April 1996, less than half a year after the barely defeated 1995 referendum, some of the most prominent citizens signed a joint statement that appeared in Quebec newspapers, including the *Montreal Gazette* and *Le Devoir*. According to the statement, to secede was as legitimate as to remain part of the federation. Quebecers had an unrestricted right to choose whatever constitutional status they preferred. There was no reference to the Constitution, nor any reference to the rights of minorities within Quebec or the rights of Canadians in the rest of Canada. Nor was there any reference to the conditions under which secession could be possible, nor to the practical difficulties, even the crises, that an attempted secession would provoke. This was a very one-sided conception of federalism.

The statement stands as a testimonial to the ignorance, the naivete and the confusion of Quebec's opinion leaders on secession. They did not understand the implications of federalism and of the rule of law in a liberal democracy. The 15 co-signers included Peter White, then (ironically) the president of the Council for Canadian Unity, and a business associate of Conrad Black; prominent philosopher Charles Taylor once again, and his sister Gretta Chambers, who, as well as contributing a column to the *Montreal Gazette*, was then chancellor of McGill University (she was in 2000 to be raised to the rank of Companion of the Order of Canada); Joseph Rabinovitch, executive director of the YMHA; Claude Corbo, then president of l'Université du Québec à Montréal, sociologist Guy Rocher, who had been Camille Laurin's deputy minister to prepare the 1977 white paper on the French language and the subsequent Charter of the French Language; Françoise David, president of *La Fédération des femmes du Québec*, who was at Lucien Bouchard's elbow during the 1995 referendum campaign; former Liberal cabinet minister and economist Claude Forget, and others.

As starting principles, we affirm and recognise the following:

...

The freedom of the Quebec people to determine its constitutional status democratically, in other words, to choose full national sovereignty or to choose to continue to share this

sovereignty with the other Canadian provinces, be this in a federal or confederal union – thus we recognise the legitimacy of the three principal options currently put forward.

The equivalent French text was published in *Le Devoir*:

D'entrée de jeu, nous nous entendons pour affirmer ou reconnaître:

...

la liberté de ce peuple de déterminer démocratiquement son statut constitutionnel, c'est-à-dire d'accéder à la pleine souveraineté nationale ou de continuer à partager celle-ci avec les autres provinces canadiennes, dans une union fédérative ou confédérale – et, par conséquent, la légitimité des trois grandes options en présence.

It would be safe to say that the pundits and intellectual heavyweights had become agitated. And yet, they were talking about the majority of non-French-speaking Quebecers when they referred to “extremists.” A SOM poll published on February 2 in *Le Soleil* of Quebec City and *Le Droit* of Ottawa, indicated that 59 per cent of non-francophone Quebecers agreed that Quebec should be divided in the event of secession. Another poll by Insight Canada Research suggested that Canadians across the country overwhelmingly backed the Cree’s right to “remain part of Canada with their lands.” Even in Quebec, 28 per cent said they “strongly agree” and another 35 per cent “somewhat agree.” So that amounted to 63 per cent of Quebecers backing the right of the Cree to remain within Canada with their territory. In other words, two-thirds of Quebecers backed the partition of Quebec, and so were “extremists” according to our intelligentsia.

On September 30, the *Montreal Gazette* published a statement signed by 14 leading members of Quebec’s Italian-Canadian community. It appeared later in *La Presse*. It claimed to speak for more than just these 14 individuals.

“We, the leaders of organizations of the Italian-Québécois community representing diverse streams of thought at the heart of the community, federalist and sovereignist, want, after joint discussion, to contribute to the political debate,” the statement began. The signers included Senator Pietro Rizzuto, who had been Jean Chrétien’s chief organizer in Quebec; Consolato Gattuso, president of the Canadian-Italian Business and Professional Association, and three former presidents of the National Congress of Italian Canadians: Alfredo Folco, Donato Taddeo, and Renzo Viero.

The authors wanted to “contribute to a lucid and responsible political debate.” What is most remarkable is that they assumed that federalism and secession were now equally legitimate options, and that the population was free to choose whatever status it preferred, with no condition, no qualification attached.

The various political options - status quo, federalism revised in various ways, sovereignty shared with Canada, independence – are each legitimate. It is incumbent on the population of Quebec to choose democratically from among these options.

There was absolutely no reference to the rule of law, no requirement that secession be accomplished according to the Constitution. Nor was any condition set for a legitimate secession. Apparently, a vote in Quebec would settle everything satisfactorily. Moreover, they decreed that Canada was divisible at will, but Quebec was indivisible.

Quebecers... have the right to choose democratically their future and to bring about the political status and the constitutional arrangement that they judge the most suitable. All are obliged to accept the decision of the majority taken democratically.

These democrats did not even for a moment raise a doubt about whether other Canadians had rights to be taken into account. Only the will of a majority of Quebecers counted. And the rights of the Inuit, the Cree, the Montagnais, all of whom voted overwhelmingly in 1995 by referendum not to join Quebec in any secession? Without a pause our 14 model citizens tossed their rights to the garbage.

Federalist opinion leaders in Quebec had placed Canada in a double jeopardy. They had accepted that secession was permissible for Quebec – but it was not permissible for the Cree or the Inuit to remain within Canada rather than secede with Quebec. So those who defended the right of the Cree and the Inuit to remain with Canada were denounced as mischievous and irresponsible, even as extremists and weirdos.

José Woehrling, a constitutional lawyer at the Université de Montréal, and himself a secessionist, wrote: “On the level of morality and politics, there is a parallel between the claims of the Aboriginal peoples and those of Québec itself. Consequently, it will not be easy to convince Canadian and international public opinion that the right of the Québécois to self-determination allows them to challenge the territorial integrity of Canada, and at the same time, that the territorial integrity of Quebec opposes the self-determination of the Aboriginal peoples.”

The riposte to the offensive of the “partitionists” and from the federal government came in April, 1996. Lucien Bouchard’s party made public its 167-page draft revised version of the Parti Québécois program. It began with a new sentence that proclaimed the right to act unilaterally:

The *peuple québécois*, made up of the entirety of its citizens, is free to decide, itself, its status and its future. The Parti Québécois has as its fundamental objective to achieve the sovereignty of Quebec democratically.

On April 28, 1996, Premier Bouchard tried to head off the new assertiveness of the federal government on the question of secession. In a speech to the *Conseil national* of his party, he used blackmail, threats, intimidation. If the federal government tried to have a say about the conditions for Quebec’s secession, or intervened in a Guy Bertrand’s suit in court for an injunction against a referendum aimed at unilateral secession, Bouchard warned that he might call snap elections.

We will never let the federal (government) presume to try to raise the crossbar, for instance, for the democratic majority: it is 50 per cent plus whatever is needed to exceed that. We will never authorize anyone in Ottawa or anywhere else to pass a law which would limit in any way whatever the possibility for the Québécois to hold referendums. It's the National Assembly which will make that decision.

So he warned Chrétien against listening to the “radicals” who urged him to adopt a “Plan B” – setting the conditions under which Quebec could secede. “There are some who favour this option in Ottawa, who want a hardening of the federal attitude towards the right of the Québécois to decide their future. I think Mr. Chrétien is intelligent enough to know that he must not precipitate a confrontation on the fundamental rights of Quebec.”

Premier Bouchard repeated that an attempt to implement a Plan B would trigger snap elections in Quebec. “If ever they tried to create a climate of confrontation by attacking the fundamental rights of the Québécois people in the area of its capacity to choose its future, it is obvious that the timetable could be accelerated.”

The premier left no doubt that, like Parizeau, but unlike René Lévesque, he had in mind a unilateral declaration of independence that would follow after a unilaterally held referendum, on a question unilaterally chosen by the Quebec provincial government, with the results to be interpreted by criteria set in Quebec unilaterally.

Even before a year, if we find that we are wasting our time, that there are delaying tactics, that there are attempts to divert the referendum through, for example, a federal referendum, it is obvious that we will proclaim it [sovereignty] unilaterally immediately.

Bouchard's stance was, in effect, supported by *La Presse's* editorial page editor Alain Dubuc. In his editorial of May 4, 1996, this “federalist” was outraged and said that Chrétien had “served the cause of sovereignty” by even thinking out loud of intervening in the Bertrand case, which was to come before the court on May 13, 1996:

The case of lawyer Bertrand raises a fundamental issue: the right to self-determination of peoples, which is unassailable for a majority of Quebecers and for enlightened people in the rest of Canada.

Dubuc assumed that the right to self-determination of peoples implied a right to secede. “It is true that the Canadian Constitution does not foresee the right to secede. So we are faced with a case where Canada, because it has its eyes fixed on its constitutional navel, would violate one of the most fundamental rights, a right recognized across the world.” Alain Dubuc had a decidedly limited understanding of what was thought acceptable in the rest of the world.

But Bouchard's threats did not work. The new assertiveness of Ottawa was demonstrated on May 10, 1996, when, despite Bouchard's warnings, Justice Minister Allan Rock announced that

Ottawa would show up in court as an intervener to present an argument in the case brought anew by Guy Bertrand against the Quebec government. Bertrand, as a private citizen, did once again what Ottawa had failed to do. He asked the court to forbid the Quebec government from carrying through an illegal secession.

Rock, wearing kid gloves, danced around on little pussy feet, tried to dissociate himself from Bertrand while still joining in the case to counter the Quebec government's assertion that Canadian law and courts had no say on secession. Rock protested that the federal government was only intervening on that one issue: to oppose Quebec's claim that the court had no jurisdiction over secession. But Rock made clear that he was not supporting Guy Bertrand's main plea, to prevent a unilateral secession.

Premier Bouchard immediately convened an emergency cabinet meeting and created a sense of crisis that lasted several days. What would he do? Call elections? Precipitate a referendum on secession? He spoke of the federal intervention as "un geste d'une extrême gravité," one that threatened "les droits fondamentaux du peuple québécois."

In the event, he backed down. Instead of those confrontational measures, he rushed an emergency resolution into the National Assembly, even while the case was before the court:

QUE l'Assemblée nationale réaffirme que le peuple du Québec est libre d'assumer son propre destin, de déterminer sans entrave son statut politique et d'assurer son développement économique, social et culturel.

THAT the National Assembly reaffirms that the Quebec people is free to take in hand its own destiny, to determine without hindrance its political status and to ensure its economic, social and cultural development.

He made it an "emergency" resolution, and he forced it through by invoking closure. At the same time, he made his intentions crystal clear: "The next time the government of the Québécois, the next time the National Assembly deals again with this question of our right to self-determination, it will not be to discuss it or to reaffirm it. It will be to exercise it." In other words, he promised a unilateral declaration of independence, should Ottawa again interfere in Quebec's destiny.

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On May 16, Premier Bouchard was interviewed on Good Morning America. There he asserted: "In Canada, as all over the world, democracy is 50 per cent plus something." He was repudiating Prime Minister Chrétien's statement earlier that 50 per cent plus one would not be enough to justify Quebec's secession.

Americans, listening to the Quebec Premier, must have gasped at his manifest ignorance. In the United States, merely to amend the Constitution, a vote of 67 per cent is required in the House

of Representatives, also a vote of 67 per cent in the U.S. Senate, and then adoption of the amendment by 75 per cent of the states. Secession, of course, cannot be passed by any majority whatever, as the 1861 Civil War determined. In France, similarly, its Constitution states that no referendum may be introduced which would affect the territorial integrity of the country.

On that same day, May 16, Bloc MPs in Ottawa argued that the Prime Minister was setting the scene for a terrible confrontation by insisting on the rule of law, on mutually negotiated terms for a referendum on secession and on a majority greater than 50 per cent plus one. "Does the Prime Minister realize that, the further he pushes his thinking, the deeper he plunges the country into a constitutional deadlock, and he is creating the conditions for a confrontation between Quebec and the rest of Canada?" a Bloc member asked.

This time, Stéphane Dion came out with the right answer. "What the Government of Canada wants in this matter is to make sure that in all circumstances, no matter how hard they may be, the rights of the citizens are respected and that the negotiations will always be carried out by mutual consent and with the protection of the legal order. Because democracy cannot be dissociated from the legal order." Right. But how could this be reconciled with his "fundamental principle in a democracy"?

Bouchard also asserted, in a speech in the National Assembly on May 22, 1996: "If Canada rejects our extended hand, if Canada wants to impose vetos upon us, keep us in the federation against our will, we will withdraw from it by proclaiming our sovereignty unilaterally. It is our right, we will exercise it." Nothing could be clearer.

Opposition Leader Daniel Johnson Jr. proposed his own resolution to the National Assembly as an alternative to that of the premier. It was only marginally better.

QUE l'Assemblée nationale réaffirme le droit des Québécoises et des Québécois à l'autodétermination, droit exercé le 30 octobre dernier en choisissant de poursuivre le développement de la société québécoise au sein du Canada et qu'en conséquence elle enjoigne les gouvernements du Québec et du Canada de donner suite à cette volonté démocratique en acceptant de négocier de bonne foi le renouvellement du fédéralisme canadien.

THAT the National Assembly reaffirm the right of Quebecers to self-determination, right which was exercised on 30 October last in a choice to pursue the development of Québec society within Canada and, consequently, charge the Governments of Québec and of Canada to follow up on this democratic wish by accepting to negotiate in good faith the renewal of Canadian federalism.

This Liberal resolution, voted down by the government majority, played on ambiguity. It spoke of the "right to self-determination," as if this meant a right to secession. The motion also suggested that the vote in the 1995 referendum created a precedent and confirmed the right to

choose secession. These were simply gratuitous affirmations. The Liberals were playing to the prejudices of the nationalists by seeming to back a right to secession, even though their ambiguous language could be construed by better informed people as really not presuming that right.

The Quebec Liberal leader gave a speech in which he also claimed that the law meant little regarding secession:

If a majority of Québécois, on a clear question which has meaning for our fellow citizens as a whole and which impressed the international community, decided clearly, by tens and hundreds of thousands of votes to leave Canada, how could an injunction or a court judgement or a judicial intervention keep us in a country that we want to leave?

The real answer to his rhetorical question should have been: because Quebec is a society built on the rule of law; because people in a civilized society respect the rule of law; because people in a civilized society respect the rights of others in a federation. People in a civilized society know that the alternative to the rule of law and the arbitration of the courts is the rule of the jungle – and it is harsh and brutish.

Meanwhile, on May 21, 1996, Chrétien announced that Quebec could not separate unilaterally. “We are saying that the Canadian laws must be respected. There will be no unilateral declaration of independence. International law must also be respected.”

On May 22, he dared to question the presumption that Quebec alone could set the rules for a referendum on secession. “There will be negotiations, if ever there is another referendum, to make sure that everyone is very clear about the question, the outcome and the consequences.” A 50 per cent plus one Yes vote would not be enough, he said again. And, once again, he referred to the importance of abiding by the Constitution. “In Canada, nobody wants to use violence to keep people in Canada. But as I’ve said before, everything has to be done according to the Canadian Constitution and international law.”

The media commentators, with depressing unanimity, condemned, deprecated, ridiculed or trivialized Guy Bertrand’s court action against any new attempt by the Quebec government to secede from Canada in violation of the Constitution. The federal government was denounced for intervening in the Bertrand case. Lise Bissonnette in *Le Devoir* called it “a provocation.” Lysiane Gagnon in *La Presse* was blunter: “Stupid, there is just no other word for it.”

On May 9, 1996, the day before Justice Minister Allan Rock announced his decision to intervene in Guy Bertrand’s suit for a court injunction against a referendum leading to a unilateral declaration of independence, the *Montreal Gazette* published a rather tortuously argued editorial in which it suggested that Mr. Rock should go to court to clarify the legal issues. At the same time, the *Montreal Gazette* warned that it was a dangerous course to take: “By defending Canada in court, even if it wins, Ottawa could end up helping the separatist movement.”

The *Montreal Gazette* also minimized the importance of any future ruling that secession was not a right.

Anyone who thinks that the courts can save Canada is wrong. The issue of Quebec separation will be resolved primarily in the political arena... But if a decisive majority of Quebecers, freely and in full understanding, were to choose to separate from Canada and form an independent country, the rest of Canada would have to recognize that will and negotiate Quebec's legal separation. The political reality of the situation is that you can't keep a country together without the will of the people.

Joan Fraser, in a column on May 11, the day after Rock had announced that his government would intervene in Guy Bertrand's case, spoke of him as a "messianic federalist." By implication, she also placed him (and, eventually the Supreme Court) among the lunatics:

Nobody outside the lunatic fringe argues that Quebec has no right to become independent, if that is what Quebecers demonstrate clearly, decisively and democratically what they want.

She conceded that secession should be carried out under the rule of law – but insisted that this was a procedural matter only, a formality, since Quebec had a right to secede if it so chose. But what if the "will of the people" of Quebec was unjust towards the people of the rest of Canada and towards the minorities of Quebec, including especially the Aborigines? Fraser never considered that possibility.

The same ambivalence, but with, again, a presumption for the right to secede, was evident in an editorial in the *Montreal Gazette* on May 15, 1996, titled: "Time to get back to Plan A."

Ottawa is right to say that Canadian law should be respected and that the rule of law and democracy are not mutually exclusive; indeed, one safeguards the other. At the same time, Quebec is right to say that Quebecers should have a right to decide whether they want to stay in Canada or become an independent country, separate from Canada.

...

To be sure, the legal issues surrounding the question of independence are vital. But the law will not prevent Quebecers from separating from Canada if that is what they so wish. The best way to ensure that Quebecers will want to remain in Canada is to find ways to make the country work better for all, English or French.

Incidentally, Ms Fraser also was of the opinion, as she demonstrated later, that a 50 per cent plus one vote was all that was required for Quebec to secede. She stated this after she had left her position at the *Montreal Gazette*, when she spoke at McGill University, as recorded in *The Suburban* of January 27, 1977. She was asked by Brent Tyler if a 50 per cent plus one Yes vote was enough to allow for an UDI. Her reply:

If, after a clear campaign, the people of Quebec voted Yes even by a narrow majority to a question that said very broadly, very explicitly, something like 'do you believe Quebec should separate from Canada and become an independent country,' I would have difficulty quarrelling with it."

In the Commons, on May 13, 1996, Justice Minister Rock and Treasury Board President Marcel Massé both gave good accounts of why the federal government was intervening in the Bertrand case. Mr. Rock gave an unusually clear defence of the rule of law:

We recognize the right of the people of Quebec to express themselves in a referendum. It is another matter entirely, however, when the attorney general of Quebec says the Constitution may be nullified by popular vote. It is not true, and I cannot, as attorney general of Canada, stand on the sidelines in the light of the position of the attorney general of Quebec.

Mr. Massé's explanation was even more clear and firm:

The federal government recognizes clearly that referendums are a means for the public to express its opinion, and there is no doubt that democratic means such as referendums are open to Quebec, as they are open to Canada. It is also clear that the Constitution of a country is not and cannot be amended through a referendum in just one part of a country, and that constitutional law and the internal law of a country are the laws that govern popular decisions and that allow constitutions to be changed.

In the second half of June 1996, the C.D. Howe Institute published a book by two legal scholars that threw some light on an obscure issue. The legal study, authored by Patrick Monahan and Michael Bryant, was titled *Coming to Terms with Plan B: Ten Principles Governing Secession*. They proposed that Ottawa should respond to the threat of secession by clarifying all the issues, including by a reference to the Supreme Court of Canada. Ottawa should also consult how all other countries handle the issue of secession. And so the authors surveyed what happened in the rest of the world: "Secession is usually prohibited," they concluded. "Unilateral secession is always prohibited."

The authors explained why the terms of secession must be studied, discussed and established in advance of any future Quebec referendum. The alternative was to let the separatists set the terms, as they had done since 1970.

A continuing refusal to contemplate the possibility of secession was the centerpiece of the referendum campaigns in 1980 and 1995. The results on October 30 conclusively demonstrated that this strategy no longer makes sense. Its main by-products have been confusion and disorder in the federalist camp, while giving sovereignists a free hand in defining the rules of the game to their advantage.

Monahan and Bryant proposed that Ottawa should accept countenancing the possibility of Quebec's secession, but only if it were to be achieved under the rule of law, with ground rules agreed to in advance. The referendum must be on "a clear question conducted according to a transparent and fair procedure." No more booby traps like those of 1980 and 1995.

In their scenario, a 50 per cent plus one vote would only trigger negotiations on secession. These would set the new territorial boundaries for Quebec, on the assumption that "Canadians living in identifiable regions of Quebec who wish to remain within Canada should be permitted to do so." Then, they proposed that a second and final referendum should be held by Quebecers to ratify what had been negotiated.

So how was this study by legal experts received in Quebec? To give an example written at that time and place, I offer a column that I published in the *Montreal Gazette* on July 5, 1996:

### **Media put nationalist spin on reports of C.D. Howe study**

By William Johnson      National Affairs

GATINEAU - It always amazes me to see how Quebec nationalism constantly puts its spin on the news. Year after year, biased press reports reinforce nationalist myths and confirm ethnocentric prejudices.

Take the coverage of last week's C.D. Howe Institute study, *Coming to Terms with Plan B: Ten Principles Governing Secession*, by Patrick Monahan and Michael Bryant.

The study was important because the debate on whether and how Quebec can legitimately secede has been carried out in a claustrophobic and incestuous atmosphere. The "right" to secede has been affirmed as a matter of faith, of political correctness, of strength of conviction. Those who questioned the "right" were undemocratic extremists.

So two experts presented an analysis drawing on the experience of the world. "Of the 89 constitutions we examined, 82 do not permit secession of a part of the state's territory under any circumstances," the authors report. No constitution permits what has been arrogated as a right in Quebec: to hold a referendum on secession with a question, rules, timing and interpretation entirely set by the secessionist government.

So how was the study reported? *La Presse* carried the account of Suzanne Dansereau of *la Presse Canadienne*. Nowhere did it tell the readers that secession on Quebec's terms was not accepted anywhere else. Nor did it convey the premise of the study: that secession must be carried out in accordance with the constitution of Canada.

While the study affirmed the paramountcy of the rule of law, the account in *La Presse* suppressed the rule of law altogether.

### Separation not a right

The report played to nationalist prejudices. It began: "Rather than play ostrich and refuse to discuss the constitutional question, the rest of Canada should accept Quebec's right to separation, favour a legal separation and create a special authority to negotiate it, given a Yes in the next referendum."

The authors nowhere spoke of separation as a "right," as Dansereau implied. They merely said that separation could be brought about legally by changing the constitution, and it would be prudent to make this possible rather than face a unilateral declaration of independence.

They made it clear that separation is not a right, either under the Canadian constitution or the laws of almost all countries.

Dansereau wrote that the two authors "propose to recognize and accept a vote for separation if it is expressed by 50 per cent plus one in a referendum."

They said no such thing. They proposed that a 50-per-cent-plus-one vote should trigger negotiations on a separation agreement, but the agreement would then have to be ratified in a new referendum. Dansereau made no mention of the second referendum, the only one that is definitive. She failed to report that the first referendum is to be merely consultative. In other words, readers of the *La Presse* story would be grossly misled.

### Headline was misleading

The report in *Le Devoir* by Jean Dion was competent and intelligent. But the headline (not of his doing) was misleading: "Secession is legal, Plan B is legitimate." In fact, the study made clear that secession as proposed in the 1995 referendum was illegal and unconstitutional. Someone, glancing at *Le Devoir's* front page would walk away misinformed.

In *Le Soleil*, Raymond Giroux discussed the study in a long editorial. He omitted the central thesis: that secession must be carried out according to the Constitution and under the rule of law. And he affirmed, without giving a single justification, the opposite of what Monahan and Bryant affirmed: "We must reject the authors' proposal giving to Ottawa the right to dictate the legislative framework for a new referendum. The question will be decided in Quebec, between Quebecers." For Quebec to control the whole process unilaterally is to bring on precisely the crisis of legitimacy that the experts strove to avoid.

*Le Droit's* Murray Maltais discussed the study in an editorial yesterday. He made no mention of the rule of law and the need to abide by the Constitution, nor did he recognize that secession would require a second, decisive referendum, nor did he bring

up the fact that the authors posit that Quebec would likely be partitioned as part of any secession agreement.

Again, the news media served the nationalist prejudices.

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So, the great concern of Quebec's beautiful people, whether French-speakers or English-speakers, was with the "partitionists" in the first half of 1996. But, fortunately there was one exception: Guy Bertrand. Just as he had gone to court in August 1995 and won the decision by Justice Robert Lesage that the *Draft Bill on the Sovereignty of Quebec* threatened the overthrow of the Constitution and the rights of Citizen Bertrand, now Bertrand in 1996 went back to Quebec Superior Court to plead fundamentally the same case before Justice Robert Pidgeon. In 1995, Bertrand tried to prevent the Parizeau referendum from taking place. He did not succeed in that objective, because of the complacency of Jean Chrétien. But he did elicit a condemnation of Parizeau's venture. Now, with Lucien Bouchard as Premier, Bertrand was trying to forestall another referendum on unilateral secession. Here is how Justice Pidgeon summarized the case before him, in his decision rendered on August 30, 1996.

#### IIINTRODUCTION

**1** Le gouvernement du Québec, dont l'un des objectifs est la souveraineté, prétend que le Québec est en droit de décider seul de son avenir sans passer par la formule d'amendement prévue à la Constitution canadienne. Dans la poursuite de cet objectif, il a présenté certaines mesures législatives qui n'ont pas été adoptées par l'Assemblée nationale et a entrepris une vaste campagne d'information et de consultation, suivie d'un référendum.

**2** C'est là que le demandeur GUY BERTRAND (LE DEMANDEUR) intente une action en justice, requérant du Tribunal une déclaration à l'effet que ce projet de sécession unilatérale est illégal, puisqu'inconstitutionnel.

**3** Pour contrer ce recours, LE PROCUREUR GÉNÉRAL DU QUÉBEC (LE DÉFENDEUR) présente alors une requête déclinatoire et en irrecevabilité. Il soutient que l'action du DEMANDEUR est irrecevable parce qu'elle concerne des questions non justiciables, essentiellement théoriques et politiques, sur lesquelles les tribunaux n'ont pas juridiction.

**4** En cours d'audition, LE DÉFENDEUR a été autorisé à ajouter un moyen d'irrecevabilité fondé sur l'absence de traduction de certains textes intégrés à la Loi constitutionnelle de 1982.

**5** Le DEMANDEUR oppose que les questions soulevées sont de la compétence du Tribunal puisque certains de ses droits fondamentaux, garantis par la Charte canadienne des droits et libertés (La Charte), sont menacés par la progression de la démarche de

sécession unilatérale du gouvernement du Québec. D'ailleurs, illustre-t-il, **l'Assemblée nationale a récemment adopté une résolution affirmant le droit du Québec de procéder unilatéralement à la sécession.** (Emphasis added)

6 Enfin, LE PROCUREUR GÉNÉRAL DU CANADA (L'INTERVENANT) soumet que tout le processus d'accession du Québec à la souveraineté ne saurait bénéficier d'une immunité en regard de la Constitution du Canada et de la compétence des tribunaux, notamment de la Cour supérieure.

This summary by Justice Pidgeon makes clear beyond any doubt that what the Quebec government, now headed by Lucien Bouchard, had in mind was precisely a unilateral secession through a declaration of independence by the National Assembly. In that sense, Premier Bouchard was claiming the right, just as did Premier Parizeau before him, to secede from Canada without obtaining an enabling amendment to the Constitution of Canada. The Bouchard government's insistence on that right was categorical, without the slightest ambiguity.

The Bouchard government also insisted that the *Constitution Act, 1982*, was inoperative. It also insisted that the court had no jurisdiction to pass a judgment on the constitutionality of a decision by the National Assembly to secede from Canada.

In response, the judge rejected these three pretensions, notably that the Constitution and the court had no authority over an attempted secession:

45 Le principe de la primauté du droit constitue la pierre angulaire de notre système démocratique. Incorporé dans le préambule de La Charte, il garantit aux citoyens, peu importe leur origine, race, couleur, religion ou langue, le respect de leurs droits fondamentaux. Pour en assurer le maintien, il existe une institution indépendante, à l'abri de toute contrainte ou influence de l'exécutif, du législatif, des groupes de pression, de l'opinion publique et même des médias. Son devoir est de veiller à ce que tous, y compris les gouvernements, respectent les lois et à ce que l'action des uns ne porte pas atteinte aux droits des autres. C'est le pouvoir judiciaire.

In the end, the judge sustained Guy Bertrand's right to pursue the Quebec government. So Bertrand was once more vindicated, as he had been before Justice Lesage a year earlier.

I reprint here the account of the event that was published in *Le Devoir* on August 31, 1996:

#### **Pas de souveraineté sans amendement constitutionnel, conclut Ottawa**

*Guy Bertrand a le feu vert; Québec minimise son échec*

PAUL CAUCHON, LE DEVOIR

Le ministre canadien de la Justice, Allan Rock, s'est réjoui hier de ce que le juge Robert Pidgeon reconnaisse la « primauté du droit » dans toute discussion sur la souveraineté du Québec, et il en conclut qu'un amendement constitutionnel serait nécessaire pour permettre la souveraineté du Québec.

Mais le gouvernement québécois soutient que le juge Pidgeon n'a pas vraiment tranché le fond de la question. « C'est l'Assemblée nationale et le peuple québécois qui doivent se prononcer seuls (sur cette question) », a répété hier le ministre de la Justice du Québec, Paul Bégin.

Déposé plus tôt en matinée, le jugement établissait que la requête de l'avocat Guy Bertrand, qui veut faire établir comme illégale toute déclaration unilatérale de souveraineté du Québec, est recevable. Elle pourra donc être analysée par les tribunaux, a décidé le juge Robert Pidgeon de la Cour supérieure du Québec dans un jugement de 62 pages.

La décision du juge Pidgeon a suscité des réactions opposées hier chez les deux ministres de la Justice impliqués dans la cause.

Du côté canadien, le ministre Allan Rock s'est fait très clair: les questions relatives et afférentes à l'indépendance du Québec ne sont pas seulement politiques, mais juridiques, constate-t-il à la lumière du jugement.

« En participant à cette cause, explique-t-il, nous n'avions qu'un seul objectif: affirmer l'importance de la primauté du droit et le rôle fondamental des tribunaux dans cette question, alors que le Procureur général du Québec alléguait que les tribunaux n'avaient aucun rôle à jouer dans le processus de sécession du Québec. »

M. Rock constate donc que le jugement Pidgeon établit trois principes: les questions soulevées autour du processus d'accession à la souveraineté doivent être discutées (par les tribunaux); les tribunaux ont un rôle fondamental à jouer dans la protection des droits; les questions relatives et afférentes à l'indépendance du Québec ne sont pas seulement politiques, mais juridiques.

« La question posée devant la cour était très simple, ajoute-t-il: le processus d'accession à la souveraineté est-il absolument hors de la loi ? La cour a décidé que les tribunaux et la loi ont un rôle à jouer. » Mais le ministre Rock est allé beaucoup plus loin en laissant entrevoir comment le fédéral interprète le rôle de la loi face à la démarche politique entreprise par le gouvernement péquiste. Expliquant qu'un référendum présente un caractère purement consultatif, le ministre Rock a déclaré qu'un amendement constitutionnel serait nécessaire pour permettre une éventuelle sécession du Québec (donc avec l'accord de toutes les provinces du Canada).

« Personne ne met en doute l'expression de la volonté populaire lors d'un référendum, a-t-il dit, mais on ne peut pas prétendre que les résultats d'un référendum sont suffisants en soi pour provoquer des changements juridiques. »

« La primauté du droit [établi par le tribunal] n'est pas un obstacle au changement, soutient-il. Elle permet les changements en leur procurant un cadre dans lequel les changements peuvent se produire de façon ordonnée. »

De son côté, le ministre québécois de la Justice, Paul Bégin, a tenté hier de minimiser les impacts du jugement Pidgeon, faisant valoir que le juge n'avait pas tranché le fond de la question.

« Le juge a préféré renvoyer la question à une étape ultérieure, » soutient le ministre Bégin. En droit, vous pouvez dire 'je ne suis pas prêt à ce stade-ci à accueillir ou rejeter l'action parce qu'il me manque de l'information, en conséquence je refuse de me prononcer aujourd'hui et je renvoie au juge de fond.' Le juge Pidgeon ne dit nulle part

qu'il rejette l'argument voulant que ce débat ne relève que de l'Assemblée nationale. Il dit que des questions importantes sont soulevées, mais il se refuse de trancher. Il soulève son appréciation des questions en cours. »

Malgré ce bel optimisme du ministre Bégin, il reste que Québec soutenait que les questions soumises au tribunal par Guy Bertrand n'étaient pas recevables par le tribunal, et il se retrouve maintenant entraîné dans un débat de fond devant la cour autour de ces mêmes questions.

Le ministre Bégin soutient donc que la situation de cette cause est la suivante : le juge Pidgeon n'a pas tranché, il demande d'aller au fond de la question, et un autre jugement pourrait décider, après analyse approfondie, qu'« il revient effectivement au peuple québécois de se prononcer [sur son avenir], toutes les autres questions devenant sans intérêt pour la cour ».

M. Bégin a déclaré hier que le conseil des ministres doit maintenant décider de ce qu'il fera avec cette cause, soit « aller au fond de la question [devant un tribunal], ne pas aller au fond, ou aller en appel ».

Le gouvernement canadien, lui, entend également étudier le jugement et prendra une décision « à la lumière de la position qui sera prise par le gouvernement québécois », reconnaît Allan Rock.

Pour sa part, le chef du Bloc québécois Michel Gauthier a pris la mesure exacte du jugement Pidgeon en se disant hier « particulièrement déçu » de sa teneur. Selon lui, la question de la légitimité de la séparation du Québec est une question beaucoup plus politique que juridique. Tout en réitérant sa foi envers le processus démocratique d'affirmation nationale, M. Gauthier a ajouté: « Nous, on croit que la parole est au peuple alors que le gouvernement fédéral croit que la parole est à la Constitution de 1982, que nous n'avons jamais signée. »

Quant au principal intéressé, Guy Bertrand, il a livré une courte réaction hier. « Nous venons de franchir une étape, a-t-il dit. On ne pourra plus colporter de mensonges éhontés sur le projet de souveraineté, un projet dépassé. C'est une victoire pour la démocratie au Québec et partout ailleurs au Canada. Ce jugement va permettre de faire réaliser à la société québécoise l'importance dans une société civilisée de la primauté du droit, pierre angulaire de la démocratie. »

Me Bertrand entend livrer mardi à Québec une analyse approfondie du jugement.

Almost as significant as Justice Pidgeon's decision was the reaction of the Quebec government. Lucien Bouchard refused to be bound by the decision. **“With all the respect I have for the courts, it's not the courts, a politician, a businessman, a union official or a citizen who will decide the collective future of a people, it is the people itself,”** Bouchard declared on September 3, five days after the decision was made public. Then, following a September 4 meeting of Bouchard's cabinet that focused on the Pidgeon decision, his Justice Minister Paul Bégin, also repudiated the jurisdiction of the court: **“We submit that the only judge and only jury on the future of the Quebec people is the Quebec people itself.”**

Minister Bégin also trotted out the arguments made in court by his lawyers, to the effect that Quebec is not bound by the Constitution of Canada, and so a unilateral declaration of

independence cannot be unconstitutional: “They say that it is illegal, but they forget to tell you that the Constitution was not recognized by Quebec, it was not translated in French, it has not been adopted by other legislatures as is said in Section 55 of this Constitution **and we maintain that it’s not in effect. How can they say we aren’t respecting a Constitution that is not in effect?”**

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When, finally, on September 26, 1996, the federal Government decided at last to send a reference to the Supreme Court of Canada on the legality of unilateral secession, public opinion was confused. In the *Ottawa Citizen*, shortly before Mr. Rock made his announcement, an editorial urged him not to do so. At the time, the editor was James Travers, the editorial page editor was Peter Calamai.

It is hard to imagine how quarrelling in court about the legalities of separation could serve the cause of Canadian unity... Whatever the motives, a federal reference to the Supreme Court seems bound to fail... In sum, Canada’s future cannot and should not be decided by lawyers asking hypothetical questions in court. It must be settled by Canadians themselves, in the full exercise of democracy.

Also, shortly before the announcement on the reference, the *Montreal Gazette* returned to its constant theme that Quebec could secede if the population so willed. In an editorial published on September 17, 1996, the *Montreal Gazette* suggested that unilateral secession was to be undertaken only as a last resort: “Despite the PQ’s pretensions, a unilateral declaration would be a violation of democratic principles and in no way could be justified as long as legal avenues had not been exhausted.”

On September 21, Premier Bouchard voiced his indignation after hearing that Newfoundland’s Brian Tobin was thinking of repudiating his contract with Quebec over Churchill Falls power. Repudiate a legal contract? Bouchard was aghast.

Me, I am for the rule of law in every case. You have to respect rights every time that a question of rights arises. That’s our position with respect to sovereignty. We believe that there is a fundamental right on which we must base the sovereignty of Quebec. The Canadian Constitution is silent on a fundamental right like the destiny of a people. We must found [sovereignty] on international law. But it is founded on the law.

But, on September 25, with the expectation now aroused that the federal government was going to go to the Supreme Court the next day to get a ruling on the right to secede, suddenly Quebec’s ministers backed away from the claim that the law gave them a right to secede. Now the right was sacred, that is, above the law. This was the view of Intergovernmental Minister Jacques Brassard:

Que ce soit la Cour supérieure, la Cour d'appel ou la Cour suprême, la position du Québec demeure inchangée. Un juge, ça reste un juge. Nous pensons que cette question ne relève pas des juges, quel que soit le niveau du tribunal.

[Translation] Whether it be the Superior court, the Appeal Court or the Supreme Court, the position of Quebec remains unchanged. A judge remains a judge. We think that this question does not come under the purview of the judges, whatever be the level of the tribunal.

Brassard now conceded that Quebec did not hold a right to secede under the Constitution. "Under the current Canadian Constitution, it is obvious that the right to secede does not exist. It is not there. To have the highest court of the land say it [would not] teach us very much."

The PQ ministers had long maintained that Quebec held the right to secede under international law. Now, that, too, was a position they backed away from, in case it should be publicly exposed as unfounded. "The process of recognizing a new sovereign state is not provided for in international law," Brassard finally admitted. "It is not codified. It is a matter of political reality."

Deputy Premier Bernard Landry was also backing away from previous positions. "Even the International Court in The Hague wouldn't be the right place because the sovereignty of nations is very fundamental law and does not have to be interpreted by this or by that. It is the sacred right of nations to be masters of their own destiny."

On September 26, when Rock did, finally, refer the legality of secession to the Supreme Court, he read a ministerial statement in the Commons. That meant that his statement was a solemn declaration of policy on the part of the government, unlike the less formal answers to questions given in the Commons by Rock and Massé on May 13. Rock now assured the Commons that a UDI had "no political justification" because the government and people of Canada would accede to the will of Quebecers to secede. For Rock, it was only a matter of doing things in an orderly way.

A referendum is an opportunity for a government to consult with the people. But however important that consultation may be, the result of a referendum does not in and of itself effect legal change. It is terribly important to remember that in the Canadian context there is no political justification to argue for a unilateral declaration of independence by the Quebec National Assembly.

In most countries the very idea of secession would be rejected. But that has not been so in Canada. There have been two referenda in Quebec. The leading political figures of all the provinces and indeed the Canadian public have long agreed that this country will not be held together against the will of Quebecers clearly expressed. And this government agrees with that statement. This position arises partly out of our traditions of tolerance and mutual respect but also because we know instinctively that the quality and the functioning of our democracy requires the broad consent of all Canadians.

Rock took for granted that a demonstrated will to secede must be followed by secession. This was Stéphane Dion's "fundamental principle in a democracy," now officially consecrated as the policy of the Chrétien government. But what if the would-be secessionists insisted on a course that would violate the rights of the Aboriginals, of the minorities in Quebec and of Canadians outside Quebec? What about Quebec's obligations under the principle of federalism? Rock never raised these fundamental questions. Moreover, the Chrétien government was, on the one hand, sending a reference to the Supreme Court to judge the legitimacy of unilateral secession. But, at the same time, the government of the day was giving the assurance that there would be no obstacle to secession if the will to secede was clear. But did the federal government have the power, the jurisdiction, the authority, to issue that blanket assurance? Rock and Chrétien were asserting that they had the power to have Canada partitioned without the consent of the other provinces. And they were presuming that the reply that would eventually emerge from the Supreme Court would legitimize their authority to do so. That was an egregiously unfounded presumption.

Rock had made a terribly imprudent statement: "The leading political figures of all the provinces and indeed the Canadian public have long agreed that this country will not be held together against the will of Quebecers clearly expressed." But there had never been a systematic enquiry to establish whether all the provinces endorsed that statement. In fact, there was much evidence to the contrary. Moreover, during the referendum campaign, people across the country were convinced that Jean Chrétien had everything under control and so they did not feel called upon to react to the possibility of the vote returning a majority OUI.

Now, with the referendum vote results so breath-takingly close, disillusioned people were finally waking up and stirring across the country. The previous calm had been the result of apathy and complacency, encouraged by the Chrétien government. The surprising turnout for the Moot Court meeting on January 21 was a sign that change was in the air. The supposed unanimity that Quebec could go at will, that Rock now asserted so confidently, had always been an illusion. There was so much contrary evidence.

Allan Blakeney, the highly respected former premier of Saskatchewan, delivered a speech at Toronto's York University on June 14, 1991. If Quebec seceded, he predicted, it would not have its present borders.

If there is a basis for separation, it cannot be that the Canadian Province of Quebec with its existing boundaries has any status to separate. There is no basis for such a position in either domestic or international law.

The *Globe and Mail*, in an editorial published on March 29, 1994, rejected a secession that was unilateral and suggested that a seceding Quebec could not keep its current boundaries:

Every citizen of this country is a citizen of the whole of this country, and should not be expected to stand and watch while a part of it is wrenched away. [...] What of the self-

determination of the Cree, of the anglophones, of federalists of every stripe? What of the self-determination of the Canadian nation?

The *Toronto Star*, in an editorial on May 7, 1994, spelled out some conditions that Quebec must fulfill for secession.

First, the issue must be decided by an explicit referendum question on independence. Weasel words, such as sovereignty, will be meaningless. Canadians must agree to any final partition agreement or Quebec will be treated as a rogue republic in the diplomatic and financial world. If Quebecers can leave Canada, then the Cree and Inuit of Ungava can leave Quebec, if they so choose.

On May 11, noted columnist Richard Gwyn had an opinion piece on the same subject in the *Toronto Star*. Here were some of his observations:

Not until the actual decision has been made will Canadians become engaged emotionally. They will do so then in a manner Quebecers have never experienced nor, on the evidence, have yet anticipated.

Rather than receiving a Quebec delegation in Ottawa, Canadians would go into council with themselves. A general election would have to be called to elect a government with a specific mandate – as Jean Chretien’s lacks – to negotiate the terms of the break-up. (A tragedy here is that Chrétien, immensely popular and a passionate pan-Canadian, would have to seek re-election in a constituency outside of Quebec.) Very probably, the new administration will be some form of a national unity government, including the Reform party. A new movement advocating union with the United States might well become the opposition.

Only then will Canadians be ready to talk to Quebecers, and, because ever since the constitutional referendum ultimate political legitimacy has resided in the public rather than in Ottawa, also probably not until after constituent assemblies have discussed the character of the new nation-state. (Parizeau’s recent threat to force the pace of these talks by withholding payments on the national debt is pure bluff. Quebec would destroy its credibility with international investors).

That many Canadians would then be bitter and angry is beside the point. What matters is that their single concern would be their own, and Canada’s, self-interest. Decisions about cross-border deals – many, a few, none at all – would be made by cost-benefit analyses from which all sentiment about or sympathy toward Quebec would be absent.

Thus, should the Cree of Nouveau Quebec vote to separate, as they may well do, Canadians would welcome them back into Confederation because, to our great psychic self-interest, this curious country would once again stretch from sea to sea.

Similarly, there would be no give in the negotiations on sharing the national debt and on compensation for federal properties, except to the extent that Canada gets its full share. It isn't nice to say all this. But breaking up a country isn't nice. Pray to God it doesn't happen. But if that's what Quebecers really want, it will happen. And if that's not what they really want, then being not nice today may help them avoid sleepwalking themselves – and us – into a chasm.

In the May 1994 edition of *Maclean's*, eminent journalist Peter Newman threatened:

Instead of playing by Robert's Rules of Order let's tackle Bouchard on his own terms. Let's leave no doubt in his mind that our will to survive as one nation is at least as strong as his intention to turn himself into the first president of a socialist republic straddling the St. Lawrence Seaway<sup>38</sup>.

On May 16, Diane Francis, editor of the *Financial Post*, published a column in *Maclean's* under the title, "The severe storm that lies ahead"<sup>39</sup>.

There is also the question of the legality of secession under international law. In his essay, McGill University economics professor John McCallum says that, under Canada's Constitution, Quebec would need a clear mandate from its people to leave and then have to get permission to go from both the federal parliament and at least seven provincial legislatures representing half the population." A UDI [unilateral declaration of independence] is almost always resisted by the original state. Military action is not prohibited by international law and the secessionist government is subject to all the penalties proscribed by the domestic legal system," he added.

Diane Francis then quoted Daniel Turp to the effect that Aboriginals had the same right to self-determination in international law as did the Québécois.

Also on May 16, 1994, the premier of British Columbia, Michael Harcourt, spoke bluntly: "Frankly, the position I'm taking is that Quebec and B.C. are natural allies in a renewed Canada," he told the *Globe and Mail*. "But if they decided to separate, we wouldn't be the best of friends; we'd be the worst of enemies. The anger that would be felt by British Columbians to the people of Quebec wanting to break up and destroy this great country would be immense."<sup>40</sup>

Premier Harcourt predicted that there would be a dispute over Quebec's northern territories, which the province received after Confederation. There would also be hard bargaining over

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<sup>38</sup> Peter Newman, "The Faustian deal of Lucien Bouchard," *Maclean's*, May 1994.

<sup>39</sup> Diane Francis, *Maclean's*, Toronto Vol. 107, Issue 20, (May 16, 1994): p. 9.

<sup>40</sup> Miro Cernetig, "Harcourt hardens on Quebec," *Globe and Mail*, May 17, 1994.

Quebec's share of the debt and the assets it would retain after secession. He called Jacques Parizeau a "Pied Piper" for insisting that the breakup of Canada could be amicable.

Oh, it would be terrible consequences for everybody. They think it's going to be logical and civilized. Forget it, it won't be. There will be great bitterness and a nasty split. And they'll suffer, not just economically but they'll suffer every which way, the people of Quebec. And it'd do harm to Canada"

The next day, May 17, Indian Affairs Minister Ron Irwin was in Quebec City, attending a federal-provincial conference on native self-government. He rejected the view that Aboriginal territories within Quebec would necessarily remain within a seceding Quebec.

They are part of Canada. If they want to stay in Canada, that's their choice. I don't think Indians are chattel for the separatists to decide on. They've been here for 10,000 years<sup>41</sup>.

Jacques Parizeau and Lucien Bouchard had always insisted that the rest of Canada would finally accept, even if grudgingly, the unilateral secession of Quebec. On May 28, in her column in *La Presse*, Lysiane Gagnon offered the same reassurance. I reprint it in full because Lysiane Gagnon has been such a respected witness to history since the beginning of the Quiet Revolution that her confusion shown here is revealing of the wider problem. Her analysis of the situation then, I believe, is another demonstration of the generalized misunderstanding of the real issues at stake.

### **Débats oiseux**

*Gagnon, Lysiane*

*La Presse*, Samedi 28 mai 1994 p. B3 756 mots

La salive ne coûte rien et l'encre est bon marché...

Heureusement, sinon les Irwin, Harcourt, Manning, Romanow, Bouchard et Parizeau seraient aujourd'hui en faillite, après avoir gaspillé pendant deux semaines consécutives tant d'encre et de salive autour de questions aussi futiles que « le droit à l'autodétermination » des Québécois et des autochtones.

Ce débat est non seulement prématuré, il est en porte-à-faux par rapport aux réalités politiques les plus élémentaires. Bien sûr que la Constitution canadienne ne prévoit ni le droit à l'autodétermination ni, à plus forte raison, les modalités de la sécession d'une des parties du Canada! Et alors?

Si une majorité de Québécois votait OUI, qui peut croire sérieusement que le Canada enverrait l'armée au Québec? Ou qu'il refuserait d'entrer en négociation avec son

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<sup>41</sup> Ron Irwin was quoted in the *Ottawa Sun* on May 18, 1994.

gouvernement légitime? Ou qu'il soumettrait la question à un vote pancanadien, ce qui reviendrait évidemment à noyer le vote québécois dans le vote majoritaire?

Le premier ministre de la Saskatchewan, Roy Romanow, déclarait jeudi [26 mai] qu'il faudrait davantage que la volonté clairement exprimée des Québécois pour que le Québec se sépare. Son vieux complice de la guérilla constitutionnelle de 1981, le premier ministre Jean Chrétien, a lui aussi évoqué le même scénario, mais à sa manière, c'est-à-dire de manière vague et inarticulée.

Cette grossière démagogie, qui ne vise qu'à faire peur au monde, n'a rien à voir avec les réalités politiques. Qui va croire deux minutes qu'un monde occidental qui a reconnu l'indépendance de la Slovaquie (négociée entre chefs politiques sans consultation de la population) et le démantèlement douloureux de deux fédérations (l'URSS et la Yougoslavie), etc., refuserait de sanctionner un verdict populaire clair obtenu après une démarche pacifique dans une société à forte tradition démocratique?

Allons donc! Que le cas du Québec s'applique ou non à la définition juridique d'État colonial n'a aucune importance. Tout le monde sait bien que c'est sur le plan politique et non pas juridique que l'affaire se conclura, comme du reste l'a affirmé Daniel Johnson, l'un des rares à avoir gardé la tête froide dans cette partie de ping-pong hystérique.

L'autre débat oiseux qui a fait couler énormément d'encre inutile, c'est celui qui consiste à savoir qui, des Québécois ou des autochtones, aurait « droit à l'autodétermination ». D'un côté, le ministre fédéral des Affaires autochtones, Ron Irwin, prétend que les autochtones pourraient « se séparer » d'un Québec indépendant, entraînant leurs territoires ancestraux avec eux. De l'autre côté, MM. Bouchard et Parizeau s'obstinent à refuser de reconnaître aux autochtones les mêmes droits qu'aux Québécois.

Il semble qu'en regard des lois internationales, ni l'un ni l'autre peuple ne jouirait de façon explicite du droit à l'autodétermination. Mais on le sait, l'important, en pareille matière, n'est pas le texte juridique, encore moins l'interprétation qu'en font les experts – d'ailleurs comment s'y fier?

Voyez Daniel Turp, ce professeur de Droit, qui se laisse aujourd'hui bâillonner par son parti comme un vulgaire mercenaire de la pensée! Ce qui compte, c'est la réalité politique. Or il est bien évident qu'en théorie, la souveraineté des nations autochtones se justifierait autant sinon davantage que celle du Québec. Les autochtones sont par la race, l'histoire, la culture, la langue et la religion ancestrale, infiniment plus « différents » des autres Canadiens que les Canadiens français ne l'ont jamais été des Canadiens anglais. Les autochtones peuvent, dans une certaine mesure, faire valoir certains droits territoriaux.

Surtout, que cela soit mérité ou non, ils ont une formidable cote de popularité dans les capitales occidentales. Aucun gouvernement québécois ne pourrait s'opposer, ni en théorie ni en pratique, à la souveraineté de ses peuples autochtones... Mais voilà, il y a un hic: l'hypothèse est irréalisable.

Car pour revenir sur le terrain de la réalité, il manque aux nations autochtones un attribut essentiel: l'autosuffisance financière, de même que le nombre requis pour constituer des sociétés viables. Cette incontournable réalité, que même Ovide Mercredi reconnaît à demi-mots, devrait normalement clore le débat. La souveraineté autochtone n'advient jamais – pas dans les prochaines décennies en tout cas. Ce n'est qu'une arme de papier agitée par ceux qui, comme le ministre Irwin, sont déjà entrés en guerre active contre le projet souverainiste.

Les autochtones pourraient évidemment réclamer le rattachement de leurs territoires au reste du Canada. Mais pour en arriver là, il faudrait que le Canada reconnaisse aux Indiens un droit inaliénable sur leurs territoires ancestraux... Et alors, cela voudrait dire que le même principe s'appliquerait ailleurs, dans des provinces comme la Colombie-Britannique, où les Indiens réclament la juridiction exclusive sur à peu près les quatre cinquièmes du territoire, y compris sur Stanley Park, le joyau de Vancouver!

Le ministre Irwin a beau plastronner, il se heurtera tôt ou tard à la réalité, et la réalité c'est qu'aucune province ne voudra céder sa juridiction sur de larges portions de son territoire. Les Indiens n'arriveront jamais à négocier mieux qu'une formule mixte: l'autonomie relative sur des territoires infiniment plus réduits que ceux dont ils se réclament – quelque chose comme des grosses municipalités avec des services scolaires et un embryon de système judiciaire pour les délits mineurs.

On peut certes imaginer, dans un Québec indépendant, des enclaves comme Kahnawake rattachées au Canada... Mais si les Cris « partaient » avec le Nord du Québec, la même logique voudrait que le Canada « donne » le Nord de l'Ontario aux Ojibways, le Nord du Manitoba aux Cris et l'île de Vancouver aux Haïdas!

Que cachent ces débats frénétiques sur la question éminemment hypothétique des modalités post-référendaires de l'accession du Québec à la souveraineté? Dans le cas des Bouchard et Parizeau, cela sert à se maintenir chaque jour sous les feux de la rampe et à provoquer l'adversaire, tout en occultant le problème de fond, qui est qu'une majorité de Québécois reste réfractaire à l'indépendance.

Dans le cas des Romanow, Irwin et compagnie, ces menaces sont une façon de flatter dans le sens du poil leur électorat de droite, de même qu'une tentative puérile et gauche d'effrayer les Québécois.

Mais ces derniers en ont vu d'autres, et la tactique fera long feu.

Clearly, Lysiane Gagnon did not understand the legal definition of the right to self-determination. It did not grant a right to secession, as she obviously assumes. Then, she assumed that if the lands of the Cree in northern Quebec remained part of Canada while Quebec seceded, other northern Aboriginal communities in other provinces would have to have their independence recognized. That was a total non-sequitur, and not at all an issue at the time. The Aboriginal nations were not seeking secession from Canada. The only issue in question was the choice of the Inuit, the Cree and the Montagnais *not* to participate in Quebec's secession from Canada. They had gone to the expense of holding a referendum on that issue and the vote result, above 95 per cent against being part of a seceding Quebec, was definitive.

Then, Gagnon assumed that, if the Québécois voted for independence, Canada would have no way to retain Quebec except by sending in the army. That is an absurd dichotomy. The Québécois obey the law, not because they are afraid of the army, but because they believe in an ordered society, under the rule of law. Lysiane Gagnon never considered that the courts of Quebec and, ultimately, the Supreme Court of Canada would be called on to rule on any attempt at unilateral secession. When the decision came down that secession was illegal without an amendment to the Constitution, the government and the people of Quebec would submit, because the alternative of anarchy and disruption to the economy would be beyond endurance. The people of Quebec were not and are not inclined to revolution, unless they are misled into thinking that there is no revolution, only an assertion of rights.

But the wrong impression is precisely what the Chrétien government conveyed on September 26, 1996. At the same time as his government launched a reference to the Supreme Court of Canada, it offered the assurance that there would be no strong resistance from the rest of Canada if the Québécois expressed their preference for independence. On the contrary, the Chrétien government assured the Québécois that they could secede if that was what they wanted to. No condition, no reservation, accompanied that reassurance. That projected Canada through rose-coloured glasses.

René Lévesque knew better in March 1980. He recognized that the referendum that he was about to hold could very easily end up in violence. Jean-François Lisée, in his 1990 book on diplomatic relations between Canada and the United States titled *In the Eye of the Eagle*, relates a conversation between the premier and U.S. consul-general George Jaeger. Lévesque spoke to him confidentially, as Jaeger reported back to Washington. This was not for public consumption. But Lévesque raised with him what might happen if the referendum produced a vote of 40 to 44 per cent in favour of sovereignty-association, but the majority Yes vote of the francophones was overwhelmed by the almost unanimous No votes of the anglophones. In that case, Jaeger reported, "Levesque expresses the fear that there could be a return of violence in Quebec, 'as in Ireland.'"

In the event, there was a rampage of vandalism in the night following the 1980 referendum, but no significant uprising and no enduring expressions of anger. But a *real* attempt at the break-up of Canada would be an elephant of a different colour. There would almost certainly be violence

on both sides of the attempted secession. That is why Allan Rock, Stéphane Dion and Jean Chrétien owed it to the country to express and defend the constitutional order, which Chrétien and Rock were now failing to do for a second time.

The ambiguity of Allan Rock's position was in evidence at a press conference that followed his announcement of the reference in the Commons. Rock was asked by a journalist whether the move was intended to discourage Quebecers from favoring secession by convincing them that it would lead to chaos. He replied: "No."

Ce que nous disons, c'est que les Québécois doivent accepter un processus ordonné tout comme nous devons respecter les souhaits qu'ils expriment dans un référendum.

In fact, such was the ambiguity of Rock's statement that journalist Chantal Hébert led off her September 27 report on the reference by presenting it as intended to ready Canada for Quebec's secession.

Sous le couvert de son renvoi à la Cour suprême, le gouvernement Chrétien est passé hier de la prévention de la souveraineté du Québec à la préparation du Canada à cette éventualité.

Dion, appearing on the RDI program, *Maisonneuve à l'écoute*, had stated on September 18, 1996, a week before Rock's declaration: "Si les Québécois, très clairement, selon une procédure qui est très claire, décident de quitter le Canada, on ne peut pas les retenir contre leur gré. » Then, on Radio-Canada's *Point de Presse* on September 29, three days after the reference was announced, Dion went further. "No one challenges the right of the Québécois to stay in Canada or to leave it," he said. "Un référendum pancanadien ne peut pas bloquer la volonté clairement exprimée des Québécois. »

Here were his exact words when, on September 29, 1996, he was questioned by the program's host, Pierre Maisonneuve, by Chantal Hébert, then reporter for *La Presse*, and by Michel Vastel, reporter with *Le Soleil*:

Dion : Non, mais – écoutez – on peut établir ça clairement dans le débat public que personne ne met en cause le droit des Québécois de rester ou de sortir du Canada – établir ça. Que ce qui est en cause c'est la procédure par laquelle ce droit va s'exprimer. C'est ça qui est en débat, là. On ne demande pas aux juges de décider à la place des Québécois, parce que ça, c'est dit et répété, y compris dans vos télé-journaux, on dit : est-ce que Ottawa va bloquer le droit des Québécois – c'est pas ça! Arrêtez de dire ça.

Maisonneuve : Quand on parle de référendum canadien, on parle de quoi, à ce moment-là?

Dion : Quand on parle d'un référendum, on parle d'une procédure par laquelle un droit s'exprime. On peut avoir un référendum canadien comme on a eu en Suisse un référendum pour entériner la séparation du Jura du canton de Berne, à la fin, comme

pour dire : voilà, on fait le référendum. Mais je ne crois pas possible que le Québec, malgré sa volonté clairement exprimée reste dans le Canada --. Il faut que ça soit clair, ça.

Chantal Hébert : Et si la Cour suprême nous dit que ça prend l'Île du Prince-Édouard? C'est pas vous qui êtes en train de vous attacher, là?

Dion : Non. Parce que je pense que l'Île du Prince-Édouard, bien sûre, ça ne serait pas raisonnable de penser que l'Île du Prince-Édouard puisse garder les Québécois contre leur gré.

Maisonneuve : Pourquoi?

D : Parce que c'est pas démocratique, c'est pas québécois, c'est pas canadien. Par contre, par contre, l'Île du Prince-Édouard est certainement en droit, l'Île du Prince-Édouard est certainement en droit (sic) de s'assurer que cette volonté des Québécois aurait été clairement exprimée, parce que, si jamais le Québec sort du Canada, ça aura des effets très graves sur les citoyens de l'Île du Prince-Édouard.

Thereby, the promise made by Allan Rock not to oppose the will of Quebecers to secede was upgraded into a "right" to secede. Dion also suggested that the process would not necessarily be subject to the amending formula of the Constitution when he conceded that Prince Edward Island should not have the right to prevent Quebec from seceding.

As reported by Chantal Hébert in *La Presse* the following day, Dion said it was unlikely that a small province would choose to block Quebec's secession after a vote in favor, unlike what had happened with Meech Lake. She wrote:

En 1990, il avait pourtant suffi de seulement deux petites provinces pour faire avorter l'Accord du lac Meech. Selon Stéphane Dion, une éventuelle sécession du Québec ne se prêterait pas à ce genre de scénario parce que les conséquences de bloquer le départ du Québec seraient d'un tout autre ordre. En rejetant l'Accord du lac Meech, les provinces récalcitrantes n'avaient pas à envisager d'avoir recours à la force pour imposer leur volonté, fait-il valoir. Quant au scénario du recours à un référendum pancanadien, le ministre Dion l'entrevoit pour « entériner » les termes d'une sécession plutôt que pour l'en empêcher.

By setting up two imaginary polar opposites – the use of force or the right to secede – our two Ministers, Rock and Dion, sent out the message to Quebecers that secession would be accepted no matter what the Supreme Court should decide. They thereby diverted attention from the only real likelihood in the real world, if it did happen that Quebecers did vote some day for secession: a state of chaos would result, because no joint agreement would ever be possible on the conditions for secession. As the court was to establish later, a legal secession would require

a prior agreement on such difficult issues as Quebec's future boundaries. Almost certainly, such an agreement would prove impossible, if both sides in the negotiations treated fairly the rights of all the parties involved<sup>42</sup>. The unconditional guarantee offered by Rock and Dion served only to maintain Quebecers in their illusion that the issue of secession would be settled by a referendum. It provided an unrealistic assumption that the referendum, and nothing but the referendum, would settle everything. And here was the federal government abetting that illusion.

There seemed to be such a consensus among politicians that Quebec could go if it wanted to that Michel David wrote in his column in *Le Soleil* after Rock's announcement:

Il n'y a plus qu'une poignée de nostalgiques de Pierre Elliott Trudeau pour nier au Québec le droit de choisir librement son destin, que ce soit à l'intérieur ou à l'extérieur du Canada.

So Dion and Rock set the stage for the worst case scenario, the nightmare scenario: one in which both sides of an attempted secession believed that right was on their side, with no known way of resolving the impasse, since the Quebec government had rejected the jurisdiction of the courts.

This September 26 announcement, unlike the decision in May to intervene in the court challenge launched by Guy Bertrand, was treated calmly by Premier Bouchard. He made no threat to hold snap elections or a referendum. There was no emergency resolution rushed through the National Assembly. Instead, he dismissed the reference to the Supreme Court as a political act, one that would have no consequence for determining Quebec's future. He simply repudiated the jurisdiction of the court over Quebec's secession. Thereby, Bouchard ignored the decisions rendered in 1995 by Superior Court Justice Robert Lesage and now in 1996 by Justice Robert Pidgeon.

Il n'y a qu'un tribunal pour décider de l'avenir politique du Québec, c'est le peuple du Québec. Je ne vois pas en quoi une intervention autre pourrait affecter le destin d'un peuple. [...] [La Cour suprême rendra] un avis qui sera sûrement classé dans les archives, dans les bibliothèques à Québec ou ailleurs. Mais il est certain que ça n'affectera en rien l'avenir du Québec et la détermination du gouvernement de faire un référendum et s'en remettre à la suite des choses si la réponse est positive.

He did not even hold a press conference, but merely a scrum. The premier announced that his government would not mandate lawyers to represent Quebec before the Supreme Court. His Minister of Justice, Paul Bégin, added that if the court appointed an *amicus curiae* to represent the secessionist case, his government would disavow the lawyer.

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<sup>42</sup> Quebec still does not accept the boundary between Quebec and Labrador, established by the Judicial Committee of the British Privy Council in 1927. Maps issued by the Quebec government show a broken line between the two, to suggest that the line is contested.

The Quebec government's official reaction to Rock's announcement was given that same day in the following press release:

**960926 CABINET DU MINISTRE DE LA JUSTICE, PROCUREUR GENERAL ET MINISTRE RESPONSABLE DE L'APPLICATION DES LOIS PROFESSIONNELLES - L'AVENIR POLITIQUE DU QUEBEC**

*Déclaration du procureur général du Québec et ministre de la justice, monsieur Paul Bégin relativement à l'initiative du gouvernement fédéral de demander à la Cour Suprême de se prononcer sur l'avenir politique du Québec*

La décision du gouvernement fédéral de demander un avis à la Cour suprême du Canada sur des questions relatives à l'avenir du Québec a été rendue publique ce matin par le ministre de la Justice du Canada monsieur Allan Rock. Au nom du gouvernement du Québec, monsieur Paul Bégin, ministre de la Justice et Procureur général du Québec a réagi à cette décision. Monsieur Bégin fait la déclaration suivante que nous reproduisons au long:

« J'ai pris connaissance de l'annonce faite aujourd'hui par le Gouvernement fédéral de s'adresser à la Cour Suprême du Canada afin qu'elle se prononce sur l'avenir du peuple québécois.

Comme je l'ai déjà dit, et je le répète aujourd'hui, le seul juge et le seul jury de l'avenir du Québec, c'est le peuple du Québec. Aucun juge, ceci dit en tout respect, ne pourra empêcher l'expression démocratique d'un peuple.

Vous l'aurez compris, le Gouvernement du Québec ne se présentera pas devant la Cour suprême du Canada. Nous n'aiderons pas le Gouvernement fédéral à faire de la Cour suprême un acteur politique. Comme nous l'avons toujours dit devant le Juge Lesage, et comme nous l'avons redit devant le Juge Pidgeon, il s'agit ici d'une question purement politique et non juridique.

Par ailleurs, je comprends que le Gouvernement fédéral a l'intention de participer à la prochaine campagne référendaire. En effet, je prends bonne note que le Gouvernement fédéral ne conteste pas, contrairement à monsieur Guy Bertrand, et je cite :

« ... l'autorité du Gouvernement du Québec d'ordonner en vertu de la Loi sur la consultation populaire du Québec, un référendum pour permettre (au peuple du Québec) de s'exprimer sur son avenir. » (Fin de la citation)

D'autre part, je constate que le Gouvernement fédéral tient un discours contradictoire. Dans sa déclaration lue à la Chambre des communes, le Procureur général du Canada, monsieur Allan Rock, a indiqué que, et je cite :

« ... que le pays ne restera pas uni à l'encontre de la volonté clairement exprimée des Québécois. Notre gouvernement est d'accord avec cette position. » (fin de la citation)

Il a ajouté toutefois que cette démarche du Québec exigeait, et je cite :

« ... l'assentiment général de tous les Canadiens » (Fin de la citation)

Ce qui signifie que le Gouvernement fédéral espère qu'advenant un OUI lors d'un prochain référendum au Québec, monsieur Frank McKenna, Terre-Neuve ou tout autre groupe serait ainsi en mesure de s'opposer au résultat d'un référendum tenu démocratiquement.

Ce qui est nouveau, quant à moi, c'est que le Gouvernement fédéral pour la première fois, reconnaît, comme l'a dit le Québec lors de la dernière campagne référendaire, qu'il y aura lieu de tenir des négociations pour conclure un traité de partenariats. »

Minister Bégin also added, according to *La Presse* that, whatever the advisory opinion the Supreme Court might deliver, “après un référendum où la souveraineté l’aurait emporté, l’Assemblée nationale du Québec pourrait déclarer unilatéralement l’indépendance après un délai où le Québec chercherait à en arriver à une entente de partenariat avec le reste du Canada, soutient-il.”

Bouchard said, as reported in the *Globe and Mail*, that Quebec was not bound by the Constitution:

We all know that this Constitution that exists in Ottawa, which will be used by the tribunal in Ottawa, has been imposed on Quebec and that no Quebec government has ever accepted to sign it. It's completely irrelevant and unacceptable for any government to go there.

Quebec Liberal Leader Daniel Johnson Jr. did not comment publicly. The reaction of the Quebec Liberal Party was given by Jean-Marc Fournier, member of the National Assembly for Chateaugay and the critic on constitutional matters. The day before Rock's announcement, Fournier had said to the news media: « Je m'attendais à ce que les énergies soient concentrées sur les changements à apporter au fédéralisme. Je suis désolé qu'on perde du temps en allant ailleurs. On n'a pas de temps à perdre avec ce genre de débat. »

Then, after Rock announced the reference, Fournier claimed that Ottawa was turning its back on reforming federalism, which is where it should be active, and was undertaking a political rather than a legal action by putting its three questions to the Supreme Court. The “federalist” party, through its spokesman on federal-provincial matters, maintained that no legal rules applied to secession.

La question renvoyée à la Cour suprême par le gouvernement fédéral ne nous avance pas à l'égard du dernier référendum. Tout ce qu'elle fait c'est de permettre à M. Bouchard et à M. Landry d'avoir un forum pour aller prouver leur opinion, eux qui prétendent que le droit international supporte la thèse sécessionniste. Or, il n'y a aucune règle légale constitutionnelle ou de droit international qui entoure cette aventure. Nous, ce qu'on dit, c'est qu'il existe le trou noir, l'incertitude.

In other words, that day, the Quebec Liberals chose to reject the federal initiative without fully denouncing it. But they implied that the judicial system did not have jurisdiction over the question of secession because there was a legal blank, or a “black hole,” on the issue. That was also the stance of Jean Charest, both before the 1995 referendum and, in 1998, even after the Supreme Court had delivered its response to the reference on the secession of Quebec. To

claim that there was a “trou noir,” as Charest did, was an evasive way of saying that the authority of the court did not apply to Quebec’s secession.

However, three days later, Leader Daniel Johnson Jr. made a show of repudiating the federal ministers while, in fact, attacking something they had never said or done. He maintained that they were trying to dictate what question Quebec could ask in a referendum. Mr. Rock had said explicitly that he recognized Quebec’s right to set its own referendum terms.

*Le Droit* reported Mr. Johnson’s reaction under the heading: “Johnson donne une autre gifle à Ottawa.”

« S’ils veulent intervenir de cette façon, qu’ils viennent au Québec, se fassent accepter par un parti politique et se fassent élire, » a retorqué de cette manière cinglante le chef du PLQ à une question d’un reporter.

Johnson was speaking at a meeting of the general council of his party. He condemned equally the federal government and the PQ. He also took the occasion to support a youth who had spoken out against a resolution at the meeting which would commit the party to banishing referendums forever. The young man had been booed when he spoke at the microphone, but Johnson, who was not in the hall at the time said: « Moi, je l’aurais applaudi. »

One person whose reaction is of interest was that of Benoît Pelletier, then professor of constitutional law at the University of Ottawa, later a Liberal MNA and head of a committee charged with developing a revised constitutional policy. Professor Pelletier recognized that it was legitimate for the federal government to seek an opinion from the court as part of its mandate to defend the territorial integrity of Canada. But Pelletier worried, according to *Le Soleil*, that the advisory opinion might put the rest of Canada back to sleep.

« Le plan B est loin d’être un complément au plan A. Dans mon esprit, c’est un obstacle au plan A. Car le plan A a besoin pour réussir que les Canadiens sentent qu’il y a péril en la demeure. Or, ils ne voient pas pourquoi ils devraient faire des concessions au Québec si de toute façon en temps opportun ils vont réussir à bloquer les ambitions sécessionnistes québécoises, » a-t-il soutenu... M. Pelletier croit qu’un vote majoritaire des Québécois en faveur de la souveraineté forcera malgré tout Ottawa à négocier rapidement une entente.

So Prof. Pelletier was a believer in the knife-to-the-throat strategy formerly practiced by Robert Bourassa.

Jean Charest, then leader of the Progressive Conservative Party of Canada, expressed his disapproval of the federal referral to the Supreme Court. “The decision announced today by the Minister of Justice sends the signal that the Liberal Government has put more thought into the break-up of the country than on keeping it united and making it function well. This is more than

a legal consultation. It is a political statement. A terribly sad and wrong statement that is not providing useful answers for everyone that believes in the future of a united Canada.”

The Reform Party, with Stephen Harper as its spokesman, approved of the federal action, but would have preferred Ottawa to clarify all the issues surrounding secession.

Lise Bissonnette commented in an editorial on September 27 in *Le Devoir*:

Il est clair que si la Cour suprême devait entériner cette théorie d’un droit de veto du reste du Canada sur une décision démocratique des Québécois, la démonstration serait explosive quant à l’illégitimité et l’immoralité de la Constitution adoptée en 1982. Elle dirait que le Canada a eu le droit à l’époque, d’imposer aux Québécois un cadre constitutionnel sans leur consentement mais que ce même cadre constitutionnel, fruit d’un coup de force, oblige absolument le Québec à obtenir le consentement du Canada s’il veut en changer.

Jean-Jacques Samson, editorial page editor of *Le Soleil*, dismissed the reference contemptuously. « Le gouvernement Chrétien a commis une erreur grave, sinon l’erreur du siècle... Jean Chrétien fait tout pour devenir le père de l’indépendance du Québec. »

Columnist Michel C. Auger was also sceptical that same day in *Le Journal de Montréal*.

S’il est un consensus chez les fédéralistes québécois, c’est que si les procédures de sécession peuvent intéresser tous les Canadiens, la décision de partir ou de rester ne peut être prise qu’au Québec. La dernière fois que les Québécois se sont fait dire qu’ils n’étaient pas maîtres de leur avenir politique, c’était en juin 1990, après l’échec de Meech. Il y a eu un demi-million de personnes dans les rues et l’appui à la souveraineté a flirté avec les 60 pour cent. Avec ce renvoi à la Cour suprême, le gouvernement Chrétien se prépare une sorte de Meech juridique qu’il pourrait regretter d’avoir préparé avec tant de soin.

So Michel Auger was asserting the power of the street to settle constitutional controversies. Michel Vastel, columnist for *Unimédia*, also minimized the true impact of a court advisory opinion.

Pour les Québécois, cela ne changera pas grand-chose. Comme le suggère le professeur Michael Mandel (Osgoode Hall): « la meilleure façon pour les Québécois d’affirmer leur droit à l’autodétermination, c’est de s’assurer que leur gouvernement est démocratique. Ils n’ont qu’à dire: ‘Je me fous de ce que le juge peut dire. C’est nous qui allons décider.’ » De fait, si un Oui à la souveraineté l’emportait par 55 % ou plus des suffrages, l’opinion de neuf juges, tout Honorables qu’ils soient, ne pèserait plus très lourd!

As for the usual suspects, such as the Société Saint-Jean-Baptiste and the union federations, they gave the usual predictable responses, reported in *La Presse*. The SSJB called the federal action a confession that it would lose the next referendum, and so it resorted to « le chantage et la menace. » The SSJB maintained that Quebec had the right to secede under international law. Gérald Larose, president of the CSN, called the federal action a “provocation.”

Le dirigeant syndical estime farfelu de penser que le peuple québécois s’en remettrait, pour décider de son avenir, à des juges nommés par le gouvernement fédéral et qui s’appuieraient sur une Constitution que le Québec n’a pas acceptée, celle de 1982 rapatriée sous le premier ministre libéral Pierre Elliott Trudeau.

Depuis Val d’Or, le président de la FTQ, Clément Godbout, a indiqué que la démarche fédérale est une perte de temps. Selon M. Godbout, il appartient au peuple à décider de son avenir collectif.

With such a populist unanimity in Quebec that the reference to the Supreme Court was inappropriate or irrelevant, the Prime Minister himself encouraged the same ambiguity displayed earlier by his ministers, in a year-end televised Town Hall session on December 10, 1996. An English-speaker from the Gaspé region asked what would happen to people like himself if Quebec were to secede.

“Could we expect any assistance, financial or otherwise, from our Canadian government in that disastrous scenario?” asked teacher Howard Miller. Chrétien tried to fob him off with his patented don’t worry, be happy tune: “Yeah, but I would not want to spend a lot of time on the disastrous scenario. I think that what I said a year ago – that we were to bring about some changes to...” Miller interrupted him: “Excuse me, Mr. Prime Minister, I do want to point out to you that prior to the last referendum you also said that you did not want to spend a lot of time on that type of scenario and we came within one percentage point... I’m asking you right now, for my fellow anglophone Quebecers, what type of contingency plan is in place in the event Quebec does separate?”

Chrétien again avoided the real issue. “But for me, I just say that the goal of this government is to make sure that if there is a referendum, that it will be won. We are proposing some changes at this time. You saw yesterday, for example, the reaction of most of the premiers, quite positive, to recognize the fact that in fact, Quebec is a different society.”

So Chrétien, like Brian Mulroney, offered distinct society and possibly another Meech Lake as his policy on separatism. But Miller was not to be turned away by a red herring. He wanted an answer. He persisted and got in return Chrétien’s second line of defence. “I said clearly that next time, the question has to be clear.”

So, Miller asked, if the question is clear and the Yes vote is more than 50 per cent, was that to mean the end of Canada? Chrétien danced about until moderator Peter Mansbridge nailed him: “Is there or is there not a contingency plan to protect anglophone Quebecers who want protection in the case of a Yes vote? Just yes or no.”

So Chrétien tried again to duck, claiming it was “a hypothetical question.” Miller countered: “It’s not hypothetical with a one per cent differential.”

Chrétien offered his third line: “We went to the Supreme Court... everything has to be done legally, according to the Constitution.” Then he immediately undermined that statement of resolve. “But if the Quebecers, in great – a real majority of Quebecers, on a clear question, want to go, I’m a democrat.” So, ultimately, the protections and constraints provided by the Constitution would not matter in the real world: Chrétien was a democrat!

Meanwhile, though the Quebec Government refused to be represented by lawyers before the Supreme Court, claiming that the high court had no jurisdiction and no right to establish rights and wrongs on the issue of secession, Quebec’s Intergovernmental Affairs Minister Jacques Brassard continued to mislead the public. On January 29, 1997, he told an outright untruth. He was reacting to the resolutions then being adopted by several municipalities claiming their intention to remain part of Canada, in the event that Quebec were to secede. The municipalities of Côte-Saint-Luc and Hampstead had already passed resolutions to hold such a plebiscite and other municipalities were considering doing the same.

To secede, Brassard said, “is a fundamental right of the Quebec people. It’s not a right that can be claimed by a village, a region, a (county). It is a known, unequivocal right in international law.” And yet, on September 25, 1996, Brassard had conceded that Quebec did not possess a right to secede under international law, as quoted earlier. Moreover, as we saw, the five truly eminent experts in international law consulted by the Quebec government in 1992 had stated unequivocally that a “people” had a right to self-determination, but not to secession. Only colonies could claim the right to secession, and Quebec was not a colony.

Brassard was correct that a village, a region, a county did not have the right to secede. But nobody claimed such a right for them. What they claimed was a right to abide by the law and to refuse to join an illegal secession; they asked to be protected by the *Constitution*. Quebec, on the other hand, had no right to secession at all.

Brassard went on to threaten jurisdictions if they chose not to accompany an illegal secession. “If they don’t respect the laws of Québec, the state will simply see to it that the laws are respected... A modern state possesses the means to ensure that laws voted democratically... are respected.”

In other words, in the event of unilateral secession, the outlaw regime would use force against regions of Quebec that chose to abide by the Constitution. That was a double standard. Brassard never accepted that the federal government had a right under both Canadian law and international law to use force against an illegal secession. That right to enforce federal jurisdiction was confirmed by Université de Montréal constitutional law professor José Woehrling: “In the case of a unilateral secession, the parent State will practically always begin by opposing it. If it decides to do so by armed force, which constitutional law allows it to do and

which international law does not forbid, the international organizations will generally abstain from intervening,” Woehrling wrote in a book he co-authored with separatist Jacques-Yvan Morin, titled *Demain le Québec*.

And yet, it was Stéphane Dion who, in the name of the federal government, gave the commitment not to resort to force. He called on Lucien Bouchard to do the same. But, instead of agreeing, Bouchard merely threw up a smokescreen of outrage and accusations. “Mr. Dion is a fire-brand,” Bouchard had told reporters on January 28, 1997. “And so I leave him to his fire-brand activities. I don’t reply to the statements of Mr. Dion. He doesn’t exist for me.”

Dion pointed out Bouchard’s inconsistency, his double standard. “But I thought that, for the Quebec government, all this was only political, and law was not relevant,” he said. “The truth is, without the legal framework, you don’t have a democracy.”

Dion faced Bouchard squarely with his duplicity: if the law is to rule, then it applied not only to municipalities, but also to Quebec’s secession. If “democracy” outside the law was to over-rule the Constitution, then the municipalities have at least as good a case as does a secessionist Quebec government to claim the right to choose. But Bouchard preferred to ignore inconvenient realities and to call people names. He accused Dion of “trying to divide and provoke Quebec,” despite his claim that Dion didn’t exist for him:

From the start, that man has tried to stir up divisions. He initiated the debate on the partition of Quebec, which raises very dangerous emotions. It’s not the kind of debate in which I want to become involved, to speak of partition and the rejection of Quebec democracy.

Dion retorted that same day: “The truth is, without the legal framework, you don’t have a democracy.” That was and is still the heart of the matter, set aside too readily by both federalists and secessionists. But Dion, to be consistent, would have had to withdraw his “fundamental principle in a democracy.”

Rémy Trudel, the Quebec Municipal Affairs Minister, told the PQ’s national council on the week-end of January 24, 1997, that he had a legal opinion to the effect that such municipal resolutions were not legal because municipalities had no competence to take decisions on their constitutional status. Trudel’s assertion was, at best, irrelevant. Eminent constitutional expert Stephen Scott and other lawyers had provided legal opinions that the municipal resolutions were, indeed, legal. But no one pretended that a municipal referendum would change the constitutional status of a municipality. It would be a political statement to the entire country – just as a Quebec referendum on secession would be a political statement to the entire country.

A new opportunity to enlighten the civic conscience of Quebecers was lost on February 28, 1997, when Allan Rock made public a first-class document that he had submitted to the Supreme Court of Canada: the “factum,” or brief, arguing the federal case against Quebec’s

claim to a right to secede unilaterally from Canada. Rock also presented to the court the report of two foreign international law experts who surveyed the precedents regarding secession.

These documents blasted out of the water all the assumptions of the secessionist movement and its press coverage over the past 36 years. They negated authoritatively the assumption that French Canadians (or "*le peuple Québécois*") had a right to secede under Canadian or international law; that the Québécois, if they fulfilled the definition of "a people," "un peuple," thereby acquired the right to secession in the name of the right to self-determination; or that "winning the referendum" on secession conferred, in the name of democracy, the right to become independent.

"In international practice, there is no recognition of a unilateral right to secede based on a majority vote of the population of a sub-division or territory, whether or not that population constitutes one or more 'peoples' in the ordinary sense of the word," wrote James Crawford, professor of international law at Cambridge University.

He pointed out that, in accordance with the 1970 Resolution 2625 of the United Nations, "a state whose government represents the whole people on a basis of equality complies with the principle of self-determination in respect of all of its people and is entitled to the protection of its territorial integrity. The people of such a state exercise the right of self-determination through their equal participation in its system of government."

That should have been the occasion in Quebec for a shocking confrontation at last with reality. The easy assumptions relayed by the news media and by politicians were once again revealed as clearly in conflict with the consensus of democratic humankind and with the law. They were shown to be rife with contradictions: how could one claim a democratic right to secede just because a "people" had so voted without granting at the same time the democratic right for other "peoples" to vote not to secede?

But the moment of truth, the moment of revelation never occurred. In the reports and analyses of Manon Corneiller and Michel Venne in *Le Devoir*, of Michel Vastel in *Le Soleil*, of Michel C. Auger in *Le Journal de Montréal*, each of these apologists for Quebec's nationalistic pretensions neatly side-stepped the fundamental issues to preserve the illusions.

And why could they do so? Because Rock gave them an out. That day, as on the day in September, when he announced the reference to the Supreme Court, Rock played a double game. On the one hand, he said he wanted the court to clarify the issues raised by unilateral secession. But, at the same time, he insisted that he in no way sought to prevent Quebec's secession if Quebecers really wanted it.

By his double talk, by presenting secession merely as a matter for orderly process rather than an almost insoluble deadlock, Rock placed an impossible onus on the federal government: that of proving that secession was possible and could realistically be implemented in practice under the Constitution of Canada. And that was the standard whereby most Quebec journalists

judged the documents that were then made public. The journalists avoided having to acknowledge that they and others had been deluded, misguided, misinformed, presumptuous, arrogant, reckless and blind. No, they said: Rock, why aren't you asking the court to tell us how Quebec can secede?

For Michel Auger, it would be an international scandal if the legislature of Prince-Edward-Island could prevent Quebec from seceding, since the amending formula presumably would require unanimity of the provinces. For Michel Venne, "the highest court in the land would then confirm that Canada is a prison for Quebec."

Rock's evasions weakened his case and the case for federalism under the rule of law. If, as he claimed, Quebecers would be enabled to secede, as long as they really wanted it and it was done in an orderly way, then, surely, he had an obligation to show convincingly how it could be done. At the same time, he would have had an obligation to state clearly whether Ottawa would defend the right of the Cree, the Inuit, the Montagnais, the Mohawks and dissident regions to remain as part of Canada.

Instead, he set the Canadian government an impossible burden of proof: to demonstrate that Quebec could secede realistically under the Constitution. That was promising a squared circle. It displaced the entire debate and maintained the Québécois in their illusions.

The federal government, meanwhile, had dissolved Parliament and called for general elections. The federal party leaders held a debate on May 12 and 13, 1997. Jean Charest, the curly-haired leader of the drastically diminished Progressive-Conservative party (down to 2 seats), won applause in the English debate for a meaningless sentence in which he promised he would leave Canada intact to his children. It sounded good, but he didn't say how.

Charest preferred to put his head in the sand – or what he called "a black hole" – to avoid saying what he would do if Quebecers actually voted to secede. He condemned the Liberal government for going to court to establish the legality or illegality of a unilateral secession. Even that timid step, taken two years too late, was too much for our patriotic Charest. For him, to acknowledge that the Québécois might vote for secession if they were left in the dark – or in his "black hole" – meant somehow that the government was giving up on the country.

Under his youthful charm, he followed the familiar modus operandi of Brian Mulroney. Charest, like Mulroney, was a master of the glib phrase, the hand-on-the-heart double talk. Charest, like Mulroney, had a single strategy, which was to appeal to Quebec nationalists against the federal Liberals' hesitant attempts to recognize that there was a Constitution that must be recognized and followed. Charest, like Mulroney, was a master tactician and was aided because he had apparently no firm principles.

Chrétien, when Gilles Duceppe asked him in the Commons whether he would recognize a majority vote for secession, avoided a direct answer. He asked Duceppe what the question would be. He made no statement, did not raise the paramount issue of the rule of law, or the

rights of Canadians under the Charter of Rights, he did not mention the rights of the Cree, the Inuit and other regionally concentrated federalists to remain within Canada. That silence was exactly how he had nearly lost the last referendum and now he was resorting again to the failed strategy of evading clarity over the fundamental questions facing the country.

Meanwhile, the united secessionist camp was waging a ferocious campaign against the Constitution, the rule of law, the legitimacy of the Supreme Court of Canada, the impartiality of the judges. Not content with boycotting the Supreme Court proceedings to establish the legality of a unilateral secession, Lucien Bouchard, Bernard Landry and Gilles Duceppe treated the reference as an assault on the Québécois, as perhaps the worst plot in their history.

When the Supreme Court announced it would appoint a lawyer to defend as *amicus curiae* the Quebec government's position on secession, Bouchard showed his contempt for the court: "I, as premier of Quebec, as leader of the Parti Québécois, I think that this judgement, since it will be a political judgement, will be null and void. And we will ignore it entirely."

Before this barrage against the legal foundations of the country, Chrétien and Stéphane Dion dodged and hid behind the abstract concept of "clarity." They avoided stating clearly and firmly that they would defend the rule of law or the right of federalist areas of Quebec to remain within Canada, even though that had been Stéphane Dion's counterpart to the license he granted to secede at will. Now Dion avoided the topic of "partition."

And yet, a large majority of French-speaking Quebecers recognized that the Cree and the Inuit should not be forced to be taken hostage by a seceding Quebec, as the COMPAS poll of May 15, 1997, demonstrated.

The firm intention of the Aboriginals not to be part of a seceding Québec was on the record, confirmed not only by three referenda in 1995, but by repeated statements from Aboriginal leaders over the following years – before the National Assembly, before the House of Commons and before the Supreme Court of Canada. The implications for secession had been brought out by Irish diplomat, politician, historian and author, Conor Cruise O'Brien, who had represented the United Nations in African trouble spots.

"There is one message of a not particularly conciliatory nature, that I think Ottawa should now send to Quebec in an unambiguous form," O'Brien wrote in *The Observer* right after the October 30, 1995 referendum. "Québec is free to declare independence and its decision will be respected. But Quebec should not assume that the frontiers of the province will be the same as those of the present province of Quebec. The government of Canada will not take it upon itself to determine what the frontiers of a sovereign Quebec will be. It will submit the matter to international arbitration.

"The leaders of Québec nationalism will get the message. An international commission under the auspices of the United Nations would be respectful of the wishes of the Cree and Inuit, and utterly unsympathetic to the Quebec project of ruling these people against their known wishes.

So the new sovereign Quebec would be reduced to the densely populated, mainly French-speaking areas in the south of the province.”

The diplomat also had a word of caution for those (like Joe Clark and many of the groups that sprang up after the scare of the referendum) who advocated that the solution to restoring national unity was to transfer major powers to Quebec: “In Ottawa, they are talking about ‘reassuring’ Quebec. I don’t think there is much future in that. Where nationalism is aroused – as now in Quebec – it gives no thanks and no rewards for concessions.”

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A new turning point with respect to secession occurred on August 6, 1997. Premier Bouchard made a serious tactical mistake, which gave Minister Dion the opening to launch a propaganda counter-offensive against secessionism.

Until then, Bouchard had avoided any frontal attack against “partition” and against those who claimed that Quebec had no right to secede. He spoke and acted as though both concepts were so outrageous, so undemocratic, so contrary to law and common sense, that he would only demean himself by stooping to attack them. The strategy had served him well. It relied on and reinforced the prejudice in Quebec, shared by politicians and journalists alike, that to secede unilaterally after a successful referendum was a right.

It began when Premier Frank McKenna of New Brunswick endorsed in a letter the campaign sponsored by the Quebec Committee for Canada (QCC) to have municipalities pass resolutions stating their intention of remaining in Canada in the event of secession.

“It is indeed a worthy accomplishment to obtain the commitment of 40 Quebec municipalities to “Staying Canadian,” the premier wrote on July 23, 1997, to Gary Shapiro and Maurice Suissa, principals of the QCC. “I am in full agreement with the resolutions that you have put forth to the municipalities of Quebec and am optimistic that even more will embrace them. I wish you the best of luck in your endeavor and join you in your wish for a truly united Canada forever.”

It happened that year that New Brunswick was to be the host in August of the annual conference of the premiers. Moreover, the Montreal suburb of Ville LaSalle was to consider a unity resolution on August 11, with other suburbs, such as Lachine, to follow. So Premier Bouchard, made aware of McKenna’s letter, lost his *sang-froid* and penned a letter that was released to the public with the headline: « Inqualifiable ingérence du Premier ministre du Nouveau-Brunswick dans les affaires du Québec. » (Unspeakable meddling of New Brunswick’s Prime Minister in the affairs of Quebec). In his first sentence, Bouchard condemned McKenna’s « lettre injustifiable. »

Votre intervention dans ce dossier constitue non seulement une ingérence sans précédent d’un premier ministre provincial dans les affaires québécoises, mais vient

appuyer une position fondamentalement antidémocratique, que le droit international et l'histoire des peuples ont maintes fois rejetée.

(“Your intervention in this matter constitutes not only an unprecedented meddling by a provincial premier in Quebec’s affairs, but it offers support to a fundamentally antidemocratic position that international law and the history of peoples have many times rejected.”)

It was rather paradoxical that Bouchard should complain about “meddling.” His government, just a month before, had raised a statue to Charles de Gaulle to commemorate perhaps the most flagrant instance of meddling in another country’s affairs in recent memory. And, to celebrate de Gaulle’s call of *Vive le Québec libre*, the Quebec government brought over from France a claque of officials and paid their expenses so that they could join in the celebration. And, he who refused to appear before Quebec Superior Court or the Supreme Court of Canada to defend Quebec’s right to secede, now insisted that Quebec’s right to secede was a matter of the law, consensus and precedent.

En tant que premier ministre du Québec, je réitère ici que l’intégrité territoriale du Québec et la capacité du peuple québécois, en son entier, de déterminer son avenir sont des principes défendus par tous les partis représentés à l’Assemblée nationale. Ces principes ont été maintes fois affirmés publiquement par mes prédécesseurs, y compris MM. Daniel Johnson et Robert Bourassa.

Lors des référendums de 1980 et de 1995, c’est l’ensemble du peuple québécois qui s’est prononcé. Tous les électeurs, y compris ceux des villes ou régions qui ont voté Oui, se sont pliés à la décision majoritaire... Toute autre solution, donnant pour ainsi dire « deux droits de vote » à certains des électeurs du Non, serait contraire à tous les principes de démocratie et de justice.

It was a bold propaganda stroke. The Premier would not recognize the courts’ right to decide on whether Quebec had a legal right to secede. But, since the case was going forward anyway, he took the occasion of his letter to McKenna to lay out all the principal elements of Quebec’s defense. He claimed that “partition” or the denial of Quebec’s right to secede unilaterally were contrary to both democracy, history and justice.

He also defended the criterion of 50 per cent plus one as the decisive standard of victory – giving as example Newfoundland’s entry into Confederation in 1949 with 52 per cent of the vote and with its entire territory.

Les Québécois ont-ils, selon vous, moins de droits démocratiques que les Terre-Neuviens? Ailleurs dans le monde, lorsque d’anciennes provinces d’État fédéré accèdent au statut d’État souverain... le droit international récuse fermement toute tentative de démembrement du nouvel État.

The Quebec premier then launched into an attack against those who challenged Quebec's right to separate unilaterally or who maintained that Quebec could not claim indivisibility if it seceded. All these people, he said, were opposed to democracy.

Nous constatons depuis quelques mois que, dans la défense de leur cause, des porte-parole fédéralistes sont disposés à tourner le dos aux principes démocratiques. La déclaration du premier ministre canadien Jean Chrétien, selon laquelle une réponse positive de 50% plus un, même à une question qu'il aurait lui-même rédigée, n'entraînerait pas le respect de cette décision, montre à quel point la tentation antidémocratique fait des progrès dans ces milieux.

Les déclarations de la nouvelle ministre de la Justice, Mme Anne McLellan (*sic*), sur la divisibilité du Québec, la désignation, contre le vœu du Québec, d'un *amicus curiae* dans un renvoi purement politique à la Cour suprême, puis votre lettre pro-partitionniste du 23 juillet, sont autant d'éléments qui poussent les Québécois à douter, de plus en plus, de la tradition démocratique dont le Canada s'enorgueillit pourtant.

Quelles que soient ces dérives, le gouvernement du Québec, avec l'appui unanime de l'Assemblée nationale réitéré encore ce printemps, a l'intention de mener le débat sur l'avenir du peuple québécois en respectant scrupuleusement les règles démocratiques dont le Québec s'est doté et en défendant fermement les droits des Québécois.

Le projet de souveraineté en est un d'ouverture. Si les Québécoises et les Québécois décident, majoritairement, de le mettre en œuvre, il sera à leur image et en continuité avec leurs valeurs de tolérance et de pluralisme.

The ideological propaganda battle was now engaged. In his carefully constructed letter, the premier had laid out all the major arguments in favor of unilateral secession with all of Quebec's territory retained. These were all the arguments he should have presented to the Supreme Court; but did not dare. And he laid claim to moral and legal superiority, qualifying the contrary positions as undemocratic, unjust and anti-Quebec. Speaking to the press, Bouchard huffed: "Let us not forget what the partitionists are. They are people who, despite a democratic majority expressed in a referendum, want to dismember the territory of Quebec..."

Stéphane Dion took up the challenge. Bouchard's letter to McKenna became the occasion for an historic round of open letters from the federal minister to Bouchard and other ministers of the Quebec government, attacking their comfortable myths about a right to a seamless secession. The first, to Premier Bouchard, was launched on August 11, 1997.

Votre argumentation repose sur trois règles qui, d'après vous, sont universellement acceptées : qu'une déclaration unilatérale d'indépendance trouve appui dans le droit international, qu'une majorité de « 50% plus un » soit suffisante pour assurer la sécession et que le droit international rejette toute modification des frontières de

l'entité qui tente de faire sécession. Nous sommes persuadés que de telles affirmations sont contredites par le droit international et la pratique des États.

Against the claim that international law recognized Quebec's right to secede unilaterally, Dion cited the decision of the U.S. Supreme Court that the United States formed an "indestructible union," une « union indestructible ». He cited France's Constitution which declared that « la France est une République indivisible ». Moreover, « la plupart des pays ne permettent sous aucun prétexte à leurs éléments constituants de faire sécession. » He referred to the 1992 opinion of the five eminent international law experts that the right to secede did not exist in international law. Canada's openness to the possibility of secession, he claimed, is exceptional.

Le gouvernement du Canada n'a jamais contesté le droit du gouvernement du Québec de consulter les Québécois sur leur avenir, mais il affirme que le gouvernement provincial ne peut avoir le monopole sur l'établissement d'un processus équitable pouvant mener à la sécession. Il n'existe aucun cas de pays démocratique ayant permis au gouvernement d'une province ou d'une autre entité constituante de déterminer cette démarche unilatéralement.

With respect to the claim that an outcome of 50 per cent plus one vote sufficed to justify secession, Dion pointed out that it was common for democracies to require an enhanced majority to make changes with very serious consequences for future generations. « Or, la sécession, le fait de se choisir entre concitoyens, est l'un des changements les plus lourds de conséquences que l'on puisse opérer en société. »

He also noted that where secession occurred following a referendum, in all cases the referendum confirmed a pre-existing consensus. An attempt to secede with a bare majority was a formula for disaster. Moreover, he quoted the white paper which preceded the introduction of the *Referendum Bill*, where the government of René Lévesque had recognized that a referendum could only have a consultative character with these words: « ce qui fait qu'il serait inutile d'inclure dans la loi des dispositions spéciales à l'égard de la majorité requise ou du taux nécessaire de participation. »

On the subject of territorial integrity, Dion pointed out the contradictory position of the Quebec government. It claimed that Quebec could destroy the territorial integrity of Canada, but also claimed that international law would protect its own territorial integrity in case it seceded.

Il n'est pas un paragraphe, pas une ligne dans le droit international qui protège le territoire du Québec mais pas celui du Canada. L'expérience internationale démontre que les frontières de l'entité cherchant à obtenir son indépendance peuvent être mises en cause, parfois pour des raisons qui relèvent de la démocratie. Par exemple, vous savez sans doute que la France a insisté en faveur de la séparation de l'île de Mayotte des Comores au moment où celles-ci ont obtenu leur indépendance, car les résidents de Mayotte ont exprimé sans équivoque leur désir de maintenir leur lien avec la France... Ni vous, ni moi, ni personne ne peuvent prédire que les frontières d'un Québec

indépendant seraient celles qui sont aujourd'hui garanties par la Constitution canadienne.

Having made such excellent points, though, Dion immediately weakened the strength of his position by making a concession he had no authority to make, certainly in the light of what the Supreme Court was to lay down the following year. He accepted the principle that, if the Québécois really wanted to secede and expressed this determination clearly in a referendum, the rest of Canada would agree. Whereas the Supreme Court would insist that any secession agreement must be fair to the rights of all, that the rule of law, the principle of federalism and the rights of minorities must be respected, Dion made no such qualification to his promise to accept a secession. This was the fatal flaw in his letter, as it was the fatal flaw in the position of the Chrétien government since January 1996:

Le gouvernement du Canada a toujours soutenu que si les Québécois exprimaient très clairement le souhait de se séparer du Canada, leur volonté serait respectée... Nous convenons que l'esprit et la pratique de la démocratie doivent être respectés en toutes circonstances, même celle, très improbable et triste, de la partition du Canada.

On February 3, 1998, less than two weeks before the hearings on the reference were to begin before the Supreme Court of Canada, former Quebec Liberal Leader Claude Ryan held a press conference where he presented an open letter to the federal government in which he protested against the reference to the Supreme Court. I'll not reprint the entire lengthy, subtle arguments put forth by Claude Ryan, but only a couple of indicative quotations.

Le droit du peuple québécois à l'autodétermination est inscrit au cœur du débat politique québécois. L'adhésion à ce droit sous-tend la démarche du Parti québécois en faveur de la souveraineté. Le Parti libéral du Québec a lui aussi affirmé à maintes reprises son adhésion à ce principe. Dès 1981, à l'occasion d'un congrès d'orientation, le Parti libéral du Québec inscrivait en ces termes ce droit dans son programme politique : « Le Parti libéral du Québec reconnaît le droit du Québec de définir sa Constitution interne et d'exprimer librement sa volonté de maintenir l'union fédérale canadienne ou d'y mettre fin. Il reconnaît en bref le droit du peuple québécois à disposer librement de son avenir. »

...

Sur le droit à l'autodétermination, interprété comme pouvant impliquer entre autres options le choix en faveur de la souveraineté, il existe au Québec un consensus large et profond entre les principales formations politiques et la grande majorité des acteurs politiques œuvrant sur la scène québécoise. Tous sont d'accord pour reconnaître que l'avenir politique du Québec quelle que soit l'option devant être retenue relève en dernière analyse de la volonté souveraine du peuple québécois.

...

Le gouvernement fédéral soutient que toute résolution ou projet de loi de l'Assemblée nationale proclamant l'indépendance ou devant y conduire de manière unilatérale entraînerait des modifications majeures à la Constitution actuelle et devrait

en conséquence être astreinte à l'approbation du Parlement fédéral ou d'une majorité, sinon de la totalité des provinces en vertu de la formule de modification insérée dans la Constitution en 1982. Ce point de vue est hautement contestable.

Souscrire à l'argumentation du gouvernement fédéral, ce serait consentir en principe à ce qu'une décision touchant son avenir politique, prise à la suite d'une volonté clairement et démocratiquement exprimée par la population, soit assujettie au consentement et aussi, par voie d'implication, au pouvoir de veto du Parlement fédéral et d'au moins une majorité substantielle des provinces. C'est là une position difficile à soutenir. Il serait inconcevable qu'après avoir franchi une à une toutes les étapes d'un cheminement démocratique devant conduire à l'indépendance, le Québec se fasse dire, au terme d'un processus ayant été étalé sur plusieurs décennies, que tout cela n'était qu'un vain exercice et qu'il n'avait d'autre choix dès le départ que de se soumettre au pouvoir de veto du reste du Canada.

Claude Ryan left no doubts about his convictions. He clearly believed that the "right to self-determination" in international law included a right to secede. This was the same Claude Ryan who had written in his Beige Paper of 1980 – the constitutional policy of his Quebec Liberal party : « Au terme d'un processus de maturation politique qui s'est grandement accéléré ces dernières années, le Québec sait qu'aucun choix ne lui est désormais interdit, et qu'il n'en tient qu'à lui de définir les frontières de son avenir. » (p. 144)

Stéphane Dion issued an open letter on February 6 in which, while disagreeing with Ryan's conclusion against the reference to the Supreme Court, he agreed with many of Ryan's premises.

Permettez que je souligne d'emblée nos points d'accord. Nous croyons tous les deux que les Québécois ne peuvent être maintenus dans le Canada contre leur volonté. Nous pensons aussi qu'ils ne doivent pas perdre le Canada sans y avoir très clairement renoncé.

Dion then went on to enumerate other points they shared, such as the requirement that there be no ambiguity in the question put in the referendum. But then Dion returned once again to the viewpoint they shared – that the Québécois must not be forced to remain in Canada against their clearly expressed will:

Voilà un grand nombre de points d'accord entre nous deux. Le plus important est notre conviction commune à l'effet que l'unité du pays ne pourrait être maintenue contre la volonté clairement exprimée des Québécois. C'est là un point de vue que le gouvernement du Canada a répété à plusieurs reprises. Mais il ajoute que cette prise de position est tout à fait compatible avec celle selon laquelle les institutions provinciales du Québec n'ont pas le droit de procéder unilatéralement à la sécession. Ici, nous avons un désaccord.

Vous affirmez que la sécession est un enjeu politique et démocratique et non juridique. Certes, la démocratie prime, mais le droit lui est essentiel. Le droit est nécessaire pour que l'action politique se déroule de façon démocratique et non anarchique.

On February 10, 1998, just six days before the hearings on the reference were to begin before the Supreme Court of Canada, the subject of debate in the House of Commons was a motion from the Bloc Québécois: "That this House recognize the consensus in Quebec that it is for Quebecers alone to decide their own future."

When he spoke in the Commons that day, Stéphane Dion again put forward clearly his thesis that, should the Québécois clearly express their desire to secede from Canada, they should be allowed to do so. Here are some excerpts from his speech that day:

Hon. Stéphane Dion (President of the Queen's Privy Council for Canada and Minister of Intergovernmental Affairs, Lib.):

We have never said the issue was to keep Quebecers in Canada against their will, but the opposite. Our country would not be the same if it were not resting on the voluntary participation of all its constituent parts.

[...]

If we say in Canada that we cannot keep part of our population against its clearly expressed will, it is not because we are bound by some international or Canadian legal requirement—at least that is what we believe, and we will see eventually what the court's opinion is on this score—but because that is part of our political culture in Canada, part of our values. We feel that our country would not be the same, as I said earlier, if it did not rest on the voluntary participation of all its constituent parts.

[...]

The political culture Quebecers and all Canadians share has been summed up very ably by Ernest Renan, a French philosopher who said that a country is based on the clearly expressed will of a community to live together<sup>43</sup>. We believe that Quebecers, if the issue is clearly defined, will always say that they want to go on sharing this common life inside a great federation they have contributed to, along with all the other Canadians.

What I have just said should have been obvious and readily acknowledged for a long time. On September 26, 1996, in explaining why we were referring this matter to the Supreme Court, the attorney general of the day, who is now the health minister, said in the House, and I quote:

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<sup>43</sup> Ernest Renan gave a conference at the Sorbonne on March 11, 1882, in which he famously said: « Une nation est une âme, un principe spirituel. Deux choses qui, à vrai dire, n'en font qu'une, constituent cette âme, ce principe spirituel. L'une est dans le passé, l'autre dans le présent. L'une est la possession en commun d'un riche legs de souvenirs ; l'autre est le consentement actuel, le désir de vivre ensemble, la volonté de continuer à faire valoir l'héritage qu'on a reçu indivis. » That principle was illustrated in France by a recurrent series of revolutions, uprisings, coups d'états, overthrows of the Constitution by referendums, from 1789 until Charles de Gaulle resigned the presidency of France in 1969.

The leading political figures of all the provinces and indeed the Canadian public have long agreed that this country will not be held together against the will of Quebecers clearly expressed. And this government agrees with that statement. This position arises partly out of our traditions of tolerance and mutual respect but also because we know instinctively that the quality and the functioning of our democracy requires the broad consent of all Canadians.

Dion then went on to say:

The issue is not whether a democracy such as Canada can keep a population against its will. Of course, it cannot. The issue arises from the false claim by the Government of Quebec that it alone, in a unilateral fashion that changes according to its short term political interests, can decide the process that may lead to secession. Quebecers as well as their fellow citizens across Canada would be dramatically affected by the break-up of our country. Everyone has the right to be certain that the process is lawful, mutually acceptable and fair to all.

There seemed to be some convergence in the anticipated outcome, if not in the wording, between the Minister Dion and the Cardinal-Archbishop of Montreal, Jean-Claude Turcotte. In an interview with *Le Devoir* published on December 29, 1997, the prelate had said: « La Cour suprême dira ce qu'elle voudra. Même si elle dit qu'on n'a pas le droit de le faire, si le peuple décide de le faire, c'est le peuple qui est souverain. Je suis un démocrate. S'ils veulent s'amuser à se brancher là-dessus en Cour suprême, ils peuvent bien le faire, mais si la majorité le décide, je ne vois pas comment un ordre de la Cour suprême pourrait empêcher le peuple de le faire. C'est au peuple de décider et non pas à la Cour suprême de nous dire si on a, ou pas, le droit de décider. »

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Finally, the time came for the Supreme Court of Canada to hold its public hearings on the secession reference. On February 16, 1998, the very day when the court hearings were to begin, the *Toronto Star* published an interview with Justice Minister Anne McLellan in which she contradicted the position advanced by the federal government in its factum to the court; there, it was stated that even a secession by a province must be carried out according to the terms of the 1982 *Constitution Act*, by using the amending formula contained in that act.

Here is a reprint of part of that *Toronto Star* interview:

New Hurdle for Quebec / Ottawa looks for specifics on split  
By Edison Stewart, Star Ottawa Bureau

The federal government appears to be placing another hurdle in the way of separatists, saying some extraordinary, specific procedure would have to be negotiated before Quebec could legally separate.

The move comes as the Supreme Court of Canada today begins a week of hearings on Ottawa's request that it rule that any unilateral declaration of independence – one without the rest of the country's consent – would violate the Constitution.

In the past, Intergovernmental Affairs Minister Stéphane Dion has said secession, to be legal, would require the approval of Parliament and at least seven provincial legislatures and probably all 10.

But Justice Minister Anne McClellan said in an interview that neither of those formulas would apply.

"One would be dealing with an extraordinary set of circumstances not comprehended, in our opinion, within the existing constitutional framework," she said.

Thus, if confronted with secession, "one would probably acknowledge the extraordinary nature and determine what process would be pursued at that point."

She declined to elaborate except to say the process would be lawful.

Ottawa has stopped short of asking the court to spell out what procedures would have to be followed for secession to be legal.

...

McClellan said the week-long hearing will also likely delve into issues such as the right of Quebec's Aboriginal people to choose their own future if Quebec secedes.

Separatists have a double standard when it comes to this issue, she said.

"If the arguments they make are valid for them, they – I would argue – are probably equally as valid, if not more so, for the Aboriginal people."

Ottawa hasn't asked the court to address that issue but there's no doubt native groups appearing before the nine judges this week "will put that directly in play," she said.

The federal government, too, will probably "express views on that point."

McClellan added, however, that it's up to the court alone to decide whether to deal with the Aboriginal issue, and if so, how.

McClellan acknowledged that the federal strategy is a tough sell in Quebec, where it has been denounced by separatists and federalists alike as an attempt to limit Quebecers' democratic right to choose.

But she said she's confident that "over time" Quebecers will appreciate the need to ensure that whatever happens, happens within the rule of law.

A unilateral declaration of independence "leads us into an abyss where nobody knows anything about the rules that apply," she said. "You have chaos."

...

"I sometimes wonder how many times the Prime Minister, Stéphane and myself and others have to say, this is not about limiting the political will of Quebecers to express their views on their own future in Canada. This is about helping people understand that you need respect for the rule of law to exercise free democratic will."

Anne McClellan, who had replaced Allan Rock as Minister of Justice and Attorney-General of Canada, was the official – though nominal – representative before the court of the Government of Canada. In fact, the two lawyers who would do the actual pleading, Yves Fortier and Pierre Bienvenu, were called "Counsel for the Attorney General of Canada" and were officially speaking in her name. The federal Department of Justice had presented to the court, well in advance, a written argument entitled "Factum of the Attorney General of Canada." In the factum, as it would later be repeated in court *viva voce*, the attorney general argued that the secession of Quebec would constitute a *de facto* amendment to the Constitution of Canada and therefore secession must be accomplished according to the amendment procedures laid out in the 1982 *Constitution Act*. At Section 52, the Act stated: "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."

The factum drew this conclusion: "While the Constitution does not expressly provide for secession, it is the position of the Attorney General of Canada that the Constitution of Canada is capable of accommodating any alteration to the federation or its institutional structures, including even such an extraordinary change as the secession of a province." And the factum cited the section of the Constitution dealing with amendments to the Constitution: "Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada."

So the statement of Anne McClellan to the *Toronto Star* caused consternation. It cast into doubt the firm position of the factum that the Constitution already covered even such an exceptional possibility as secession.

Inside the Supreme Court, at his first opportunity, which occurred on February 19, 1998, Chief Justice Antonio Lamer questioned the government's counsel, Yves Fortier, quoted McClellan's words in the *Star* story, and declared: "Some people have said that the minister's remarks could indicate that she thinks that there is no legal answer to question 1 [whether Quebec can secede under Canadian law] and that Part V of the *Constitution Act* of 1982 [the amending formulas of the act] is not applicable. Could you tell us what effect that might have... on our competence and above all on our discretionary power to answer or not answer question one? »

In other words, was the Attorney General implying that the whole reference to the court was a waste of time? Yves Fortier assured the judge that Anne McClellan did not mean that at all. “The Attorney General issued subsequently a statement saying that she did not wish in any way to change the arguments that had been presented by her counsels to this Honourable court in the context of the reference.” Fortier read the statement that had been quickly issued by McClellan that denied she meant to question whether the Constitution covered the possibility of secession.

Yves Fortier then added: « Je n’ai pas l’intention de me lancer dans un débat qui nous amènerait à plaider le renvoi à l’extérieur de la Cour suprême. La position du gouvernement fédéral est énoncée dans notre mémoire et notre réponse et elle a été réitérée devant la Cour lundi dernier [February 16]. La position du gouvernement fédéral est que la Constitution s’applique et j’appuie entièrement cette position. »

But, whether McClellan had meant or not her words to the *Toronto Star*, the discrepancy between her statement and the position argued before the court cast doubt on whether the Chrétien government really knew what it was doing and had a clear concept of the applicable law.

It soon turned out that McClellan was not the only one who bungled. Yves Fortier, inexplicably, was soon also exposed in the act of contradicting the factum that he was there to defend. On the morning of the first day of pleading, February 16, he had begun by telling the court that Quebec would be allowed to secede, and he set no condition.

Premièrement, la Procureure générale du Canada ne conteste d’aucune façon le droit des Québécois de se prononcer sur leur avenir, y compris leur choix de rester au sein du Canada ou de s’en séparer. Le 26 septembre 1996, lors de l’annonce à la Chambre des communes de la décision du gouvernement fédéral d’initier le présent renvoi, l’Honorable Allan Rock, alors ministre de la Justice et Procureur général du Canada, déclarait, et je cite : « Les principales personnalités politiques de toutes nos provinces et le public canadien ont convenu depuis longtemps que le pays ne restera pas uni à l’encontre de la volonté clairement exprimée des Québécois. Notre gouvernement est d’accord avec cette position<sup>44</sup>. »

Fortier was now declaring that the Attorney General was recognizing *the right* of the Québécois to remain within Canada or to secede. That went much further than Allan Rock’s statement in September 1996.

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<sup>44</sup> « In the first place, the Attorney General of Canada does not in any way challenge the right of the Québécois to pronounce themselves on their future, *including their choice to remain within Canada or to separate from it*. On September 26, 1996, in the course of announcing in the House of Commons the decision of the federal government to issue the current reference, the Honourable Allan Rock, then Minister of Justice and Attorney General of Canada declared, and I quote...”

But then, just a few moments later, Fortier was stating the exact opposite. « La Procureure générale du Canada soutient en instance que la sécession d'une entité fédérée est possible aux termes de la Constitution du Canada, mais qu'elle doit se faire conformément aux dispositions applicables de notre Constitution et du principe de la primauté du droit<sup>45</sup>. »

To say that Quebecers' right to secede was unchallenged was simply incompatible with then saying that secession must abide by the terms of the Constitution. The amending formula of the Constitution conferred to the Parliament and to the provinces a veto against secession. The provinces were not bound by any *laissez-passer*, declared by the federal government. And even if the federal government and the provinces concurred with giving a free pass to secession, private citizens could appeal to the courts for protection of their constitutional rights, as Guy Bertrand had previously done twice. That made any agreement to let Quebec secede open to serious challenge.

On that Thursday morning, February 19, it was the judges' turn to question the lawyers. Chief Justice Lamer put three questions to Fortier that challenged his statement that Quebecers had the right to secede.

On what ground is Ottawa constitutionally permitted to concede as it has done here that the people of Quebec have the ultimate right to decide their own political future? Does the Constitution impose a duty on the federal government to oppose such claims by any province on the ground of the fundamental principle of federalism? Does such a concession by Ottawa in a judicial context like this one have any binding legal effect and if so, should the other provinces have a say in whether such a concession is made?

In reply, Fortier never dealt directly with the questions raised by the judge. In his florid style he talked around them. "I ask my Lord Chief Justice and my Ladies and my Lords to keep in mind the assertion made by the Attorney General of Canada in her introductory remarks on Monday morning that, of course, the rest of Canada – the Attorney General of Canada can only speak on behalf of the Government of Canada – that the Government of Canada would not stand in the way of a clear expression by the majority of Quebecers, a clear expression of its wish to secede from Canada."

At least he was now implicitly recognizing that the issue was more complicated than merely the federal government issuing a green light to secession. The provinces also had their say. What if there was an impasse?

Fortier went on to assume that an impasse was impossible because of Canada's democratic tradition. "So I say to your Lordships and your Ladyships that envisage an ulterior point in time when there could conceivably be an impasse is to refuse to recognize that democracy is indeed

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<sup>45</sup> The Attorney General of Canada maintains in this suit that the secession of a federated entity is possible by the terms of the Constitution of Canada, but that it must be done in conformity with the applicable terms of our Constitution and of the principle of the rule of law."

an important principle and that it exists not only in Quebec, but in the rest of Canada and a way would be found in order to deal with and implement a clearly expressed wish on the part of Quebecers to secede.”

What a naïve assumption! This was an act of faith. The long tedious history of federal-provincial negotiations hardly supported the assumption that an impasse is impossible. Impasse had been the usual outcome, rarely broken. Also naive was the assumption that if Quebecers voted by a majority for secession, the federal government and all the provinces would fall into line. This was the usual Quebec-centered assumption shared by Fortier as well as Chrétien. It considered the rights and interests of Quebecers, but not equally the rights and interests of other provinces, or of the country as a whole. What if other provinces held a referendum asking their citizens if they favored the break-up of the federation and the majority voted NO? How would that impasse be broken?

Mr. Justice Bastarache, from New Brunswick, put a pointed question to Fortier: “When you say that the Government of Canada would not stand in the way of a clear expression of will, are you saying that that clear expression of will creates a legal entitlement, or are you talking about a political obligation to negotiate or something of that kind?”

Again, Fortier evaded a direct answer but talked around the question. “My answer may appear to be political, but I submit that my answer is both political and legal. I have referred to the democratic will of Quebecers. I have referred to the long tradition of democracy, not just in Quebec, but also in the rest of Canada and subscribing to the view which has been expressed by this Honourable Court that all changes to the Constitution could be enacted, could be implemented, within the four corners of the instrument called the supreme law of the land, the Constitution. I submit that, yes, there would be a legal way of breaking any impasse such as the one which is alluded to in the question by my Lord Chief Justice. Yes, my Lord, there could be legal ways of dealing with such a situation.”

He did not say what legal way could be found to break an impasse. And he never addressed the question put by the judge: “are you saying that that clear expression of will creates a legal entitlement?”

Madame Justice L’Heureux-Dubé put another question that went to the heart of the matter. Could the political elites decide among themselves whether or not to let Quebec secede, or did the citizens have some rights and so some say in the matter?

Dans ce sens-là, est-ce qu’il y a possibilité d’arriver constitutionnellement à détruire le fondement même d’une Constitution qui appartiendrait au peuple? Je mets en certains mots, là, l’argument de Maître Bertrand.

Fortier again misunderstood or evaded her question. He went into a discourse on when a revolutionary regime can become recognized as legitimate – which had nothing to do with her question.

Then he switched topics and returned to Judge Lamer's question about what would be the status of secession if there was an impasse. Lamer had asked: "Assuming that Part V [the procedure for amending the Constitution] is the only means of effecting secession, what would happen if Part V fails, for example if after a clear expression of Quebec's will to secede, Ottawa or one or more provinces refuses to negotiate in good faith towards a separation? What if good faith negotiations simply reached an impasse over an intractable issue like the division of territory?"

It was a good question. Past experience suggested that an impasse would very likely develop over many issues, such as the boundaries of the new country to be formed out of what was Quebec. This time, Fortier did deal with the substance of the question, but in such a way as to undermine the main argument of the factum, that is, that all changes to the Constitution, including secession, must be carried out in accordance with the terms for amending the Constitution that were laid out in the Constitution. Now Fortier invoked a *deus ex machina*.

"In the eventuality of an impasse that your question referred to, it is not excluded that the doctrine of necessity that you have recognized as being part of our legal system could be applied."

The doctrine of necessity is invoked – most rarely – when a situation is so dire or so insoluble that proceeding according to the normal requirements of the Constitution is suspended. Fortier invoked the doctrine as a solution to an impasse in negotiations – thereby negating the government's legal position that all must be done in accordance with the amendment terms of the Constitution.

The Chief Justice then returned to a question he had raised earlier: "On what ground is Ottawa constitutionally permitted to concede as it has done here that the people of Quebec have the ultimate right to decide their own political future?" Fortier's reply to that question did not address the constitutional validity of the concession, but simply restated that Quebecers had a right to secede because the federal government had said so.

« Le Procureur général du Canada a affirmé par la voix de ses procureurs, et ce n'était pas la première fois, j'ai cité lundi matin la déclaration de l'Honorable Allan Rock qui était alors Ministre de la Justice et Procureur général du Canada en septembre 1996 que le gouvernement fédéral reconnaît le droit des Québécois clairement exprimé de quitter le Canada. Je l'ai dit lundi matin. Je le répète. Je ne me faisais que l'écho de ce que l'Honorable Allan Rock déclarait en septembre 1996. »

Madame L'Heureux-Dubé then intervened in such a way as to make Fortier understand that he was contradicting his own official position.

« Maître Fortier, vous parlez de quoi? D'autodétermination ou de sécession? Il semble y avoir une grosse ambiguïté là. Peut-être que cet après-midi vous pourriez clarifier ça parce que

d'après votre réponse, là, vous avez l'air de dire ils ont le droit de se séparer. J'avais compris que vous aviez concédé qu'ils avaient le droit de s'autodéterminer. »

Fortier began his reply: « Si j'ai dit ça, je n'ai pas été précis. » He had, in fact, been perfectly precise, attributing a right to secession rather than merely a right to self-determination, which in international law excludes a right to secession. He had taken refuge in merely repeating the words of Allan Rock – which were part of the problem, not the solution.

C'est évidemment le droit à l'autodétermination des Québécois qui – je crois qu'il serait utile que je vous donne lecture à nouveau et ça va être, pour ce matin, ça va être mon dernier commentaire. J'ai dit et je répète, j'ai dit lundi matin que la procureure générale du Canada ne conteste d'aucune façon le droit des Québécois de se prononcer sur leur avenir, y compris leur choix de rester au sein du Canada ou de s'en séparer. Et j'ai cité à ce moment-là l'Honorable Allan Rock qui disait que « les principales personnalités politiques de toutes nos provinces et le public canadien ont convenu depuis longtemps que le pays ne restera pas uni à l'encontre de la volonté clairement exprimée des Québécois. Notre gouvernement est d'accord avec cette position. » Alors je ne peux que répéter, réitérer ce que je vous ai livré lundi matin.

But when he returned in the afternoon, after consulting legal experts, a chagrined Yves Fortier took back and contradicted what he had said that morning, as well as on the previous Monday morning. Now, Quebecers did not hold a right to secede. And the doctrine of necessity did not apply to resolving a future impasse in negotiations on secession. He no longer invoked “democracy” as the cure-all for all conflicting rights and interests.

Aucun fondement juridique n'existe pour prétendre que la Constitution du Canada ne s'appliquerait pas à la sécession d'une province, ou que la Constitution deviendrait inopérante ou qu'elle pourrait même être écartée à l'issue d'un vote positif dans un référendum concernant la sécession. Bien que les résultats de toute consultation démocratique soient importants et qu'ils puissent avoir beaucoup de poids politique, cela ne change rien à la réalité juridique selon laquelle, au Canada, un référendum n'est pas un mécanisme formel pour procéder à des modifications constitutionnelles.

”On what ground is Ottawa constitutionally permitted to concede as it has done here that the people of Quebec have the ultimate right to decide their own political future? Does such a concession by Ottawa in a judicial context like this one have any binding legal effect? “

Je réponds à ces deux questions. What I said this morning, citing the Honorable Allan Rock, is that: “The Government of Canada would not remain united against the wish of Quebecers clearly expressed.” That is an expression of government policy. This is not to say and I did not say and no spokesman on behalf of the Government of Canada has ever said that there is a right to secede or that Ottawa has ever conceded such a right. Ottawa, the Government of Canada, has never conceded that there is a right to secede.

Quite the contrary, the Government of Canada maintains that there is no such right. While there is no right, there is a framework in our Constitution to effect secession. That framework is provided by Part V.

Here, Yves Fortier outright lied. He had said that there is a right to secede, very explicitly, and more than once. But now he was caught in the contradictions of the Chrétien-Dion-Rock doctrine. He was caught with his pants down. He continued:

In the second question (d), I said I would answer question (a) and question (d). Should the other provinces have a say in whether such a concession is made? I repeat that Canada, the Government of Canada has never made any such concession. Canada has never conceded that there was a right to secede. Quite the contrary.

Insofar as the role of provinces is concerned, within the framework of Part V, the provinces have a role to play.

Sub-question (c): “Does such a concession by Ottawa in a judicial context like this one have any binding legal effect?” “Respectfully, my Lord Chief Justice, my Ladies, my Lords, this question does not arise in the opinion of the Attorney general of Canada because no such concession has been made.

Sub question (b): “Does the Constitution impose a duty on the federal government to oppose such claims by any province on the ground of the fundamental principle of federalism?”

The answer of the Attorney general of Canada is the following: “There is a duty to uphold the Constitution and to act in conformity with the Constitution. It is because of that duty that the Government of Canada has come before the Honourable Court and posed the three questions which it has framed, seeking confirmation by this Court that an attempt by the Government of Quebec to secede unilaterally would be contrary to the Constitution of Canada. This said, the government of Canada’s position remains that secession is possible under the constitution of Canada, but that it must be achieved by constitution amendment under Part V.

Yves Fortier’s performance before the Supreme Court was a total embarrassment, both for himself, but above all for the Chrétien government that he represented. He clearly had not mastered the arguments put forth in the factum. He did not understand the precise and pointed questions put to him by the judges and gave irrelevant and rambling replies. He was unaware of the contradictions in his own statements. If the Chrétien government had chosen him to act as its lead counsel in the case, it was more for his political experience as Brian Mulroney’s former chief of staff, than because he possessed a first-rate legal mind.

But Fortier was not the only one responsible for the imbroglio. He was executing the ambiguous instructions of the Chrétien government which aimed simultaneously at demonstrating that

secession would be fraught with difficulties, but that, at the same time, the door would not shut, for fear that too firm a line would cause outrage in Quebec. In Chrétien's approach, political considerations trumped legal clarity.

This was most evident in the government's insistence on limiting the scope of the answers that would be forthcoming from the court. Ottawa refused to ask the court to spell out all the major conditions for a legitimate secession. It wanted only the first steps clarified. That way, Quebec would be less provoked.

And so, the first question put to the court was this: "Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally?"

Now, normally, one would expect that, in answer to that first question, the government would want the court to explain in full why Quebec could not secede from Canada unilaterally – and so spell out what conditions would have to be fulfilled for a secession to be legal. And that would mean defining all the parties whose consent would be required for the secession to be legal. All these would hold a veto over Quebec's secession.

But, on the contrary, Fortier made clear that the court was not to raise follow-up questions, central issues, such as whose consent would be required for Quebec's secession to be legal.

Le Procureur général du Canada soutient qu'il n'est pas nécessaire, ni opportun que la Cour envisage d'autres questions pour répondre à la première question du renvoi. Plus particulièrement, il est respectueusement soumis que la Cour n'a pas à examiner les arguments portant sur la question de savoir laquelle ou lesquelles des procédures de modification prévues dans la Constitution du Canada, pourraient s'appliquer, ou à se demander quels autres principes constitutionnels pourraient être applicables, dans le cas d'une éventuelle sécession.

Similarly, it was clear that the Achilles heel of Quebec's aspirations for secession was the presence of Aboriginal peoples in Quebec who had rights that preceded European contact and Confederation. So the judges asked: "What is the position of the Attorney General of Canada with regard to the fiduciary duty owed to First Nations people if there should be a unilateral declaration of independence?" Fortier's reply was, in effect, to ask the judges not to talk about it.

With respect to the rights of Aboriginal peoples, which have often been the subject of decisions by this Honourable Court, the Government of Canada acknowledges the existence of their constitutionally protected Aboriginal and treaty rights, as well as the existence of the Crown's fiduciary relationship with them, with the Aboriginal peoples. Canada fully intends to honour its fiduciary obligations to Aboriginal peoples in Quebec... However specific questions regarding the nature and the scope of these rights

of Aboriginal peoples in Quebec, as well as outside of Quebec, in the event of an attempted secession, are beyond the scope of this Reference.

In another statement before the Supreme Court, Fortier tried to reconcile the fact, that he now acknowledged, that Quebec had no right to secede, with the claim that Canada was so open and generous that surely a solution could be found to allow Quebec to secede:

Il n’y a pas de droit de sécession découlant du principe d’autodétermination hors du contexte colonial, ce qui n’est manifestement pas le cas du Québec; et si les acteurs de la Partie V, tous les acteurs de la Partie V acceptent l’hypothèse d’une sécession, tous les acteurs qui se sont exprimés devant cette Cour, les deux provinces et le gouvernement fédéral, c’est en raison, nous soumettons respectueusement, de notre tradition politique canadienne et non pas en raison de l’existence d’un droit. Un tel droit n’existe pas non plus qu’il existe une obligation légale de la part du reste du Canada de reconnaître comme indépendant un gouvernement du Québec qui s’auto-proclamerait tel.

In other words, in the last analysis, Fortier maintained that Quebec did not have a right to secede, but in practical terms it would be allowed to secede because all those who held a veto against its secession would accept Quebec’s secession, “en raison de notre tradition politique canadienne et non pas en raison de l’existence d’un droit.” That was a very big if to assume. It’s greatest weakness, other than relying strictly on faith rather than on law, was that it paid no attention to the rights and interests of others – the provinces, the Aboriginals, the official language minorities – who would assert their own conditions before they would agree to secession. The most obvious condition was that the Quebec-to-be after secession would not include the lands of the Aboriginals or the regions of Quebec where the people voted to remain within Canada.

But the federal government’s disgraceful performance before the Supreme Court proved that neither Jean Chrétien, Allan Rock nor Stéphane Dion had a constitutional vision that was compatible with the Constitution of Canada. Their blunders before the Supreme Court proved that they just did not know what they were doing.

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Finally, on August 20, 1998, the Supreme Court of Canada delivered its ruling in response to the reference on the secession of Quebec. The response contained some surprises. It was very complex but presented a totally coherent intellectual structure. One could not simply take one or another sentence out of context and interpret it as a total statement. Every part of the reply had to be understood in its relationship to the whole.

What did the court say in this fully integrated structure? First, that the issue of secession must be resolved by the people of Canada, the people from all parts of Canada, coming together to

resolve a difficult situation. Quebec could not legally secede unilaterally, that is, without an amendment to the Constitution of Canada. The court declared:

85 The Constitution is the expression of the sovereignty of the people of Canada. It lies within the power of the people of Canada, acting through their various governments duly elected and recognized under the Constitution, to effect whatever constitutional arrangements are desired within Canadian territory, including, should it be so desired, the secession of Quebec from Canada.

This statement negated all the assumptions of the Parti Québécois, but also the illusions of the Quebec Liberal Party since the Quiet Revolution.

Secondly, the court identified four fundamental principles underlying the Constitution that must always be considered as interactive between each of them, and one must never trump the others. The four principles: democracy, federalism, the rule of law (constitutionalism) and the rights of minorities (including especially Aboriginals). Perhaps the best paragraph to sum up the entire ruling is the following:

91 [...] We hold that Quebec could not purport to invoke a right of self-determination such as to dictate the terms of a proposed secession to the other parties: that would not be a negotiation at all. As well, it would be naive to expect that the substantive goal of secession could readily be distinguished from the practical details of secession. The devil would be in the details. The democracy principle, as we have emphasized, cannot be invoked to trump the principles of federalism and rule of law, the rights of individuals and minorities, or the operation of democracy in the other provinces or in Canada as a whole. No negotiations could be effective if their ultimate outcome, secession, is cast as an absolute legal entitlement based upon an obligation to give effect to that act of secession in the Constitution. Such a foregone conclusion would actually undermine the obligation to negotiate and render it hollow.

Thirdly, the court insisted repeatedly that the entire process precipitated by a successful referendum in Quebec must be pursued always within the terms required by the Constitution of Canada, notably the 1982 *Constitution Act*.

72 The constitutionalism principle bears considerable similarity to the rule of law, although they are not identical. The essence of constitutionalism in Canada is embodied in s. 52(1) of the Constitution Act, 1982, which provides that “[t]he Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.” Simply put, the constitutionalism principle requires that all government action comply with the Constitution. The rule of law principle requires that all government action must comply with the law, including the Constitution. This Court has noted on several occasions that with the adoption of the Charter, the Canadian system of government was transformed to a significant extent from a system of Parliamentary

supremacy to one of constitutional supremacy. The Constitution binds all governments, both federal and provincial, including the executive branch (*Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, at p. 455). They may not transgress its provisions: indeed, their sole claim to exercise lawful authority rests in the powers allocated to them under the Constitution, and can come from no other source.

84 The secession of a province from Canada must be considered, in legal terms, to require an amendment to the Constitution, which perforce requires negotiation.

96 No one can predict the course that such negotiations might take. The possibility that they might not lead to an agreement amongst the parties must be recognized. Negotiations following a referendum vote in favour of seeking secession would inevitably address a wide range of issues, many of great import. After 131 years of Confederation, there exists, inevitably, a high level of integration in economic, political and social institutions across Canada. The vision of those who brought about Confederation was to create a unified country, not a loose alliance of autonomous provinces. Accordingly, while there are regional economic interests, which sometimes coincide with provincial boundaries, there are also national interests and enterprises (both public and private) that would face potential dismemberment. There is a national economy and a national debt. Arguments were raised before us regarding boundary issues. There are linguistic and cultural minorities, including Aboriginal peoples, unevenly distributed across the country who look to the Constitution of Canada for the protection of their rights. **Of course, secession would give rise to many issues of great complexity and difficulty. These would have to be resolved within the overall framework of the rule of law, thereby assuring Canadians resident in Quebec and elsewhere a measure of stability in what would likely be a period of considerable upheaval and uncertainty. 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.** (Emphasis added)

104 Accordingly, the secession of Quebec from Canada cannot be accomplished by the National Assembly, the legislature or government of Quebec unilaterally, that is to say, without principled negotiations, and be considered a lawful act. **Any attempt to effect the secession of a province from Canada must be undertaken pursuant to the Constitution of Canada, or else violate the Canadian legal order.** (Emphasis added)

153 The task of the Court has been to clarify the legal framework within which political decisions are to be taken “under the Constitution”, not to usurp the prerogatives of the political forces that operate within that framework. The obligations we have identified are binding obligations under the Constitution of Canada.

149 The Reference requires us to consider whether Quebec has a right to unilateral secession. Those who support the existence of such a right found their case primarily on the principle of democracy. Democracy, however, means more than simple majority

rule. As reflected in our constitutional jurisprudence, democracy exists in the larger context of other constitutional values such as those already mentioned. In the 131 years since Confederation, the people of the provinces and territories have created close ties of interdependence (economically, socially, politically and culturally) based on shared values that include federalism, democracy, constitutionalism and the rule of law, and respect for minorities. A democratic decision of Quebecers in favour of secession would put those relationships at risk. The Constitution vouchsafes order and stability, and accordingly **secession of a province “under the Constitution” could not be achieved unilaterally, that is, without principled negotiation with other participants in Confederation within the existing constitutional framework.** (Emphasis added)

The Supreme Court justices were so confident that all the negotiations on secession would have to be governed by the Constitution that they did not see it necessary to define the precautions needed to protect Quebec’s Aboriginals, in the event of secession:

139 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, 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. (Emphasis added)

The ruling of the Supreme Court injected an unexpected new factor into the debate on secession. The court declared that, should the Québécois express a clear desire to form an independent state, the other official partners in the federation would have the obligation to respond by meeting and negotiating. The following is the paragraph that drew the most attention:

92 However, we are equally unable to accept the reverse proposition, that a clear expression of self-determination by the people of Quebec would impose no obligations upon the other provinces or the federal government. The continued existence and operation of the Canadian constitutional order cannot remain indifferent to the clear expression of a clear majority of Quebecers that they no longer wish to remain in Canada. This would amount to the assertion that other constitutionally recognized principles necessarily trump the clearly expressed democratic will of the people of Quebec. Such a proposition fails to give sufficient weight to the underlying constitutional principles that must inform the amendment process, including the principles of democracy and federalism. The rights of other provinces and the federal

government cannot deny the right of the government of Quebec to pursue secession, should a clear majority of the people of Quebec choose that goal, so long as in doing so, Quebec respects the rights of others. Negotiations would be necessary to address the interests of the federal government, of Quebec and the other provinces, and other participants, as well as the rights of all Canadians both within and outside Quebec.

Lucien Bouchard, in particular, was delighted to find this obligation to negotiate spelled out in the Reference ruling. He saw it, correctly, as giving a degree of legitimacy within the constitutional order that it had not enjoyed previously. Previously, he had insisted on Quebec's right to secede unilaterally. But now, he almost embraced the verdict of the Supreme Court: "The obligation to negotiate has constitutional status. This is of the utmost importance. There is no way the federal Government could escape it."

Indeed. But he and many others thereafter interpreted the obligation to negotiate secession almost as implying an obligation to achieve secession. That was far from the court's intentions. To understand the true import of this obligation to negotiate, one must look at the preliminary statements heading the Supreme Court's reply. The justices said this:

Our democratic institutions necessarily accommodate a continuous process of discussion and evolution, which is reflected in the constitutional right of each participant in the federation to initiate constitutional change. This right implies a reciprocal duty on the other participants to engage in discussions to address any legitimate initiative to change the constitutional order. A clear majority vote in Quebec on a clear question in favour of secession would confer democratic legitimacy on the secession initiative which all of the other participants in Confederation would have to recognize.

In other words, the court invoked a general principle of mutual respect between the partners of the federation. If any one of them launches "any legitimate initiative to change the constitutional order," the other partners must come together and negotiate. This does not mean that, during the negotiations, the proposal of the partner initiating the process must enjoy the benefit of the doubt. The federalist obligation would be to take the proposal seriously, not to favour it. Once they all get together, each puts forward its own objectives, fears and possible compromises. It's not all or nothing, secession or the status quo. The provincial partners would no doubt try to find less drastic solutions than secession for the grievances of Quebec. There would be offers of *quid pro quo*.

To see more clearly what the Supreme Court meant by the obligation to negotiate, let's briefly remove secession from the agenda and imagine other proposals for amendments to the Constitution. Alberta might move a resolution for the federation to adopt its favourite Triple-E Senate. Saskatchewan might put forward a proposal to put an end to the equalization program that redistributes wealth among the provinces. British Columbia, which is entitled to six seats in the Senate, might move a motion to raise the number to 10. In each case, the likelihood of

attaining the initial demand is slight. Modern democracies do not often amend their Constitutions.

The Supreme Court warned that Quebec's motion to obtain an amendment permitting its secession was far from a sure thing. That was obvious. The harm that Quebec's secession would inflict on the rest of the country would be great, while Quebec's great need for independence was hardly obvious. By world standards, Quebec was doing very well indeed within the federation of Canada.

93 [...] The negotiation process precipitated by a decision of a clear majority of the population of Quebec on a clear question to pursue secession would require the reconciliation of various rights and obligations by the representatives of two legitimate majorities, namely, the clear majority of the population of Quebec, and the clear majority of Canada as a whole, whatever that may be. There can be no suggestion that either of these majorities "trumps" the other.

97 In the circumstances, negotiations following such a referendum would undoubtedly be difficult. While the negotiators would have to contemplate the possibility of secession, there would be no absolute legal entitlement to it and no assumption that an agreement reconciling all relevant rights and obligations would actually be reached. It is foreseeable that even negotiations carried out in conformity with the underlying constitutional principles could reach an impasse. We need not speculate here as to what would then transpire. **Under the Constitution, secession requires that an amendment be negotiated.** (Emphasis added)

An issue that would arise later was what the Supreme Court meant when it required a clear answer to a clear question for the democratic principle to be activated. And who would be authorized to judge the clarity of the questions and the answer? Two years after the reply of the Supreme Court, all parties would unite at the National Assembly to deny that the federal government or the rest of Canada had the right to judge the clarity of the referendum question and answer and respond accordingly. But the intention of the Supreme Court seems itself clear:

77 In this way, our belief in democracy may be harmonized with our belief in constitutionalism. Constitutional amendment often requires some form of substantial consensus precisely because the content of the underlying principles of our Constitution demand it. **By requiring broad support in the form of an "enhanced majority" to achieve constitutional change, the Constitution ensures that minority interests must be addressed** before proposed changes which would affect them may be enacted. (Emphasis added)

100 The role of the Court in this reference is limited to the identification of the relevant aspects of the Constitution in their broadest sense. We have interpreted the questions as relating to the constitutional framework within which political decisions

may ultimately be made. Within that framework, the workings of the political process are complex and can only be resolved by means of political judgments and evaluations. The Court has no supervisory role over the political aspects of constitutional negotiations. Equally, the initial impetus for negotiation, namely a clear majority on a clear question in favour of secession, is subject only to political evaluation, and properly so. **A right and a corresponding duty to negotiate secession cannot be built on an alleged expression of democratic will if the expression of democratic will is itself fraught with ambiguities. Only the political actors would have the information and expertise to make the appropriate judgment as to the point at which, and the circumstances in which, those ambiguities are resolved one way or the other.** (Emphasis added)

This question will be addressed more fully in Chapter III, in the context of discussing the *Clarity Act* and *Bill 99*. Suffice for the moment to observe that the Supreme Court called for negotiations between the parties to reach, if possible, an agreement. If the Quebec government alone has the right to frame the referendum question, set the rules of the campaign and then insist on the exclusive right to judge the clarity of both question and answer, this does not correspond to the model of negotiations projected by the Supreme Court of Canada. It tilts the power relations entirely in Quebec's favour, thus depriving the process of negotiations of any legitimacy.

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The Supreme Court of Canada's response to the reference was a truly impressive work of judicial craftsmanship. But, because public opinion had for so long been corrupted by myths, misrepresentations and pretentious ignorance of what a liberal democratic state really entails, there was great misunderstanding in the country about what the Supreme Court had actually said.

On the day that the court's decision was published, Stéphane Dion issued a lengthy communique. It contained this characteristic sentence:

Our citizens are the big winners. The citizens of Quebec have had their right to remain part of Canada confirmed so long as they have not clearly indicated their desire to leave. **In addition, they have obtained the assurance that they will not be held in Canada against their clearly expressed will.**

The second sentence has absolutely no basis in the court's response. Nowhere did the court extend to the Québécois "the assurance that they will not be held in Canada against their clearly expressed will." On the contrary, the court made it clear that, under the Constitution, the secession of Quebec would be very difficult to achieve. But the sentence reflected the "fundamental principle in democracy" that Dion had announced in his very first interview with the press after he was sworn in as minister. He, apparently, had learnt nothing from the court's ruling on secession.

So the Chrétien government used its bully pulpit to distort the thrust of what the Supreme Court had so carefully decreed. Throughout the land, Dion's version became the conventional wisdom. For years, the *Globe and Mail* would state in editorials that the Supreme Court had recognized Quebec's right to secede as long as the question was clear and the answer was clear. *Le Devoir* took up the same theme. Whereas the Supreme Court had ruled that the fundamental requirement for secession was an amendment to the Constitution, the Chrétien government persuaded almost everyone that the fundamental requirement was that the question and answer in the referendum both be clear. In the response of the Supreme Court, the requirement for a clear answer to a clear question was merely the condition for the democratic principle to be activated.

So, despite a reference to the Supreme Court and a wise reply from the court, the country continues to live in confusion over the very perilous issue of secession.

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### **Chapter III: The *Clarity Act* Undermined. The Right to a UDI Legislated**

Despite the strongly reasoned statement of the unanimous Supreme Court of Canada, Premier Lucien Bouchard soon made it clear that he would not bend to the rule of law as that had been defined by the court in its ruling of August 20, 1998. Bouchard continued to pursue the secession of Quebec even while realizing that the fundamental condition set by the court – that it be accomplished through an amendment to the Constitution of Canada – made it unlikely that it could ever be achieved. So, after expressing his pleasant surprise that the court had set an obligation on the federation to negotiate, should the Québécois express officially a clear desire for independence, Premier Bouchard now decided to make clear that he would not be bound by the restrictions laid down by the court. He claimed for Quebec the right to unilateral secession.

He seized the occasion of the three-day International Conference on Federalism in an Era of Globalization, hosted by the Government of Canada at Quebec's prime tourist resort of Mont-

Tremblant. It would be attended by some 500 delegates from several federations, large and small. The most notable attendees would be U.S. President Bill Clinton, Mexico's President Ernesto Zedillo and Canada's Prime Minister Jean Chrétien.

On October 5, 1999, with the delegates due to arrive that evening, journalist Paul Wells of the *National Post* received an unexpected phone call from Quebec's Minister of Canadian Intergovernmental Affairs Joseph Facal. The Minister was due to attend the conference, along with Premier Bouchard. Facal told Wells that he had an important statement to make and that it represented the policy of the Quebec Government. The account of the interview was published the next day on the front page of the *National Post*. It is here reprinted at length because, as the future would show, it was an important signal of the Quebec government's intentions on an important issue.

**We will set secession rules: Quebec: Quebec: Province free to ignore Supreme Court, minister says: 'Just watch us,' Facal says of separatist response to interference by Ottawa**

By Paul Wells, *National Post*, 6 Oct 1999: A1 / FRONT.

MONTREAL - The government of Quebec is free to ignore last year's Supreme Court opinion on secession and may ask whatever referendum question it wants, treating the narrowest of majorities as permission to take the province out of Canada, the province's intergovernmental-affairs minister said yesterday.

Joseph Facal said in an interview that Canadian law can have no effect on the process of Quebec independence, which is "a political question, not a legal question." Nothing in the Supreme Court opinion, which said other Canadians would have an "obligation to negotiate" secession after a "clear majority" of Quebecers voted Yes to "a clear question," changes that situation, he said.

Mr. Facal phoned the *National Post* to request yesterday's interview, and made it clear his remarks reflected the official position of the Quebec government.

His comments come as the Chrétien government is considering setting out in some official manner what referendum question, what size of majority and what secession process it would find acceptable.

Mr. Facal said that no such federal move could take precedence over action taken by the Quebec government.

"All rules -- let me make it crystal clear -- all rules governing the next referendum on sovereignty are rules that will be determined by the National Assembly of Quebec," Mr. Facal said. "The federal government is absolutely free to dislike these rules, to suggest other rules, but the rules of the game which will effectively be in place are the ones that will have been decided by the elected parliament of the people of Quebec."

He said the Parti Québécois government would never accept the demand from his federal counterpart, Stéphane Dion, that the two governments negotiate the referendum rules and question together.

Mr. Facal said he considered the referendum questions of 1980 and 1995 “absolutely” clear, and maintained that his government still has the right, at any moment it chooses after winning a majority in a referendum, to declare Quebec’s independence unilaterally and seek diplomatic recognition from other countries.

He said that, while the PQ may decide to change its strategy to reflect changing circumstances, it would feel free to run the next referendum exactly as it did the last one.

Mr. Facal’s comments came on the eve of a three-day international conference on federalism that begins this morning at the Quebec ski resort of Mont-Tremblant. Dignitaries at the conference include Jean Chrétien, the Prime Minister, Bill Clinton, the president of the United States, and Lucien Bouchard, the Premier of Quebec.

Today Mr. Dion and Mr. Facal are to share a stage at the conference.

Mr. Facal’s most striking remarks yesterday concerned the Supreme Court. He questioned its legitimacy, saying its nine justices were “unilaterally named by the prime minister of Canada,” and that the questions in the secession reference were “written by the federal government.” Ottawa is free to decide whether it takes the court’s opinion seriously, because it’s “their court,” he said. But Quebec would not be bound by the opinion.

When asked what would happen if the federal government announces it will ignore a question or a result it finds insufficiently clear, Mr. Facal paraphrased one of the most famous statements in Canadian politics -- a warning Pierre Trudeau gave at the height of the 1970 October Crisis: “Just watch us,” he said.

Mr. Facal’s comments on the Supreme Court ruling reflect a substantial change from the position the Quebec government took in the days immediately following the ruling in August 1988. Then, Mr. Bouchard said the high court’s decision “should be helpful in the next election and mainly in the next referendum.”

Mr. Bouchard was especially delighted with the court’s discovery of an “obligation to negotiate” on the part of Quebec’s partners in the federation, if a clear majority votes Yes to a clear question.

At the time, Mr. Bouchard believed this obligation to be iron-clad. “The obligation to negotiate has constitutional status. This is of the utmost importance. There is no way the federal government could escape it.”

The federal government sought the court’s answers to three questions: Can Quebec secede unilaterally under Canadian law? Does it have the right to do so under international law? And, if the two answers differ, which takes precedence?

Mr. Bouchard embraced the court’s discovery of an “obligation to negotiate” and used it as a weapon against the federal government.

Federal strategists said a year ago that Mr. Bouchard would quickly find the court’s opinion problematic, and that by embracing part of it, he would be stuck with the rest -- the obligations for a clear question and clear majority, left undefined, and the requirement that any negotiations address explosive issues like Aboriginal rights and borders.

Minister Facal’s statement, speaking for the Quebec government, was a clear repudiation of the authority of the Supreme Court of Canada’s response to the Reference on secession. Here, unequivocally, Facal asserted that the Quebec government considered that it could secede unilaterally on the authority of a majority vote for secession in a referendum and that the Quebec government would not hesitate to proceed with secession if it received such an authorization by referendum.

On that evening of October 6, Premier Bouchard was invited to give a speech at a banquet offered to the delegates attending the conference. His lengthy speech must have startled some of the diners. He took as his theme that most of the delegates were examining federations that they considered a success, like the United States. But he suggested that they should also examine failed federations, like Canada. He proceeded to sketch a history of Canada as a series of assaults on Quebec.

Ne l’oublions pas, c’est ici et à nous Québécois qu’on a imposé, en 1982, une Constitution qui a réduit les pouvoirs de notre Assemblée nationale dans des domaines aussi névralgiques que la langue et l’éducation. Faut-il rappeler que, depuis, tous les gouvernements québécois, quelle que soit leur allégeance politique, ont répudié cette Constitution ? Les Québécois ont perçu ce coup de force pour ce qu’il était, c’est-à-dire une rupture du pacte fédératif.

The patriation of the Constitution and the new *Constitution Act* meant, he said, that Canada had breached the 1867 compact that underlay the federation. But that was only the start of his list of oppressions.

Le fédéralisme canadien, c’est aussi la main tendue du Québec qui a été rejetée, en 1990, quand celui-ci a pris l’initiative de formuler une proposition de réforme

constitutionnelle qui lui aurait permis d'adhérer dans l'honneur à la constitution actuelle.

There were other such violations of federalism that he then recited. And he asked the question: "Comment expliquer le blocage du fédéralisme canadien? La réponse est dans la description de notre réalité. » He then provided this significant explanation :

Le blocage est donc profond puisqu'il résulte de deux visions irréductibles. Tout le reste en découle : l'impossibilité avérée de convenir de quelque aménagement que ce soit; les efforts accrus du gouvernement central pour accentuer sa prépondérance; l'incapacité du Québec à exercer pleinement ses responsabilités collectives.

And then the Premier presented a solution to this deadlock, to this total failure of the Canadian federation.

**Mon gouvernement et le parti que je dirige ont depuis longtemps tiré les conclusions qui s'imposent : le peuple du Québec doit pouvoir décider seul de son avenir politique et constitutionnel. Il est établi que cette décision se prendra dans le cadre du processus le plus démocratique qui soit. Car les valeurs démocratiques font partie du patrimoine que nous partageons avec nos amis du Canada.**

**Je suis confiant que les Québécoises et les Québécois choisiront, le moment venu, de se doter d'un pays souverain. Leur parcours vers la prise en charge de toutes leurs responsabilités ne restera pas inachevé.**

**Je sais bien que le gouvernement central consacre beaucoup d'énergie pour discréditer ce projet. Il apparaît cependant à un grand nombre de Québécois comme la seule option de rechange à ce régime que l'un de mes prédécesseurs, pourtant fédéraliste, qualifiait de fédéralisme qui met les provinces, et je cite : « à genoux<sup>46</sup> ».**

These words, spoken deliberately in that solemn international setting, have great implications. They express the thinking that motivated the bill that would be introduced in the National Assembly two months later: *Bill 99, Act respecting the exercise of the fundamental rights and prerogatives of the Quebec people and the Quebec State.*

Clearly, the message of Mr. Facal, followed by Premier Bouchard's speech to the delegates, was a radical declaration of independence from Canada's constitutional order, at least with regard to secession. The court was described as partisan and illegitimate, and therefore incapable of imposing its authority over Quebec's actions to achieve independence. The court's requirement for an "enhanced majority" would be repudiated: a 50 per cent plus one vote would suffice to justify unilateral secession. The warning, "Just watch us," implied a strong response to a federal refusal to negotiate secession: obviously a unilateral declaration of independence.

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<sup>46</sup> These paragraphs I have put in bold print for emphasis. They are very important to understand the future.

The federal *riposte* came on November 23, 1999, when Prime Minister Chrétien promised publicly to lay down the conditions under which he would agree to negotiate the secession of Quebec. His words sent Lucien Bouchard into a tirade. The premier even blustered that Chrétien was opening the way for Quebec to declare independence unilaterally; and now he even claimed that the response of the Supreme Court of Canada in the Reference ruling authorized him to do so.

Bouchard resorted to his usual pretension: that 50 per cent plus one was the single universal standard for a democratic vote. What was more remarkable was that he was supported by prominent journalists and even by Jean Charest, leader of the Quebec Liberal Party. Both federalists and separatists joined together to decry Ottawa's intention. All the political parties in Quebec's National Assembly, all the political parties in the Commons but one, attacked Chrétien's announcement.

Even the *Montreal Gazette* joined editorially in the universal chorus of disapproval. As a journalist for a Toronto newspaper described the reaction in Quebec: "The federal government acted in this manner against the near-unanimous advice of Quebec politicians and pundits, and the move prompted angry reaction."

As for the 50 per cent plus one claim, Stéphane Dion pointed out in a letter to Lucien Bouchard that a referendum had failed in Nevis in 1998 because the vote was only 61.7 per cent in favor; the standard had been set at 66.6 per cent. Iceland successfully seceded from Denmark in 1944 because it more than met the requirement of a 75 per cent YES vote. Slovenia in 1990 and Latvia and Lithuania in 1991, all more than met the required support of a majority of all eligible voters, not merely the majority of those who voted.

The Prime Minister, even against the advice of his Quebec caucus, pushed forward, and on December 13, Stéphane Dion introduced *Bill C-20*, the *Canadian Clarity Act*. It had a longer official title, *An Act to give effect to the requirement for clarity as set out in the opinion of the Supreme Court of Canada in the Quebec Secession Reference*. It was carefully sculpted to correspond to the major requirements spelled out in the Reference ruling, as is evident from the preamble to the act:

WHEREAS the Supreme Court of Canada has confirmed that there is no right, under international law or under the Constitution of Canada, for the National Assembly, legislature or government of Quebec to effect the secession of Quebec from Canada unilaterally;

WHEREAS any proposal relating to the break-up of a democratic state is a matter of the utmost gravity and is of fundamental importance to all of its citizens;

WHEREAS the government of any province of Canada is entitled to consult its population by referendum on any issue and is entitled to formulate the wording of its referendum question;

WHEREAS the Supreme Court of Canada has determined that the result of a referendum on the secession of a province from Canada must be free of ambiguity both in terms of the question asked and in terms of the support it achieves if that result is to be taken as an expression of the democratic will that would give rise to an obligation to enter into negotiations that might lead to secession;

WHEREAS the Supreme Court of Canada has stated that democracy means more than simple majority rule, that a clear majority in favor of secession would be required to create an obligation to negotiate secession, and that a qualitative evaluation is required to determine whether a clear majority in favor of secession exists in the circumstances;

WHEREAS the Supreme Court of Canada has confirmed that, in Canada, the secession of a province, to be lawful, would require an amendment to the Constitution of Canada, that such an amendment would perforce require negotiations in relation to secession involving at least the governments of all of the provinces and the Government of Canada, and that those negotiations would be governed by the principles of federalism, democracy, constitutionalism and the rule of law, and the protection of minorities;

WHEREAS, in light of the finding by the Supreme Court of Canada that it would be for elected representatives to determine what constitutes a clear question and what constitutes a clear majority in a referendum held in a province on secession, the House of Commons, as the only political institution elected to represent all Canadians, has an important role in identifying what constitutes a clear question and a clear majority sufficient for the Government of Canada to enter into negotiations in relation to the secession of a province from Canada;

AND WHEREAS it is incumbent on the Government of Canada not to enter into negotiations that might lead to the secession of a province from Canada, and that could consequently entail the termination of citizenship and other rights that Canadian citizens resident in the province enjoy as full participants in Canada, unless the population of that province has clearly expressed its democratic will that the province secede from Canada;

NOW, THEREFORE, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows: [...]

The preamble, although cumbersome in wording, was almost a summary of the Supreme Court's ruling. It repeated that the secession of Quebec was not a right but a possibility. It recognized that secession was not an ordinary procedure in a democracy, like electing a government, but an exceptional and even unique undertaking, and, therefore, it must be

undertaken under unique rules. One such exceptional rule was that no numerical formula would be applied to judging the support for secession, unlike the numerical formula applied to elections of representatives. The support for secession must be clear, without any possible ambiguity, after studying the circumstances of the campaign, such as the rhetoric and publicity material deployed during the campaign. If the rhetoric centered on anything other than secession, such as "*OUI au camp du changement*," then the Quebec government could hardly prove that it had a clear support for secession. Any legitimate doubt must be resolved in favour of the territorial integrity of Canada.

Above all, the preamble reflected the insistence of the court that, when negotiations occurred on secession, the rights of all the partners in the federation must be taken into account, and that included such important components of the country as the Aboriginals. There must be an attempt to reconcile all legitimate interests. There was to be no presumption in favor of the interests of the Québécois over all the other interests involved.

The name of the bill and the public debate which followed concentrated attention mostly on the two following sections

1.(1) The House of Commons shall, within thirty days after the government of a province tables in its legislative assembly or otherwise officially releases the question that it intends to submit to its voters in a referendum relating to the proposed secession of the province from Canada, consider the question and, by resolution, set out its determination on whether the question is clear.

2.(1) Where the government of a province, following a referendum relating to the secession of the province from Canada, seeks to enter into negotiations on the terms on which that province might cease to be part of Canada, the House of Commons shall, except where it has determined pursuant to section 1 that a referendum question is not clear, consider and, by resolution, set out its determination on whether, in the circumstances, there has been a clear expression of a will by a clear majority of the population of that province that the province cease to be part of Canada.

But far more significant in every respect were the two following sections, which should have been recognized as the true heart of the bill:

3. (1) It is recognized that there is no right under the Constitution of Canada to effect the secession of a province from Canada unilaterally and that, therefore, an amendment to the Constitution of Canada would be required for any province to secede from Canada, which in turn would require negotiations involving at least the governments of all of the provinces and the Government of Canada.

3. (2) No Minister of the Crown shall propose a constitutional amendment to effect the secession of a province from Canada unless the Government of Canada has addressed, in its negotiations, the terms of secession that are relevant in the circumstances,

including the division of assets and liabilities, any changes to the borders of the province, the rights, interests and territorial claims of the Aboriginal peoples of Canada, and the protection of minority rights.

These two paragraphs, faithful to the logic of the Reference reply, were a great shock to Quebec's nationalists. They threatened the territorial integrity of Quebec, the Achilles heel of the separatist movement. If Canada was divisible, by what principle would Quebec be indivisible?

Constitutionally, the *Clarity Act* was rock solid. But, once again, Stéphane Dion undermined the impact, the significance and the credibility of the *Act*, by uttering words that were familiar to him but were always subversive of the Constitution, of the Reference ruling and of the *Clarity Act* itself. On February 16, 2000, the minister gave a speech that launched the study of the bill by a Parliamentary committee. Here, in part, is what he said that day:

À ma connaissance, aucun parti politique important ne suggère de retenir dans le Canada une province contre la volonté clairement exprimée de sa population. Comme l'a affirmé l'honorable Allan Rock lorsqu'il a exposé devant la Chambre des communes les raisons du renvoi à la Cour suprême, le 26 septembre 1996 : « Les principales personnalités politiques de toutes nos provinces et le public canadien ont convenu depuis longtemps que le pays ne restera pas uni à l'encontre de la volonté clairement exprimée des Québécois. » C'est là une position qui va de soi au Canada.

Stéphane Dion was repeating once again the heraldic statement that had been spoken by Allan Rock when he announced the reference to the Supreme Court on September 26, 1996. But, somehow, Dion was unable to grasp that this statement was logically incompatible with the position of the federal government taken in its factum to the court, namely that the *Constitution Act* governs all amendments to the Constitution and secession would precisely require that such an amendment be passed. How could Dion be sure that such an amendment would be adopted in the future, when for generations in Canada it had been impossible to agree on an amending formula, with the result that the power to amend the British North America Act remained in Britain until 1982? Moreover, the Supreme Court judges had frowned on the Rock statement, repeated before the court by Yves Fortier. And, surely, the court's advisory opinion of August 20, 1998, was incompatible with the federal government's giving an assurance that the Québécois would be allowed to secede. That assurance was beyond the constitutional powers of the federal government, and it was utterly unrealistic as well.

Dion continued:

Si, en tant que Canadiens, nous admettons notre divisibilité, ce n'est pas parce que nous considérons que le Canada n'est pas un vrai pays, dont l'intégrité territoriale serait moins digne de respect que celle des autres pays. Non, c'est que nous réalisons que notre identité canadienne est trop précieuse pour reposer sur autre chose que l'adhésion volontaire.

[...]

Le Canada ne mériterait pas d'être lui-même s'il devait ainsi reposer sur la peur et la dissimulation plutôt que sur l'adhésion volontaire.

[...]

Sitôt assermenté ministre, j'ai déclaré : « Si le Québec malheureusement votait avec une majorité ferme sur une question claire pour la sécession, j'estime que le reste du Canada a l'obligation morale de négocier le partage du territoire. » (27-01-96). À cette obligation morale, bien admise au Canada, la Cour suprême a donné une confirmation juridique dans son avis du 20 août 1998. Il est hautement souhaitable que nous nous engageons tous à la respecter, que nous soyons pour l'unité canadienne ou pour l'indépendance du Québec.

There was a difference between stating that Canada was divisible through an amendment to the Constitution and saying that such an amendment would surely be passed if that was what the Québécois really wanted. The court said the first, never the second. No one anywhere could give the assurance that such an amendment would surely be passed. So how could Dion say so, and even say that the Supreme Court confirmed it? That remains a mystery. The net effect of the repeated reassurance offered by Dion, by Allan Rock and by Jean Chrétien, was to confuse the issue and thus encourage the separatists by weakening the credibility of the real constraints on secession laid out in the Constitution and made explicit by the reply to the Reference. It plunged the country into a state of ambiguity and confusion over the true requirements of the constitutional order with respect to secession.

Meanwhile, on February 24, 2000, Minister Facal appeared as a witness before the Commons Committee studying *Bill C-20*. As expected, he denounced it root and branch<sup>47</sup>.

[Translation] « *C-20* is unacceptable for so many reasons: this bill seeks to subject the people of Quebec to a federal trusteeship; it negates basic democratic principles; it is an insult to the intelligence of all Québécois; it installs a system of arbitrary power; and lastly, it bears within itself the seeds of bitter disillusionment for you.

Facal then repeated the well-known fallacy about the threshold of victory: « *C-20* also questions the universally accepted rule in democracy of 50 % plus one, despite the fact that all referendums held in Canada to date have been based on the very same rule. » He denounced as one of the "illusions" created by *Bill C-20* "that the territory of Quebec would be divisible... This is just plain false."

Then, Facal repeated the constantly reiterated view that a majority vote in a referendum would trump every other consideration, including the Constitution and the judgments of the courts:

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<sup>47</sup> See [https://www.sqrc.gouv.qc.ca/documents/positions-historiques/positions-du-qc/part2/JosephFacal2000-1\\_en.pdf](https://www.sqrc.gouv.qc.ca/documents/positions-historiques/positions-du-qc/part2/JosephFacal2000-1_en.pdf)

On the day Quebecers decide to form a new country, *Bill C-20* will not stand in their way. You are deluding yourselves if you think otherwise. The Soviet Union tried this in 1991 and the rest is history... The National Assembly will adopt the question it wants to adopt. As in the past, the Quebec people alone will decide what constitutes clarity. The victorious option will be the one that wins 50 % plus one of validly expressed votes. Who fears Quebecers' democratic determination?

When the *Clarity Act* was being debated before the Senate, the following is what Liberal Senator Joan Fraser, the former editor of the *Montreal Gazette* who was chair of the Senate Special Committee on *Bill C-20*, said in a speech on March 30, 2000:

A country exists because its people want it to exist – that is its only moral basis for being. **If part of its population truly wishes to leave, they clearly have the fundamental right to do so. Canada is not a prison.** I take it as a point of immense national pride that, collectively, we have accepted that fundamental principle. Of course, if it comes down to it, the departure must be done lawfully. However, if it comes to that, the first job of legislators on both sides will be to ascertain the true public will, the true public conviction, and then to respect it.

Presumably she was articulating the policy of Prime Minister Jean Chrétien. Two days later, on April 1, 2000, before the Senate passed *Bill C-20* and while the debate over *Bill 99* continued in the National Assembly, Minister Dion wrote an open letter to the French newspaper, *Le Figaro*, in reply to a previous letter from Louise Beaudoin attacking the *Clarity Bill*. Mr. Dion wrote:

Contrairement à plusieurs États démocratiques qui se déclarent indivisibles dans leur Constitution, nous pensons au Canada que notre pays n'a de sens que s'il repose sur le consentement mutuel. Mais nous pensons aussi qu'aucun Canadien ne devrait voir son appartenance au Canada remise en cause à moins que les électeurs de sa province n'aient clairement signifié leur volonté de cesser de faire partie du Canada.

Once again, Stéphane Dion undermined his own *Clarity Act*, soon to be passed by the Senate, and the Constitution of Canada, while giving greater plausibility to *Bill 99*. According to both Dion and *Bill 99*, Québec would be able to secede if it so chose, no requirements stated.

The *Clarity Act* had been introduced on December 13, 1999. Two days later, on December 15, Premier Bouchard riposted by introducing *Bill 99*, the *Act respecting the exercise of the fundamental rights and prerogatives of the Quebec people and the Quebec State*. Bouchard treated the *Clarity Act* as an attack on the fundamental rights of Quebec, one that provoked a national emergency in Quebec to which he responded by his own *Bill 99*. That evening, he asked all the major television networks to let him address the people on prime time. That was an exceptional and dramatic request in the Canadian parliamentary system, one associated with crises. Pierre Trudeau addressed the nation the night the Parti Québécois won the 1976 elections and shook the entire country to its core. Jacques Parizeau made a similar address in 1995, when he launched his referendum campaign; and Jean Chrétien spoke to the country in

the last week of that campaign, when polls showed the YES side winning and a fearful crisis seemed at hand.

But what was the national threat posed by the *Clarity Bill*? Bouchard tried to portray it as a declaration of war against Quebec. He spoke of Quebec, its people and its National Assembly as “under attack.” His bill had the distinction of summarizing in one solemn document all the mystifications that, for an entire generation, had accompanied Quebec’s supposed right to secede unilaterally. The bill would be subject to scrutiny in the press, to public hearings, to the testimony of experts, to challenge by Aboriginal nations, by Alliance Quebec, by the Equality Party and others. Many dissident groups would deny not only the legality of a unilateral secession, but also the illusion of a presumed velvet divorce.

The bill claimed as part of Quebec’s fundamental rights the repudiation of the Constitution of Canada, the rejection of the legitimacy of the Supreme Court of Canada, the denial that the Parliament of Canada could speak legitimately for the people of Quebec.

Most revealing, that day, was the exchange in the National Assembly between Premier Bouchard and Jean Charest, leader of the official opposition.

M. Bouchard : La population aura constaté que tous les membres de cette Assemblée nationale, de quelque parti qu’ils soient, ont dénoncé l’intervention législative qui se prépare à Ottawa. Et, là-dessus, je pense que nous sommes en position d’unanimité. La population aura noté comme nous aussi que l’attaque sans précédent contre les droits et pouvoirs de l’Assemblée nationale et la capacité du peuple québécois de décider de son avenir lui-même et seul se fait par un projet de loi, rien de moins qu’un projet de loi déposé à la Chambre des communes, de sorte que la riposte qui doit consacrer l’unanimité à notre réaction négative doit être au même niveau, c’est-à-dire sous la forme d’un projet de loi.

Jean Charest also thought that there should be a unanimous reaction at the National Assembly against the assault coming from the House of Commons. But he proposed that the members should be unanimous behind a different approach:

M. Charest : Je réponds, M. le Président, que l’Assemblée nationale devrait adopter une motion qui dit ceci:

« Que l’Assemblée nationale réaffirme qu’elle seule peut déterminer les conditions entourant le processus référendaire sur l’avenir politique et constitutionnel du Québec dans le respect des règles démocratiques et notamment la règle du 50 % plus 1, et ce, en conformité avec la décision de la Cour suprême. »

Charest’s proposal was equivocal, in the tradition of the Quebec Liberal Party. On the one hand, he agreed that the National Assembly and only the National Assembly should determine the

constitutional future of Quebec. That, presumably, included the choice of secession. But then he qualified that by adding, “en conformité avec la décision de la Cour suprême.” But the court had established clearly that Quebec could not go alone on secession: all of Canada must participate in the appropriate amendment to the Constitution.

Premier Bouchard then reacted indignantly to the invocation of the Supreme Court of Canada as having authority over the secession of Quebec. That would disrupt his plan to invoke a right to unilateral secession.

M. Bouchard : En demandant que l'Assemblée nationale se ligote totalement par l'engagement de s'en remettre à la totale conformité du comportement éventuel de l'Assemblée nationale à la décision de la Cour suprême, c'est trop important, c'est tellement important ce qui se passe présentement, il me semble qu'on devrait prendre la peine de se rappeler ce qu'il y a dans l'avis de la Cour suprême. Dans l'avis de la Cour suprême, il y a des règles qui sont définies de façon très nette, et ces règles qui sont définies nettement, nous les avons acceptées d'autant plus que nous avons précédé. Nous avons pris bien avant la décision de la Cour suprême l'engagement de négocier de bonne foi, de négocier et de protéger les minorités, etc.

Bouchard was seizing on the court's requirement that the parties negotiate. He had found that totally satisfactory, because the Parti Québécois also proposed to negotiate, but over a proposal for an economic and perhaps even a political agreement with Canada. Bouchard knew that the court demanded, not merely negotiations, but negotiations that led to an amendment of the Constitution to permit the secession of Quebec. That requirement was embedded in the 1982 *Constitution Act*, a requirement that any future substantial amendment to the Constitution be carried out in accordance with the amending formula of the new Constitution. That was what Bouchard could not accept:

Mais, M. le Président, il y a autre chose dans cette décision, je me tue à le rappeler à l'opposition, qui le sait d'ailleurs, il y a autre chose. Il y a, dans cette décision, l'affirmation très claire et l'acceptation de la légitimité et de la légalité de l'adoption de la Loi constitutionnelle de 1982, qui a limité les pouvoirs de l'Assemblée nationale, qui a été dénoncée ici par une résolution formelle, qui a été refusée par tous les gouvernements du Québec depuis. Et, à la faveur de ce qui se passe présentement, l'opposition libérale voudrait que l'Assemblée nationale se passe la camisole de force définitive en acceptant l'odieux rapatriement de 1982, le ressort qui a été tendu et qui a créé tous les problèmes que nous vivons depuis.

That statement could not be clearer. Premier Bouchard refused to recognize the legitimacy and the authority of the 1982 *Constitution Act*. And, therefore, he could not recognize the authority of the Supreme Court of Canada, because to do so would mean having to accept the authority of the *Constitution Act*, since the Supreme Court had decreed in 1982: “The *Constitution Act, 1982* is now in force. Its legality is neither challenged nor assailable. It contains a new

procedure for amending the Constitution which entirely replaces the old one in its legal as well as in its conventional aspects.”

So, while both parties rejected angrily the *Clarity Act*, Premier Bouchard made clear that he also rejected the authority of the Constitution. He insisted on the right to secede unilaterally.

The editorial in *Le Devoir* on that same day projected the point of view shared by Bouchard and Charest that Ottawa, through the *Clarity Act*, was invading Quebec and trampling on Quebec’s most fundamental rights.

### **L’Assemblée nationale d’une seule voix!**

*Bernard Descôteaux,*

*Le Devoir*, Mercredi 15 décembre 1999, p. A8

Il aura fallu bien peu de temps pour que la politique politicienne prenne le dessus à l’Assemblée nationale dans le débat portant sur le projet de loi Chrétien-Dion sur les règles référendaires. Les péquistes ayant repoussé la motion proposée par Jean Charest vendredi dernier, en guise de réplique à l’intervention d’Ottawa, voilà qu’à son tour le chef libéral refuse de concourir d’emblée à la stratégie du gouvernement Bouchard, qui déposera aujourd’hui un projet de loi réaffirmant les pouvoirs de l’Assemblée nationale en matière de consultations populaires. Il serait regrettable que Jean Charest et ses députés n’appuient pas ce projet, car le Québec ne peut laisser passer le geste d’Ottawa sans y répliquer d’une seule voix.

On ne peut ignorer qu’il y ait dans ce débat des intérêts partisans significatifs, libéraux comme péquistes ne voulant pas être accusés de faire le jeu de l’autre. Ces jeux politiques devraient cependant être mis de côté car ce qui est en cause avant tout, c’est l’autorité de l’Assemblée nationale. C’est cette institution que les députés doivent d’abord défendre, quitte à se livrer plus tard au débat partisan dont Jean Charest nous a donné un avant-goût hier matin.

Libéraux, péquistes et adéquistes doivent trouver une façon de réaffirmer un principe qui fait consensus et qui veut, tel qu’inscrit au préambule de la loi 150 adoptée en 1992 dans la foulée de la commission Bélanger-Campeau, que « *l’Assemblée nationale demeure souveraine pour décider de toute question référendaire* ».

L’adoption d’une loi est à cet égard le geste qui aurait le plus de force, mais il ne faudrait pas que le gouvernement soit tenté d’y accrocher une série de mesures visant à mobiliser les Québécois dans une bataille qui serait assimilée à une manœuvre préférendaire. Ce serait trop demander aux libéraux. L’important est de rallier tous les députés à l’affirmation de la souveraineté et de la légitimité de l’Assemblée nationale, quitte à procéder, dans un deuxième temps, à la convocation d’une commission parlementaire pour tenir des audiences sur le projet Chrétien-Dion. S’ils ne sont pas à l’aise avec une telle démarche, les libéraux pourront alors s’en dissocier honorablement.

Le débat soulevé par l'intervention d'Ottawa risque de verser à tout moment dans l'émotivité et l'irrationalité. Le recours à des termes nettement excessifs par les députés bloquistes qui parlent de soviétisme et de fascisme en oubliant le sens de ces mots, le montre bien. Il faut s'en tenir à l'essentiel, qui est le caractère abusif du projet de loi Chrétien-Dion. Les conditions qu'il édicte sur la clarté de la question et des résultats référendaires équivalent à donner dans les faits un pouvoir de désaveu au gouvernement fédéral à l'encontre des gestes faits par l'Assemblée nationale.

L'ancien premier ministre, Robert Bourassa, aurait appelé cela du « *fédéralisme dominateur*. » C'est cela qui est inacceptable. C'est cela qu'ensemble, Jean Charest et Lucien Bouchard doivent récuser.

So *Le Devoir*, like Bouchard and Charette, insisted that the rest of Canada had no right to judge the clarity of the question or the answer in a referendum held in Quebec only.

Was Ottawa trying to bully Quebec? To think so meant confusing two very different functions of a Quebec referendum on secession. In its primary function, the plebiscite served as a "consultation populaire," to ascertain the state of public opinion in Quebec on the question posed. The plebiscite would be entirely within Quebec's jurisdiction. But, if the subject of the referendum was Quebec's secession from Canada, then the plebiscite acquired a different function because it allowed the Quebec government now to brandish it before the rest of the country to justify its claim to having a right to precipitate negotiations on Quebec's secession.

From that moment, the principle of federalism kicked in. This now became a game of bridge, not solitaire. Quebec's partners in the federation now must come to the table, as the Supreme Court stated. But, now, at the national table, Quebec must show its hand before negotiations could begin. And, since secession was not a right, but merely a possibility, the partners had the right to ask Quebec to prove it really had in hand the cards it claimed to have. To give that proof was necessary before the partners were required or even authorized to recognize that the democratic principle was now in effect. Since the stakes were so high for everyone, the Quebec government must offer compelling proof that it really did have a democratic mandate. And the partners had the right, in good faith, to judge whether the mandate was truly significant enough to compel everyone to begin such momentous negotiations. In a democratic federation, as in every democratic state, the burden of proof rests on those who would attack the territorial integrity of the state, not on those who defend it.

In effect, this is what the Supreme Court meant when it said that "the people of Canada" have the power to change the constitution. The people of Canada, not the people of Quebec. And the court said that it was up to the political players to determine whether or not there was a clear answer to a clear question. It takes two or more to make a federation, and it takes two or more to unmake a federation. For Quebec to insist that the partners must simply take Quebec's word, unquestioningly, is simply to deny the principle of federalism and to claim a right, at will, to defraud the federation.

The Mont-Tremblant declaration by Lucien Bouchard, as well as the statement to the *National Post* by Joseph Facal, set the stage for the introduction, two months later, of *Bill 99*. The conclusion of the premier's statement on October 6 was really the logical prelude, the preamble, so to speak, of *Bill 99*. Bouchard had explained in advance before the world the justification for *Bill 99* and the intentions of the government that adopted it as law. It is by the standard of the Mont-Tremblant declaration that *Bill 99* must be judged, not by the first statements of Premier Bouchard in reaction to the Reference ruling of August 20, 1998. The latter expressed a sudden delight that the ruling allowed an interpretation of the "obligation to negotiate" that was favorable to the separatist cause. But it was the Mont-Tremblant declaration that rendered the complete and carefully crafted policy of the Bouchard government with respect to Quebec's secession.

In this light, what is the significance of the following sections of *Bill 99*?

1. The right of the Québec people to self-determination is founded in fact and in law. The Québec people is the holder of rights that are universally recognized under the principle of equal rights and self-determination of peoples.
2. The Québec people has the inalienable right to freely decide the political regime and legal status of Québec.
3. The Québec people, acting through its own political institutions, shall determine alone the mode of exercise of its right to choose the political regime and legal status of Québec.  
No condition or mode of exercise of that right, in particular the consultation of the Québec people by way of a referendum, shall have effect unless determined in accordance with the first paragraph.
4. When the Québec people is consulted by way of a referendum under the *Referendum Act (chapter C-64.1)*, the winning option is the option that obtains a majority of the valid votes cast, namely 50 % of the valid votes cast plus one.
5. The Québec State derives its legitimacy from the will of the people inhabiting its territory.  
The will of the people is expressed through the election of Members to the National Assembly by universal suffrage, by secret ballot under the one person, one vote system pursuant to the *Election Act (chapter E-3.3)*, and through referendums held pursuant to the *Referendum Act (chapter C-64.1)*.  
Qualification is governed by the provisions of the *Election Act, 2000, c.46,2.5*.
13. No other parliament or government may reduce the powers, authority, sovereignty or legitimacy of the National Assembly, or impose constraint on the democratic will of the Québec people to determine its own future.

I select these six sections because they would be challenged in court beginning in 2001 in the case of *Henderson c. (Procureur general du Québec)*, of which more presently. On the face of it, and with all the policy statements that preceded it, *Bill 99* obviously claimed the unqualified right to secede unilaterally.

Meanwhile, Charest finally made public his and his caucus's stand on the substance of *Bill 99* when, on May 3, 2000, he presented a motion asking that "the National Assembly consecrate, reaffirm and proclaim unanimously the principles formulated in the following declaration..."

Of course, his motion for a "solemn declaration on the right of Quebecers to decide their future" did not win the consent of the Parti Québécois members. The first sentence stated: "Whereas it is important to reaffirm the fundamental principle in virtue of which Quebecers are free to determine their legal and political regime..." Those words seemed to suggest that Quebecers had the right to secede unilaterally. That unilateralism was further suggested in the third Whereas, which referred to Quebecers choosing Canada "on the occasion of the referendums of 1980 and 1995, thereby exercising their right to choose their future."

Then, Charest's motion skated - always ambiguously - in two opposite directions:

This Assembly reaffirms that Quebecers have the right to choose their future and to decide themselves what their constitutional and political status will be, and that this right must be exercised in conformity with the laws, conventions, and constitutional or international principles which apply to the territory of Quebec.

The first part of the sentence implied that Quebecers alone could secede if they so wanted. The second part – for those who knew the relevant parts of the constitution of Canada and international law, including the decision of the Supreme Court on secession – implied directly the opposite: Quebecers did not have a right to secede.

The motion defended considering a referendum result of 50 per cent plus one as decisive. Charest defended the "territorial integrity of Québec." Yet he also defended the Supreme Court decision on secession, and therefore its principles of the rule of law, federalism and the rights of minorities. Another contradiction.

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Over the following years, successive Quebec Governments, led by premiers of the Parti Québécois or the Liberal Party, maintained their claim that Quebec could secede if the Québécois really wanted independence. No conditions were implied as having to be met, other than a majority in a referendum. All premiers also defended *Bill 99* before the court. Meanwhile, the federal governments had left it up to private citizens in Quebec to defend the constitutional order before the courts.

In 2007, Jean Chrétien published his memoirs, *My Years as Prime Minister*. There he explained his reaction following his near-loss in the referendum of 1995: "I personally took charge to put the close call behind us, now and forever," he wrote. So what did he do? These were the instructions he gave to his cabinet in 1996, as quoted in the memoirs: "Our message also has to

indicate that if a clear majority of Quebecers vote on a clear question to leave Canada, the country will not be held together by force.”

The Supreme Court had insisted in 1998 that Quebec could only secede legally following an amendment to the Constitution, and that would require the consent of the provinces as well as of both Houses of Parliament. Chrétien, in 2007, still had not caught the message. His duty as Prime Minister had been to defend and enforce the Constitution. But, instead, he boasted that he was determined not to. He wrote in his memoirs: “Should they ever win a clear majority on a clear question, I would say, ‘OK, the people have spoken clearly. It’s a crying shame and will set us back 20 years, but it’s not the end of the world.’” He seemed to believe that he had the right to put that policy into effect. It was mere dereliction of duty.

Another significant outburst of nationalist indignation broke out when, in October of 2013, the government of Stephen Harper finally announced, in a “Declaration of Intervention,” that it was joining the legal challenge to *Bill 99*, as undertaken by *Henderson v. Québec (Procureur Général)*. It was about time, seven years after he came to power.

The immediate result was an outbreak of consternation, shock and outrage. Someone from each of the five parties in the National Assembly vented indignation at what was considered an unwarranted intrusion into Quebec’s affairs. Prime Minister Pauline Marois declared: “The people of Quebec have the right to self-determination and they alone have the power to choose their destiny.” Then- Opposition Leader Philippe Couillard – soon to be Premier – insisted that “the future of our people will always be decided by the Québécoises and the Québécois.” On October 23, the following motion, moved by Premier Marois, was adopted unanimously by the National Assembly<sup>48</sup>:

Mme Marois : Merci, M. le Président. De fait, je sollicite le consentement des membres de cette Assemblée afin de présenter, conjointement avec le chef du deuxième groupe d’opposition, la députée de Gouin et le député de Blainville, la motion suivante :

« Que l’Assemblée nationale du Québec réaffirme et proclame unanimement les principes fondamentaux formulés dans la *Loi sur l’exercice des droits fondamentaux et des prérogatives du peuple québécois et de l’État du Québec*;

« Que l’Assemblée nationale réaffirme que les Québécois et les Québécoises ont le droit de choisir leur avenir, de décider eux-mêmes de leur statut politique;

« Que l’Assemblée nationale réaffirme que, lorsque les Québécois et Québécoises sont consultés par référendum tenu en vertu de la Loi sur la consultation populaire, la règle démocratique alors applicable est celle de la majorité absolue, soit 50 % des votes déclarés valides plus un vote;

« Que l’Assemblée nationale réaffirme que seule l’Assemblée nationale du Québec a le pouvoir et la capacité de fixer les conditions et modalités entourant la tenue d’un

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<sup>48</sup> [http://www.assnat.qc.ca/fr/travaux-parlementaires/assemblee-nationale/40-1/journal-debats/20131023/98991.html#\\_Toc370390247](http://www.assnat.qc.ca/fr/travaux-parlementaires/assemblee-nationale/40-1/journal-debats/20131023/98991.html#_Toc370390247)

référendum, conformément à la *Loi sur la consultation populaire*, y compris le libellé de la question référendaire;

« Que l'Assemblée nationale réaffirme qu'aucun Parlement ou gouvernement ne peut réduire les pouvoirs, l'autorité, la souveraineté et la légitimité de l'Assemblée nationale ni contraindre la volonté démocratique du peuple québécois à disposer lui-même de son avenir;

« Que l'Assemblée nationale condamne l'intrusion du gouvernement du Canada dans la démocratie québécoise par sa volonté de faire invalider les dispositions contestées de la *Loi sur l'exercice des droits fondamentaux et des prérogatives du peuple québécois et de l'État du Québec*;

« Que l'Assemblée nationale réclame que le gouvernement du Canada s'abstienne d'intervenir et de contester la *Loi sur l'exercice des droits fondamentaux et des prérogatives du peuple québécois et de l'État du Québec* devant la Cour supérieure du Québec. »

Merci, M. le Président.

This unanimity, this conviction that the secession of Quebec is not a valid concern for the Government of Canada, reveals a fundamental flaw in the political culture of Quebec. People here believe fervently what is believed by no sophisticated person in any of the mature democracies, such as the United States, France, Great Britain or Germany: that one part of the country can secede unilaterally on the strength of a referendum designed and held in that one part of the country. This remarkable belief has been rampant in Quebec's political class since the start of the Quiet Revolution.

On June 1, 2017, Premier Philippe Couillard made public a new policy document that expressed his government's ambitions for renewing the Constitution of Canada so as to meet the demands of Quebec, long expressed, much debated, but never successfully constitutionalized. The new document was titled *QUÉBÉCOIS. Notre façon d'être Canadiens. Politique d'affirmation du Québec et de relations canadiennes*, or, in its English version, *QUEBECERS. OUR WAY OF BEING CANADIAN. Policy on Québec Affirmation and Canadian Relations*<sup>49</sup>. It repeated once again most of the self-destructive demands and illusions that came always to an impasse ever since the start of the Quiet Revolution.

An introductory statement by Quebec's Minister of Canadian Relations Jean-Marc Fournier began:

In the words of Robert Bourassa, which remain just as meaningful today, Québec is free to make its own choices and able to shape its own destiny and development. Québec has all the characteristics of, and recognizes itself as, a nation.<sup>50</sup>

<sup>49</sup> It can be downloaded at this link : <https://www.sqrc.gouv.qc.ca/documents/relations-canadiennes/politique-affirmation-en.pdf>

<sup>50</sup> The original French : « Le Québec est libre de ses choix et capable d'assumer son destin et son développement. Les mots de Robert Bourassa ont conservé tout leur sens. Le Québec possède toutes les caractéristiques d'une nation et il se reconnaît comme telle. »

This was the unfounded claim, repeated for decades, that Quebec had a right to independence. There was no recognition that the response of the Supreme Court of Canada to the Reference on secession repudiated that claim: Quebec needed an amendment to the Constitution if it wanted to separate legally, and that was no sure thing since the court stated that Quebec did not have a right to secession, only a possibility.

The same unfounded claim was made twice in the main body of the document, but now without the reference to Robert Bourassa. Under the heading of “THE DECLARATION OF AFFIRMATION” the manifesto stated:

Québec is free to make its own choices and able to shape its own destiny and development. Quebec has chosen the Canadian experience.<sup>51</sup>

Further on, under the heading of “WHAT WE ARE AS QUÉBÉCOIS,” the same unfounded affirmation was made: that Quebec was free to choose its future constitutional status because it was a nation:

Québec is free to make its own choices and able to shape its own destiny and development. Québec has all the characteristics of, and recognizes itself as, a nation. The Québec nation is predominantly French-speaking. The Québec nation also includes an English-speaking community that has specific rights and prerogatives. The Québec nation recognizes eleven Aboriginal nations throughout Québec. The Québec nation is enriched by significant cultural diversity that nourishes its shared historical narrative through interculturalism<sup>52</sup>.

To enhance this claim to full freedom of choice, the manifesto recalled approvingly a statement by Premier René Lévesque claiming that the 1980 referendum on sovereignty-association established Quebec’s right to self-determination (i.e., a presumed right to choose secession). “For Premier René Lévesque, the clear recognition of the right to self-determination remains as the most precious accomplishment of the 1980 referendum.”<sup>53</sup> After all these years and decades, the Couillard government in 2017 still cited the right to self-determination as though it implied a right to secession.

Moreover, as shown earlier, the 1980 referendum established no such precedent for a free choice in the future. In fact, as stated in the very referendum question, unless the rest of

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<sup>51</sup> French original : « Le Québec est libre de ses choix et capable d’assumer son destin et son développement. Il a choisi l’expérience canadienne. »

<sup>52</sup> French original: « Le Québec est libre de ses choix et capable d’assumer son destin et son développement. Le Québec possède toutes les caractéristiques d’une nation et se reconnaît comme telle. La Nation québécoise est composée d’une majorité francophone. »

<sup>53</sup> French original: « Pour le premier ministre, René Lévesque, la reconnaissance manifeste du droit à l’autodétermination demeure l’acquis le plus précieux du référendum de 1980. »

Canada agreed to an economic association, there would be no sovereignty. Such was the lack of intellectual or political seriousness of Couillard's manifesto.

The document went on to justify the refusal of every premier since René Lévesque to recognize the legitimacy of the 1982 *Constitution Act*, in spite of the fact that Pierre Trudeau, had complied with all the conditions set by the Supreme Court in a September 1981 decision. That included getting a consensus of the provinces; he obtained the support of all the provinces except Quebec. Also, in December 1982, the Supreme Court had ruled unanimously: "The *Constitution Act, 1982* is now in force. Its legality is neither challenged nor assailable." But still, in 2017, Premier Couillard still refused to recognize the legitimacy of the *Constitution Act*.

The manifesto presented the *Constitution Act*, adopted "unilaterally," that is, without Quebec's consent, as therefore illegitimate and unacceptable. A second justification offered for the refusal to recognize the law of the land was that the *Constitution Act* violated a fundamental condition of the Confederation of 1867: the pact between two founding peoples, English and French: another hoary myth. And another reason: it did not offer sufficient concessions based on Quebec's identity:

Essentially, the Government of Quebec was and is opposed to the *Constitution Act* of 1982 because, in its judgment, it did not find there sufficient guarantees for the protection of its national identity nor the necessary conditions for its full participation in the development of the Canadian federation<sup>54</sup>.

Then, the Meech Lake amendments would have remedied these fundamental flaws of the *Constitution Act*, the document maintained. Consequently, the failure of Meech Lake was taken by Quebecers as a refusal by the rest of the country to recognize Quebec's identity as a distinct nation within Canada, and so the people of Quebec lost faith in the federation. They see themselves as "exiles" within Canada.

It is possible to recognize the Quebec Nation without its threatening the balance between the federal partners. This recognition of the Quebec Nation could, however, enjoy a much more solid foundation in the constitutional texture and in this way, make it possible to have Canada evolve towards a more pluralist conception of federalism. Such a recognition would make it possible to ensure that the Québécois would no longer feel that they are exiles within their own country<sup>55</sup>.

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<sup>54</sup> The original French : « Essentially, le Gouvernement du Québec s'oppose à l'adoption de la Loi constitutionnelle de 1982, car il juge qu'il n'y trouve pas les garanties suffisantes à la protection de son identité nationale; les conditions nécessaires à sa pleine participation au développement de la fédération canadienne. »

<sup>55</sup> The original French : « Il est possible de reconnaître la Nation québécoise sans que l'équilibre entre les partenaires fédératifs en soit menacé. Cette reconnaissance de la Nation québécoise pourrait cependant jouir d'une assise plus solide dans le tissu constitutionnel et ainsi permettre de faire évoluer le Canada vers une conception davantage pluraliste du fédéralisme. Une telle reconnaissance permettrait de faire en sorte que les Québécois ne se sentiraient plus exilés au sein de leur propre pays. »

Couillard's manifesto described Quebec as being left outside of "the bosom of the constitution." After all these years, the same myths persist; they would be rejected out of hand by all the major democracies, such as the United States, France, Great Britain or Germany. But, as foreseen in *Maria Chapdelaine*, "in the land of Quebec, nothing has changed."

#### **Chapter IV: The Quebec Superior Court Bungles Its Decision on *Bill 99***

Madame Justice Claude D'Almeida demonstrated a lack of analytical coherence in her decision on *Bill 99*, signed on April 18, 2018. Moreover, she failed to examine and to grasp the historical sequence that preceded *Bill 99* and that revealed the intentions of the legislators who introduced and passed that bill. As a consequence, she utterly failed to comprehend and explain the true meaning of *Bill 99*.

The Supreme Court of Canada, in its ruling in reply to the *Reference on the Secession of Quebec*<sup>56</sup>, had defined four fundamental constitutional principles that must be applied if Quebec is to secede legally. And the court emphasized that these four principles must be considered together in their interaction. None of the four operates independently of the other three:

49 What are those underlying principles? Our Constitution is primarily a written one, the product of 131 years of evolution. Behind the written word is an historical lineage stretching back through the ages, which aids in the consideration of the underlying constitutional principles. These principles inform and sustain the constitutional text: they are the vital unstated assumptions upon which the text is based. The following discussion addresses the four foundational constitutional principles that are most germane for resolution of this reference: federalism, democracy, constitutionalism and the rule of law, and respect for minority rights. **These defining principles function in**

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<sup>56</sup> Henceforth, the ruling of the Supreme Court will be referred to as the Reference.

**symbiosis. No single principle can be defined in isolation from the others, nor does any one principle trump or exclude the operation of any other.** (Bold type added, here and elsewhere in this essay, unless indicated otherwise.)

One principle, for example – the principle of democracy— could not trump the other three principles. According to the Supreme Court, democracy must be reconciled with the principle of the constitutional order and the rule of law. The secession of Quebec, if desired by a clear majority in Quebec, can only be accomplished by amending the Constitution, and that must be accomplished in accordance with the Constitution’s amending formula. Democracy must also be reconciled with the principle of federalism, that is, taking into account the constitutional rights and interests of Quebec’s partners in the federation – the other provinces and the federal government. The other provinces must be actively involved in the process of secession by their vote in favour or against the motion to amend the Constitution which would then permit Quebec’s secession. Finally, the principle of democracy must be reconciled with the principle of recognizing the rights of minorities, and especially the constitutionally entrenched special rights of the Aboriginals. For example, the Aboriginals whose territories are within Quebec could demand to remain under the territorial jurisdiction of Canada.

But nowhere in her decision did Justice Dallaire carry out such a systematic analytic exploration of the legal doctrine expressed in the Reference. She quoted the Reference, but without ever explaining what the Supreme Court meant, nor did she ever summarize the overall message conveyed by the Supreme Court, with its repeated insistence that the Constitution must be amended if Quebec is to secede legally.

In September 1996, the government of Jean Chrétien had put three questions to the Supreme Court:

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

Clearly, the right “to effect the secession of Quebec from Canada unilaterally” was the central issue before the Supreme Court. But nowhere in her decision did Dallaire provide a full definition of “unilateral secession,” as it was proposed and explained repeatedly by the Supreme Court.

Finally, in her decision, Judge Dallaire attacked vehemently, and at length, *Bill C-20* of the year 2000, generally known as the *Clarity Act*. She argued that the *Clarity Act*, unlike *Bill 99*, did not conform with the directives laid down by the Supreme Court in the Reference. And yet, nowhere in her decision did she analyze the content of the *Clarity Act* in relation to what the Supreme Court had directed. She was content to repeat the accusations launched against the *Clarity Act* by Quebec politicians.

Dallaire did offer several quotations from the Reference, but without then explaining the implications of the words quoted. More specifically, she never examined the tension, described by the Supreme Court, that would exist between the clear expression of the desire of the Québécois for independence and the conflicting rights and interests of all the pertinent *others*, that is, of the other provinces, of minorities and Aborigines, and of Canadians as a whole, represented by the federal government.

So, for example, she did evoke the principle of federalism, but only in the context of the obligation imposed on the rest of Canada (ROC) by the Supreme Court to negotiate secession. The other provinces and the federal government must come to the table and negotiate. But Dallaire never recognized that the federal principle also meant that the other provinces had an *equal* right to advance and to protect their own interests in these negotiations. The Supreme Court did not confer greater weight to Quebec’s right to pursue its secession than it gave to the other provinces to put forward their own rights and interests, some of which would certainly be compromised by the secession of Quebec. A similar tension would exist between Quebec’s wish to secede and the interests of the Aborigines, particularly those with territories situated within Quebec. Dallaire did not explore this glaring problem that would have to be faced by a seceding Quebec and by the federal and provincial governments.

The judge failed to take as a premise to her decision the fundamental conclusion of the Reference: that, for Quebec, secession is not a right, neither under Canadian law nor under international law, but only a possibility; and that possibility, to the extent that it is to be realized by secession, must be preceded by a formal agreement, confirmed by an enabling amendment to the Constitution that reconciles as far as possible the rights of *others* with the interests of the *Québécois*. And always, the constitutional amendment, whatever it might turn out to be, must be effected within the framework of the Constitution of Canada. An amendment to the Constitution of Canada is an absolute requirement, the Supreme Court insisted repeatedly.

The judge’s viewpoint expressed in her decision was much more simplistic:

Pour faire progresser le désir de faire sécession vers une matérialisation concrète de celui-ci, il doit nécessairement y avoir des modifications à la Constitution, ne serait-ce que pour retirer le nom du Québec de cet acte juridique.

454. Et cela ne peut passer que par le travail acharné des élus qui devront négocier les paramètres de l'entente à l'issue de laquelle le Québec pourra enlever son nom de la Constitution...

The judge evoked only one example of a constitutional amendment: one that merely removed the word, "Quebec" from the text of the Constitution of Canada. This is an utterly astonishing *reductio ad absurdum* of a very complex undertaking. It is flippancy, not legal analysis. To remove Quebec from the Constitution of Canada would require a multiplicity of amendments that went far beyond just removing the six letters of the word *Quebec*. But that the judge would give that as an example of the amending required for Quebec to secede legally reveals much about the frame of mind that the judge brought to her decision.

She failed to grasp the complexity of the Supreme Court's analysis. For example, she seems to consider the process of negotiations as an all or nothing enterprise: they reach an agreement and Quebec secedes, or they don't reach an agreement. But the perspective opened up by the Supreme Court evokes far more possibilities. Since the conflicting rights and interests of all the parties must be considered during the negotiations, the outcome is most likely to be a compromise, rather than outright secession. For example, the outcome of the negotiations could also be a change in the respective jurisdictions of the federal and Quebec governments; or it could mean replacing the federal structure of Canada by a form of true confederation between Quebec and Canada (like the European Community). Or, again, the amendment might readjust the territorial boundaries of Quebec to include the nearby territories in New Brunswick and Ontario where French speakers are in the majority. But Dallaire chose to reduce the scope of the possibilities that could emerge from the negotiations and, thereby, she trivialized the process.

The following paragraphs from the Reference summarize well the entire doctrine conveyed by that historic Reference document. Some words and some sentences have been put in bold type because they are particularly pertinent for judging the validity of the Dallaire decision:

#### *Question 1*

The Constitution is more than a written text. It embraces the entire global system of rules and principles which govern the exercise of constitutional authority. **A superficial reading of selected provisions of the written constitutional enactment, without more, may be misleading. It is necessary to make a more profound investigation of the underlying principles animating the whole of the Constitution, including the principles of federalism, democracy, constitutionalism and the rule of law, and respect for minorities. Those principles must inform our overall appreciation of the constitutional rights and obligations that would come into play in the event that a clear majority of Quebecers votes on a clear question in favour of secession.**

The Court in this reference is required to consider whether Quebec has a right to unilateral secession. Arguments in support of the existence of such a right were primarily based on the principle of democracy. **Democracy, however, means more than simple majority rule. Constitutional jurisprudence shows that democracy exists in the larger context of other constitutional values.** Since Confederation, the people of the provinces and territories have created close ties of interdependence (economic, social, political and cultural) based on shared values that include **federalism, democracy, constitutionalism and the rule of law, and respect for minorities.** A democratic decision of Quebecers in favour of secession would put those relationships at risk. The Constitution vouchsafes order and stability, and accordingly secession of a province “under the Constitution” could not be achieved unilaterally, that is, **without principled negotiation with other participants in Confederation within the existing constitutional framework.**

Our democratic institutions necessarily accommodate a continuous process of discussion and evolution, which is reflected in **the constitutional right of each participant in the federation to initiate constitutional change. This right implies a reciprocal duty on the other participants to engage in discussions to address any legitimate initiative to change the constitutional order.** A clear majority vote in Quebec on a clear question in favour of secession would confer democratic legitimacy on the secession initiative which all of the other participants in Confederation would have to recognize.

Quebec could not, despite a clear referendum result, purport to invoke a right of self-determination to dictate the terms of a proposed secession to the other parties to the federation. **The democratic vote, by however strong a majority, would have no legal effect on its own and could not push aside the principles of federalism and the rule of law, the rights of individuals and minorities, or the operation of democracy in the other provinces or in Canada as a whole.** Democratic rights under the Constitution cannot be divorced from constitutional obligations. Nor, however, can the reverse proposition be accepted: the continued existence and operation of the Canadian constitutional order could not be indifferent to a clear expression of a clear majority of Quebecers that they no longer wish to remain in Canada. **The other provinces and the federal government would have no basis to deny the right of the government of Quebec to pursue secession should a clear majority of the people of Quebec choose that goal, so long as in doing so, Quebec respects the rights of others.** The negotiations that followed such a vote would address the potential act of secession as well as its possible terms should in fact secession proceed. **There would be no conclusions predetermined by law on any issue. Negotiations would need to address the interests of the other provinces, the federal government and Quebec and indeed the rights of all Canadians both within and outside Quebec, and specifically the rights of minorities.**

**The negotiation process would require the reconciliation of various rights and obligations by negotiation between two legitimate majorities, namely, the majority of the population of Quebec, and that of Canada as a whole.** A political majority at either level that does not act in accordance with the underlying constitutional principles puts at risk the legitimacy of its exercise of its rights, and the ultimate acceptance of the result by the international community.

The task of the Court has been to clarify the legal framework within which **political decisions are to be taken “under the Constitution”** and not to usurp the prerogatives of the political forces that operate within that framework. The obligations identified by the Court are binding obligations under the Constitution. However, it **will be for the political actors to determine what constitutes “a clear majority on a clear question”** in the circumstances under which a future referendum vote may be taken. Equally, in the event of demonstrated majority support for Quebec secession, the content and process of the negotiations will be for the political actors to settle. **The reconciliation of the various legitimate constitutional interests 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 political negotiations.** To the extent issues addressed in the course of negotiation are political, the courts, appreciating their proper role in the constitutional scheme, would have no supervisory role.

To begin our scrutiny of the Dallaire decision, we shall examine an element of that decision where we think that the judge showed a misunderstanding. It concerns the “obligation to negotiate,” should the Québécois express a clear desire for independence. Here, in part, is what the Supreme Court said about that:

88 The federalism principle, in conjunction with the democratic principle, dictates that the clear repudiation of the existing constitutional order and the clear expression of the desire to pursue secession by the population of a province would give rise to a reciprocal obligation on all parties to Confederation **to negotiate constitutional changes to respond to that desire.** The amendment of the Constitution begins with a political process undertaken pursuant to the Constitution itself. In Canada, the initiative for constitutional amendment is the responsibility of democratically elected representatives of the participants in Confederation. Those representatives may, of course, take their cue from a referendum, but in legal terms, constitution-making in Canada, as in many countries, is undertaken by the democratically elected representatives of the people. **The corollary of a legitimate attempt by one participant in Confederation to seek an amendment to the Constitution is an obligation on all parties to come to the negotiating table.** 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.

89 **What is the content of this obligation to negotiate?** At this juncture, we confront the difficult inter-relationship between substantive obligations flowing from the Constitution and questions of judicial competence and restraint in supervising or enforcing those obligations. This is mirrored by the distinction between the legality and the legitimacy of actions taken under the Constitution. We propose to focus first on the substantive obligations flowing from this obligation to negotiate; once the nature of those obligations has been described, it is easier to assess the appropriate means of enforcement of those obligations, and to comment on the distinction between legality and legitimacy.

90 The conduct of the parties in such negotiations would be governed by the same constitutional principles which give rise to the duty to negotiate: federalism, democracy, constitutionalism and the rule of law, and the protection of minorities. Those principles lead us to reject two absolutist propositions. **One of those propositions is that there would be a legal obligation on the other provinces and federal government to accede to the secession of a province, subject only to negotiation of the logistical details of secession.** This proposition is attributed either to the supposed implications of the democratic principle of the Constitution, or to the international law principle of self-determination of peoples.

91 For both theoretical and practical reasons, we cannot accept this view. **We hold that Quebec could not purport to invoke a right of self-determination such as to dictate the terms of a proposed secession to the other parties: that would not be a negotiation at all.** As well, it would be naive to expect that the substantive goal of secession could readily be distinguished from the practical details of secession. The devil would be in the details. **The democracy principle, as we have emphasized, cannot be invoked to trump the principles of federalism and rule of law, the rights of individuals and minorities, or the operation of democracy in the other provinces or in Canada as a whole.** No negotiations could be effective if their ultimate outcome, secession, is cast as an absolute legal entitlement based upon an obligation to give effect to that act of secession in the Constitution. Such a foregone conclusion would actually undermine the obligation to negotiate and render it hollow.

92 However, we are equally unable to accept the reverse proposition, that a clear expression of self-determination by the people of Quebec would impose no obligations upon the other provinces or the federal government. The continued existence and operation of the Canadian constitutional order cannot remain indifferent to the clear expression of a clear majority of Quebecers that they no longer wish to remain in Canada. This would amount to the assertion that other constitutionally recognized principles necessarily trump the clearly expressed democratic will of the people of Quebec. Such a proposition fails to give sufficient weight to the underlying constitutional principles that must inform the amendment process, including the principles of democracy and federalism. **The rights of other provinces and the federal government cannot deny the right of the government of Quebec to pursue secession,**

should a clear majority of the people of Quebec choose that goal, **so long as in doing so, Quebec respects the rights of others. Negotiations would be necessary to address the interests of the federal government, of Quebec and the other provinces, and other participants, as well as the rights of all Canadians both within and outside Quebec.**

93 Is the rejection of both of these propositions reconcilable? Yes, once it is realized that none of the rights or principles under discussion is absolute to the exclusion of the others. This observation suggests that other parties cannot exercise their rights in such a way as to amount to an absolute denial of Quebec's rights, and similarly, that **so long as Quebec exercises its rights while respecting the rights of others, it may propose secession and seek to achieve it through negotiation.** The negotiation process precipitated by a decision of a clear majority of the population of Quebec on a clear question to pursue secession would **require the reconciliation of various rights and obligations by the representatives of two legitimate majorities,** namely, the clear majority of the population of Quebec, and the clear majority of Canada as a whole, whatever that may be. **There can be no suggestion that either of these majorities "trumps" the other.** A political majority that does not act in accordance with the underlying constitutional principles we have identified puts at risk the legitimacy of the exercise of its rights.

150 The Constitution is not a straitjacket. Even a brief review of our constitutional history demonstrates periods of momentous and dramatic change. Our democratic institutions necessarily accommodate a continuous process of discussion and evolution, which is reflected in the constitutional right of each participant in the federation to initiate constitutional change. This right implies a reciprocal duty on the other participants to engage in discussions to address any legitimate initiative to change the constitutional order. While it is true that some attempts at constitutional amendment in recent years have faltered, a clear majority vote in Quebec on a clear question in favour of secession would confer democratic legitimacy on the secession initiative which all of the other participants in Confederation would have to recognize.

What is clear, here, is that the "obligation to negotiate" is not attached specifically to a referendum on Quebec's secession. It is formulated as a general principle of mutual respect within the federation, applying to all the partners in the federation and to all the changes to the Constitution that anyone of them might propose. This was stated clearly in paragraph 88, cited above.

This means that, should any province express a clear desire to amend the Constitution, all the partners must meet and negotiate – that is, confront and try to reconcile their several and probably diverging interests. This does not mean that they negotiate only on the amendment proposed. No, each brings to the attention of the others its own perception of the proposed amendment and its own acceptance or rejection of the amendment, for its own reasons. This can include proposals to modify the content of the proposed amendment to produce a proposal that is short of independence.

To take hypothetical proposals: Alberta might propose a Triple-E Senate. British Columbia might move an amendment to increase the number of its seats in the Senate. Ontario might move an amendment to change drastically the scope of the equalization principle. Et cetera. So, whatever the proposal, all the partners have an obligation to negotiate. But that does not mean that all partners, or even any partner, must endorse the amendment. Alberta would probably not get its Triple-E Senate. It is perfectly legitimate for any province to put forward its reasoned objection to the amendment, perhaps proposing an alternative formulation. And such, precisely, is the case for a proposal coming from Quebec for secession.

But the “obligation to negotiate” was new and it was widely misunderstood when the Supreme Court rendered its ruling on secession on August 20, 1998. In Quebec, in particular, it was widely understood that the partners were now obliged to meet and negotiate, but they must meet and negotiate specifically and only on Quebec’s secession. The rights of the other partners, insisted on by the Supreme Court, were minimized or forgotten, as were the rights of all Canadians, of minorities and Aboriginals. Lucien Bouchard was triumphant (see below). He gave a purely tendentious reading of the obligation to negotiate.

It is obvious that Judge Dallaire did not recognize the generality of the obligation to negotiate and its neutrality with regard to the ultimate direction to be taken by the federation’s partners. She writes about *Bill 99*:

467. Ce que recherche le législateur et les mots qu’il utilise respectent donc sa compétence interne, prévue à l’article 45 de la *Loi constitutionnelle* de 1982 et **les effets de l’exercice de ce choix à l’extérieur du Québec sont limités à ce que la Cour suprême a déjà reconnu, soit la légitimité du projet sécessionniste, qui ne pourrait être ignoré des autres membres de la fédération, qui auraient l’obligation de négocier de bonne foi pour que la phase deux de ce projet puisse se matérialiser.**

The judge clearly implied here a presumption imposed on the partners in favour of secession. They must negotiate with the *objective* that phase two, actual secession, be realized. That presumption is entirely absent from the Reference. Moreover, the Supreme Court suggested elsewhere that there was even an opposite presumption, that of the territorial integrity of the state:

(3) *Question 2*

The Court was also required to consider whether a right to unilateral secession exists under international law. Some supporting an affirmative answer did so on the basis of the recognized right to self-determination that belongs to all “peoples”. Although much of the Quebec population certainly shares many of the characteristics of a people, it is not necessary to decide the “people” issue because, whatever may be the correct determination of this issue in the context of Quebec, a right to secession only arises under the principle of self-determination of people at international law where “a people” is governed as part of a colonial empire; where “a

people” is subject to alien subjugation, domination or exploitation; and possibly where “a people” is denied any meaningful exercise of its right to self-determination within the state of which it forms a part. **In other circumstances, peoples are expected to achieve self-determination within the framework of their existing state. A state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its internal arrangements, is entitled to maintain its territorial integrity under international law and to have that territorial integrity recognized by other states. Quebec does not meet the threshold of a colonial people or an oppressed people, nor can it be suggested that Quebecers have been denied meaningful access to government to pursue their political, economic, cultural and social development. In the circumstances, the “National Assembly, the legislature or the government of Quebec” do not enjoy a right at international law to effect the secession of Quebec from Canada unilaterally.**

112 International law contains neither a right of unilateral secession nor **the explicit denial of such a right, although such a denial is, to some extent, implicit in the exceptional circumstances required for secession to be permitted under the right of a people to self-determination, e.g., the right of secession that arises in the exceptional situation of an oppressed or colonial people**, discussed below. As will be seen, **international law places great importance on the territorial integrity of nation states** and, by and large, leaves the creation of a new state to be determined by the domestic law of the existing state of which the seceding entity presently forms a part... **Where, as here, unilateral secession would be incompatible with the domestic Constitution, international law is likely to accept that conclusion.**

Nowhere does the Dallaire decision raise the issue of the territorial integrity of Canada and of the presumption in its favour. She only conceived concern for the territorial integrity of Quebec, which *Bill 99* was presumed to protect. But recognition of the rights of others, so glaringly absent from *Bill 99*, is equally absent from her decision on the constitutionality of *Bill 99*.

As for *Bill C-20*, the *Clarity Act*, which the federal government presented as fulfilling the recommendations of the Reference, the judge presented it only as a kind of peevish reaction from the federal government because Ottawa was chagrined by the Reference response. She also clearly implied that it was *ultra vires* and in violation of the doctrine spelled out by the Reference.

12. Lorsque les parlementaires québécois apprennent l’existence de ce projet de *Loi C-20* et en découvrent le contenu, ils dénoncent vertement cette initiative du gouvernement fédéral, qu’ils considèrent être **une intrusion illégale dans les affaires du Québec**.
13. En plus du sentiment d’invasion, les parlementaires québécois perçoivent que le projet de *Loi C-20* fait fi du droit du **peuple québécois à l’autodétermination** ainsi que du droit

de ses institutions de mettre en œuvre ce droit fondamental, que la Cour suprême vient tout juste de confirmer, selon leur compréhension de l'*Avis consultatif*.

14. La série de règles que le gouvernement fédéral croit alors pouvoir imposer au Québec au moyen de la *Loi C-20* leur donne également l'impression que **le fédéral se cherche une porte de sortie pour éluder les négociations obligatoires** que la Cour suprême vient de reconnaître comme étant la résultante d'un vote en faveur d'une sécession.
15. Ils jugent donc unanimement **que l'attaque perpétrée par la Loi C-20 mérite une réponse immédiate et ferme**, et cherchent alors le bon moyen de faire comprendre au fédéral et aux autres membres de la fédération canadienne que **le peuple québécois et ses institutions ont toujours été, sont, et seront toujours les seuls à décider de leur avenir, que personne ne viendra s'ingérer dans l'exercice de leur souveraineté en leur dictant de l'extérieur et à l'avance le contenu des questions référendaires** qui pourrait être acceptable, **ni leur enseigner comment compter les votes** pour interpréter le résultat d'un futur référendum sur ce sujet délicat.
16. Certains sont alors d'avis que **la gravité de l'atteinte nécessite une réponse du même type que l'arme utilisée pour l'attaque, donc une loi**. Ils croient qu'une loi serait plus à même de rassurer les Québécois sur leurs droits qu'une déclaration solennelle, dans l'hypothèse où surgissent des difficultés lors d'un futur référendum et qu'il soit nécessaire d'avoir recours aux tribunaux:

75. Avec son titre, à ce moment précis de l'histoire, et lorsque l'on sait que le gouvernement fédéral possède déjà sa propre loi portant sur les consultations populaires, la matière sur laquelle le législateur fédéral légifère dans la *Loi C-20* **trahit ses angoisses advenant que la population du Québec donne mandat à ses élus de mettre en œuvre une nouvelle tentative de sécession** à l'issue d'un futur référendum tenu par le gouvernement provincial.

471 C'est un peu comme une forme de menu déroulant qui développe toujours la même idée : **nous sommes assez grands pour nous occuper de nos propres affaires sans subir d'ingérence des autres membres de la fédération**.

472. **Pour ceux qui craignent un possible complot sécessionniste**, les mots « détermine seul » sont probablement les plus irritants, et ils n'ont pas tort, a priori.

476. Ce qui est clair, c'est que **le Québec ne veut pas subir d'interférence de la part de quiconque lorsqu'il exercera son droit à l'autodétermination interne**.

477. **Il ne veut donc personne par-dessus son épaule ou pour lui tenir la main et lui dicter comment il devra tenir le référendum provincial** qui portera sur le prochain projet de sécession, **en lui soufflant d'avance les questions, en interprétant à sa place ce qui constituera un résultat suffisant pour tirer la conclusion qui s'impose à la suite**

**du vote, et encore moins en fixant unilatéralement les conditions dans lesquelles il pourra s'attendre à ce que les autres participent à d'éventuelles négociations avec lui pour faire avancer le projet, ou décident plutôt de bouder dans leur coin.**

483. Lucien Bouchard voyait pour sa part ceci dans le contenu de cet article 3 :

*Cet énoncé n'invente rien, il ne vise qu'à empêcher toute intervention extérieure dans nos débats relatifs à l'avenir du Québec et affirme clairement que **nous n'avons pas besoin collectivement d'un grand frère.** (...)*

497. Le propos suivant, extrait des débats parlementaires, en lien avec ce que le gouvernement reprochait à la *Loi C-20*, est **intéressant pour déterminer le « mal » à endiguer par le biais de la Loi 99 :**

**Au-delà de l'option souverainiste, l'intervention fédérale attaque deux fondements cruciaux de notre système de consultation populaire : le libellé de la question et la majorité requise (...) ce ne sont plus nos différentes options politiques qui sont en cause, c'est notre liberté démocratique.**

543. Selon nous, il réitère tout cela simplement parce qu'il a été très heurté par **l'essence de ce qui se trouve dans la Loi C-20 et qu'il a jugé important d'ajouter des bretelles à la ceinture**, histoire de bien faire passer son message.

559. Si l'on se fie aux propos mis en preuve, le **gouvernement québécois s'est réjoui** de cet *Avis consultatif*, alors **que le gouvernement fédéral a tout de suite voulu faire connaître ses vues sur la façon de gérer une éventuelle démarche référendaire, en se dotant de la Loi C-20.**

560. Le contenu de cette *Loi* **a fait bondir les parlementaires québécois**, qui y ont tout de suite vu **une tentative illégale d'intervention dans la gestion interne des affaires propres à la population du Québec**, et une action forte **s'imposait afin de remettre le fédéral à sa place.**

561. Cela passait par lui rappeler, noir sur blanc, dans une loi, que le rôle de chacun des acteurs de la fédération est bien défini, qu'il doit tenir pour acquis que la population québécoise pourra toujours initier une démarche sécessionniste, si elle le souhaite, et qu'advenant qu'elle le fasse, **qu'elle est assez grande pour le faire seule, sans se faire dicter comment par lui**, sous réserve que les institutions qui la représentent agissent conformément aux obligations constitutionnelles qui lient le Québec, comme toute autre province, telles que réitérées par la Cour suprême.

563. Selon ce qui ressort des débats de l'époque, les parlementaires croient donc que **le temps est venu d'ajuster le tir et d'envoyer un coup de semonce pour faire battre le fédéral en retraite en ralentissant ses ardeurs**, l'arme prédestinée pour accomplir ce

dessein ayant finalement pris la forme d'une loi, la *Loi 99*, plutôt que celle d'une déclaration solennelle.

564. Il était donc jugé **impératif de remettre les pendules à l'heure au sujet des droits, privilèges, principes fondamentaux du peuple québécois** et de ses institutions, ainsi qu'en ce qui a trait au rôle de chacun au sein de la province tout comme membre autonome et égal de la fédération, la Cour suprême ayant reconnu à chacun des participants à cette fédération un statut égal, de sorte que **le fédéral pouvait dorénavant s'abstenir de jouer au grand frère avec le Québec**.

565. Cette loi [99] visait donc à réitérer des principes déjà existants, se trouvant dans diverses lois québécoises, pour certains, et, pour d'autres, au cœur même du système politique québécois et canadien, lesquels reposent sur le principe d'une société démocratique, et elle visait aussi à regrouper ces droits et principes au sein d'un seul instrument unique et fort dont le but ultime était de **transmettre le message que nous paraphrasons par le slogan « Maîtres chez nous »**.

572. Également, nous ne voyons **rien dans la Loi 99 qui puisse mener à l'anarchie ni à la révolution**, comme le craint le requérant, qui se dit fatigué de cette menace qui plane depuis trop longtemps sur l'avenir du Québec.

Astonishingly, Claude Dallaire railed (usually by quotations) against the *Clarity Act*, but she never quoted it, never truly analyzed it, never compared it to the Reference ruling to see whether or not they were congruent. She just picked up all the nasty things that were said about it by Quebec-based politicians and incorporated them into her decision. She spoke sarcastically, witheringly, about the federal intentions behind the *Clarity Act*. In effect, she declared the *Clarity Act* was an expression of pique by stunned federalists. As a result of their emotions, they passed an Act that was unconstitutional, contrary to the intent of the Reference, and a violation of Quebec's most fundamental constitutional rights. She used extremely biased language throughout, while offering no serious analysis to back up such extreme denunciations of the *Clarity Act*.

It is striding that, while she did not hesitate to condemn the *Clarity Act*, root and branch, she also admitted she had not seriously studied it:

**77. Sans faire l'analyse détaillée de la Loi C-20, puisque ce n'est pas là notre mission, il faut tout de même identifier certains de ses éléments, puisqu'ils provoqueront des réactions qui ne sont pas étrangères à l'adoption de la Loi 99 et surtout au contenu de celle-ci.**

She also admitted that she had not studied the evidence indicating how the federal government reacted to the Reference, although she did not hesitate to use extremely deprecating language to characterize that reaction. Moreover, that analysis of the *Clarity Act* in relation to the Reference was all the more necessary because, as she admitted, *Bill 99* was introduced

precisely to neutralize the *Clarity Act*, which itself was announced as the federal government's response to the directives laid out in the Reference. The judge declared:

**69. Même si nous n'avons pas eu le bénéfice de consulter de preuve sur la réaction du gouvernement fédéral à cet Avis**, celle de Lucien Bouchard est significative sur l'effet que l'*Avis consultatif* a pu avoir sur le fédéral. Ce dernier déclare que l'*Avis* a créé « une véritable commotion à Ottawa », parce que la Cour suprême a affirmé « clairement et expressément la légitimité du projet souverainiste québécois » et qu'elle « n'a d'aucune façon remis en cause le droit de l'Assemblée nationale de décider seule de la question et du seuil de la majorité » lors d'un référendum sur l'avenir du Québec tenu en vertu de la *Loi sur la consultation populaire*.

So Judge Dallaire saw the *Clarity Act* through the eyes of Lucien Bouchard and Joseph Facal, and she repeated as fact a falsehood that Bouchard had emitted, namely that the Reference « n'a d'aucune façon remis en cause le droit de l'Assemblée nationale de décider seule de la question et du seuil de la majorité. »

In other words, her decision was impregnated with multiple denunciations by Quebec politicians, but she did not take the trouble to scrutinize and weigh the reasoning and the arguments presented, for example, by Stéphane Dion, or other proponents of the *Clarity Act*. Her analysis was entirely one-sided and partisan and extreme.

The judge's multiple severe criticisms of *Bill C-20* can be summed up in these inter-related propositions: The government of Canada has no right to judge the clarity of the question put in a referendum on secession, nor to judge the clarity of the answer. By doing so, the federal government would be violating the fundamental rights of Quebec, notably its self-determination, and treating Quebec as an inferior or a younger brother. There is insolence in the federal government's pretensions that must be denounced. Therefore, the government of Canada must henceforth (since her decision) ignore the *Clarity Act* and simply accept as a clear question and a clear answer whatever the Quebec government says was a clear question and a clear answer. Consequently, the government of Quebec has the right, on the strength of a 50 per cent plus one vote in a referendum, to order the rest of Canada to start negotiations on the secession of Quebec, no matter what the governments in the rest of Canada think of the clarity of the question or the answer.

78. D'entrée de jeu, le préambule de la *Loi C-20* reconnaît que le gouvernement d'une province a le droit de consulter sa population par référendum, sur divers sujets, et qu'il peut décider du texte de la question référendaire.

79. Toutefois, la *Loi C-20* semble introduire un nouveau concept en édictant qu'il faut « davantage que la simple règle de la majorité » pour faire naître l'obligation de négocier dont fait état la Cour suprême dans son *Avis*. Voilà un premier élément qui interpelle.

80. Mais c'est surtout sur l'adjectif « clair », que la Cour suprême utilise dans son *Avis consultatif*, que le législateur fédéral intervient pour légiférer, afin de préciser ce que cela signifie pour lui, de manière plus concrète.
81. En effet, dans les dispositions formelles de la *Loi C-20*, le gouvernement fédéral prend la balle au bond et légifère sur ce que seront une question et une majorité suffisamment claires pour accepter de s'engager dans des négociations visant la mise en œuvre du désir d'une province de faire sécession.
82. Il se ménage même un droit de regard pour décider, *a posteriori*, si la question proposée aura été assez claire, si les propositions offertes aux citoyens étaient convenables, et si le résultat du vote est suffisant pour qu'il prenne place autour d'une table afin d'amorcer la mise en œuvre du projet sécessionniste.
- 87. Plusieurs constitutionnalistes s'entendent aussi pour dire que la Loi C-20 peut à la limite avoir pour effet de nier au Québec le droit de disposer de lui-même et c'est là que le bât blesse, pour la suite des choses, selon nous.**

484. Il [Lucien Bouchard] ajoute ensuite que le gouvernement veut ainsi éviter qu'« À une règle fondamentale de la démocratie (le processus de consultation du peuple), le Parlement fédéral tente de substituer un indigne stratagème » par l'établissement d'un nouveau concept lors de la tenue d'un futur référendum : la « majorité flottante ».

Dallaire's thesis condemning the *Clarity Act* is hard to reconcile with the demand for a "clear question" and "clear answer" expressed so often in the Reference, or with the principle of federalism itself. It comes into conflict with what the Supreme Court said at paragraph 91 of the Reference, already quoted: "**We hold that Quebec could not purport to invoke a right of self-determination such as to dictate the terms of a proposed secession to the other parties: that would not be a negotiation at all.**" But that was precisely what *Bill 99* and Justice Dallaire were claiming: that Quebec could dictate the question and the answer of the Referendum to the other parties, and they would have no choice but to submit to Quebec's diktat.

The Reference raised repeatedly the importance that the question to be put in the referendum must be clear, and the answer implied in the vote-count be equally clear. But Judge Dallaire never discussed precisely what the court meant by putting so much emphasis on clarity, and what were the implications of this for both the government of Quebec and the governments of the ROC. As she says herself numerous times in her decision, « le législateur ne parle pas pour ne rien dire. » (see e.g. paragraphs 266, 325 and 440 of her decision). And yet, she gives no significance at all to the repeated insistence in the reference that the question and the answer must both be clear. Who is to judge the clarity? Her answer is categorical: no one but the government of Quebec. But she offers no coherent argument for that conclusion, other than citing certain law professors such as Patrick Taillon and Daniel Turp who say so (in paragraphs 83-87). Be it noted that Daniel Turp's thesis on Quebec's right to secede was rejected by the five international law experts consulted by the Quebec government in 1992.

The implications of Dallaire's thesis are cause for concern. The fate of Canada as a united federation is to depend on the honesty and statesmanship of the Quebec government in its pursuit of independence. The political history of Quebec on that score is not reassuring. In 1980, René Lévesque had set aside his party's program on gaining independence. He did so because he knew by opinion polls that a referendum proposing a clear question on sovereignty itself would return a large NON majority. So he experimented and found that putting a question on "a mandate to negotiate sovereignty-association" rather than on sovereignty-association or sovereignty itself, had a chance of gaining a majority. So that was the question he put. And he even offered the assurance of a second referendum before secession was to be decided. The former leader of the Ralliement pour l'Indépendance nationale, Pierre Bourgault, recalled after that referendum:

Je me souviens que j'étais le seul à parler d'indépendance. Le Parti québécois n'en parlait pas, et à trois semaines du référendum, Lévesque avait ordonné aux troupes de ne plus parler que d'association.

The 1980 referendum offered a clear question and a clear answer? Nonsense. Who could tell us now what the 1980 answer really meant, given all the contortions of the question and then the devious campaign rhetoric that followed?

In 1994, while still Leader of the Opposition at the National Assembly, Jacques Parizeau had promised a short and clear question: « Voulez-vous que le Québec devienne un pays souverain à partir de telle date? » However, once the Parti Québécois was in power, Lucien Bouchard and Bernard Landry launched a revolt in the ranks because they knew that the clear question would result in certain defeat. In consequence, Lucien Bouchard called for a « *virage*, » a change of direction in the campaigning: henceforth, the question would refer to an "agreement" between three separatist parties and to the offer to the rest of Canada of a « partenariat. » The ruse worked and almost carried the response over the 50 per cent mark.

The question put was not the only manipulative feature of the 1995 referendum. The campaign rhetoric was also manipulative, diverting attention away from the breach with Canada. As indicated earlier in Chapter II, the 1995 referendum publicity and speeches emphasized the theme of « *Le camp du changement*, » and called on all those wanting change to vote OUI, rather than focusing on secession, or even on sovereignty or independence. Who, now, could truthfully say that the 1995 referendum offered a clear question and a clear answer?

Dallaire's decision claimed that the universal standard for victory in a referendum was 50 per cent plus one vote. But this is manifestly untrue, especially when it comes to changing a Constitution. In the United States, any referendum on secession in a state would be illegal and prohibited. That issue was settled by the 1861-65 Civil War. But merely to amend the U.S. Constitution, a vote of 67 per cent is required in the House of Representatives, also a vote of 67 per cent in the U.S. Senate, and then adoption of the amendment by 75 per cent of the states.

In France, as in Spain, no amendment to the Constitution may be passed, whatever the majority, that would affect the territorial integrity of the country.

So Dallaire was factually wrong. But just as seriously, her misinformation conveyed her state of mind: she visualized secession as a normal process, comparable to other normal processes, such as electing a government.

But that was very far from the vision of the Supreme Court. In fact the Supreme Court stated in the Reference:

31 There is no doubt that the questions posed in this Reference raise difficult issues and are susceptible to varying interpretations. However, rather than refusing to answer at all, the Court is guided by the approach advocated by the majority on the “conventions” issue in *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753 (*Patriation Reference*), at pp. 875-76:

If the questions are thought to be ambiguous, this Court should not, in a constitutional reference, be in a worse position than that of a witness in a trial and feel compelled simply to answer yes or no. Should it find that a question might be misleading, or should it simply avoid the risk of misunderstanding, the Court is free either to interpret the question . . . or **it may qualify both the question and the answer.** . .

76 **Canadians have never accepted that ours is a system of simple majority rule.** Our principle of democracy, taken in conjunction with the other constitutional principles discussed here, is richer. Constitutional government is necessarily predicated on the idea that the political representatives of the people of a province have the capacity and the power to commit the province to be bound into the future by the constitutional rules being adopted. These rules are “binding” not in the sense of frustrating the will of a majority of a province, but **as defining the majority which must be consulted in order to alter the fundamental balances of political power** (including the spheres of autonomy guaranteed by the principle of federalism), individual rights, and minority rights in our society. Of course, those constitutional rules are themselves amenable to amendment, but only through a process of negotiation which ensures that there is an opportunity for the constitutionally defined rights of all the parties to be respected and reconciled.

77 In this way, our belief in democracy may be harmonized with our belief in constitutionalism. **Constitutional amendment often requires some form of substantial consensus** precisely because the content of the underlying principles of our Constitution demand it. **By requiring broad support in the form of an “enhanced majority” to achieve constitutional change, the Constitution ensures that minority interests must be addressed before proposed changes which would affect them may be enacted.**

This statement is clear in repudiating a mere simple majority for any change to the Constitution. But secession is so much more consequential than any amendment ever passed in Canada or any amendment ever likely to be adopted in future; therefore, the need for an “enhanced majority” is all the more imperative.

How could Claude Dallaire have missed that? It makes one wonder whether she has ever read the entire text of the Referendum reply. She wrote about *Bill 99*:

78. L'article 4, qui porte directement sur le processus de consultation par référendum, ne réitère que ce qui a toujours été la règle lors de la tenue de référendums au Québec, au Canada, et même ce qui prévaut lorsqu'ils sont tenus par les Nations Unies.

79. Le fait de répéter que l'option gagnante est celle qui remporte la majorité des votes déclarés valides, soit cinquante pour cent de ces votes plus un a toujours existé, sans que cela n'ait été contesté auparavant, comme nous l'avons déjà exposé.

80. Il n'y a donc rien de nouveau sous le soleil dans cet article.

But Dallaire chose to ignore the unique character of a referendum on secession. It is so unique that few countries allow the possibility of a referendum on secession and no country allows a referendum in one part of the country to justify breaking up the country. Dallaire considered a referendum on secession as just a normal procedure, that must be conducted under the same rules as any other referendum. And she assumed that the ROC must accept at face value the results of a referendum controlled entirely by a separatist Quebec government. A clear question and a clear answer were whatever the separatist government declared them to be.

The judge clearly did not grasp the powerful incentive for the separatist government to cheat, to issue a leading question and then to divert public attention during the campaign to other issues than secession.

Then, there is another issue that Dallaire ignored. Since the Reference to the Supreme Court in 1996, attention has centered on the legality of secession. But that turns attention away from another very important dimension of secession: its moral character. By its very nature, secession is an aggressive act by one part of Quebec's population against many fellow citizens in Quebec and against all citizens in the ROC. It originates from resentment against fellow citizens who speak another language: witness the Anglophobic tradition in Quebec's literature in which the Anglo is typically portrayed as the serpent in paradise<sup>57</sup>. The pursuit of secession arouses powerful emotions on either side. To pursue secession means rejecting sharing one's identity with fellow citizens who speak another language. And nationalism is a powerful motivator: some nationalists are willing to devote their lives to the pursuit of independence and, in extreme cases, some are even willing to kill by planting bombs. It is therefore naive to think that a separatist government would abstain from cheating if it launched a referendum on

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<sup>57</sup> See William Johnson, *Anglophobie made in Québec*, Montréal, Les éditions internationales Alain Stanké, 1991.

secession. The judge was living in an unreal world when she assumed that a separatist Quebec government would present an unbiased question and conduct an unbiased campaign to elicit the true preferences of the people.

The pursuit of secession is an act of aggression in many ways. It rejects the solidarity and mutual support that should normally exist between the citizens of the same country. It aggresses the identity of those who do not share the same language or the same province. It threatens to deprive all those in the ROC of their free right to move to Quebec and it threatens the right of all Quebecers to move freely to anywhere else in Canada. It also jeopardizes the economic well-being of everyone across the country by creating a sense of insecurity over the country's future. It creates insecurity, not only by raising the specter of a turbulent transition to independence, but also by the threat of violence and sabotage if the attempted secession is unsuccessful. René Lévesque was not unrealistic in 1980 when he confided to the American consul that violence might erupt if a close referendum vote went down to defeat because of the massive Anglo vote against secession.

Given the powerful motivation to cheat in a referendum by the choice of the question and the themes of the campaign, there is need for a counterforce, a political agent able to scrutinize both the question and the unfolding of the campaign. That cannot be done within Quebec under the present Referendum Law, which confides all the elements of control over the referendum to a majority government, leaving the official opposition helpless to require a clear question or a clear answer. That function of vigilance, clearly, must come from outside Quebec, through the federal and provincial governments. That is the federal principle in operation. Without it, cheating is to be expected.

The most dramatic proof of Dallaire's lack of understanding of the unique dimension of the pursuit of secession is her total support for the assertion in *Bill 99* that Quebec's territory is indivisible in the event of secession. She exhibits a double standard: Canada is divisible but Quebec is indivisible. And, there is more. Recall that secession is not a right, but only a possibility, in constitutional terms; therefore, the partners in the federation, if and when they come together to negotiate after a Quebec referendum, must consider the moral as well as the constitutional issues involved. Realistically, they must see the Quebec government at the table as an aggressor. Why would they comply to Quebec's demand for secession? There could be only two reasons: first, fear that the country could be threatened with economic disruption and even violence if secession is refused. But, at the same time, they would feel justified in demanding that Quebec offer some concessions, some compensation, to attenuate the harm that it is about to inflict on the peaceful country that Canada has been. At a minimum, that would involve compensating Canada for the loss of an immense part of its territory and providing a territorial bridge north of Quebec to connect the Canadian lands east and west of Quebec. How could that be done? At a minimum, it would mean demanding that the territories across northern Quebec, the lands of the Inuit, the Cree and the Montagnais, be allowed to remain part of Canada if they so chose, and as they did choose in 1995.

That is where “negotiations” enter the picture: the conditions of secession must be worked out, they must be invented, discussed and possibly concluded. They are not a given. There must be give and take, on the part of Quebec in particular, which is the only winner if secession comes about. So any discussion of secession, to be realistic, should begin by concentrating attention on the conditions that would be required for secession to occur. That is the heart of the matter. But, in Quebec, there is a consensus among all the parties to demonize any talk of conditions for secession, and to be horrified by any suggestion that the territorial integrity of Quebec could be up for negotiation. There is a preference to concentrate all attention on the vote score in a referendum – as though that is what most mattered.

Realistically, secession is not a normal procedure, except in terms of the Constitution. Secession has been routinely presented in Quebec as the normal outcome of the maturation of a people – like adulthood as the terminus for childhood. But that is a myth. It needs to be debunked. Secession is abnormal in a peaceful and successful country. As the five international experts told the Quebec government in 1992:

The generalization of the right to self-determination, understood as the right for a people to establish a state, would have dramatically destabilizing effects, which obviously cannot be countenanced by an international society made up in the first place of sovereign states.

The same principle applies within a society. A secession project may acquire constitutional “legitimacy” as the genuine preference of a people. But secession, in Canada, destabilizes the country and so is also immoral.

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Now we address the most fundamental flaw in Dallaire’s very inept decision. She distorted fundamentally the meaning of the words, “unilateral secession,” to depart from both its common-sense meaning and the meaning given to those two words by the Supreme Court justices in the Reference: that is, a secession that is not authorized by the federation as such, through an amendment to the Constitution, but is rather self-proclaimed and self-enacted. In that sense, unilateral secession implies a revolution.

Dallaire gave the appearance of taking her definition of unilateral secession from the Reference itself. Early on, in paragraph 5, she quoted one passage of the Supreme Court on the subject:

5. Dans cet *Avis*, la Cour juge nécessaire de préciser ce qu’elle entend par le mot « sécession », étant donné qu’il se trouve au centre des questions posées. Elle le définit ainsi :

86. Le caractère « unilatéral » de l’acte est de première importance, et il faut bien comprendre le sens donné à ce mot. Dans un sens, toute démarche faite par un acteur unique sur le plan constitutionnel en vue de

parvenir à une modification de la Constitution est « unilatérale ». Nous ne pensons pas que tel soit le sens visé dans la question 1, ni le sens donné dans les arguments présentés devant nous. Ce qui est revendiqué comme droit de faire « unilatéralement » sécession est plutôt le droit de procéder à la sécession sans négociations préalables avec les autres provinces et le gouvernement fédéral. Ce n'est pas la légalité de la démarche initiale qui est en cause ici, mais la légalité de l'acte final de sécession unilatérale envisagée. Le fondement juridique d'un tel acte serait une volonté démocratique clairement exprimée par un référendum dans la province de Québec. Cet argument nous amène à examiner l'impact juridique que pourrait avoir un tel référendum sur le fonctionnement de notre Constitution et sur la légalité alléguée d'un acte unilatéral de sécession.

*(Nos soulignements et emphase)*

Let it be noted that Dallaire underlined and emphasized the sentence: « Ce qui est revendiqué comme droit de faire « unilatéralement » sécession est plutôt le droit de procéder à la sécession sans négociations préalables avec les autres provinces et le gouvernement fédéral. » But she neither underlined nor emphasized the following sentence, which completed the court's definition of unilateral secession: « Ce n'est pas la légalité de la démarche initiale qui est en cause ici, **mais la légalité de l'acte final de sécession unilatérale envisagée.** » The Supreme Court referred to the legality of the final act of secession, as part of its definition of "unilateral secession". That clearly referred to the need to abide by the terms of the Constitution in carrying out secession, otherwise it would be unilateral secession. That obligation to act within the framework of the Constitution in carrying out secession was made far more explicit in several other paragraphs of the reference. This is unequivocally clear in the paragraph immediately preceding the paragraph that Dallaire quoted, but that, inexplicably, she ignored in defining "sécession unilatérale":

84 **The secession of a province from Canada must be considered, in legal terms, to require an amendment to the Constitution, which perforce requires negotiation.** The amendments necessary to achieve a secession could be radical and extensive. Some commentators have suggested that secession could be a change of such a magnitude that it could not be considered to be merely an amendment to the Constitution. We are not persuaded by this contention. It is of course true that the Constitution is silent as to the ability of a province to secede from Confederation but, although the Constitution neither expressly authorizes nor prohibits secession, 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 amendments to the Constitution of Canada.

Here, in the first sentence of this quotation, the absolute priority is placed on effecting an amendment to the Constitution. That is the necessary precondition for a legal secession. The need for negotiation is offered here simply as the means to reach that fundamental condition for constitutionality. But Dallaire constantly left out that need for an amendment in her many evocations of “unilateral secession.” She thereby distorted the meaning given to those two words by the Supreme Court. Here are some examples:

349. La *Loi 99* ne crée donc pas ce peuple québécois et ne lui permet aucunement de faire sécession **sans négocier au préalable**.

359. Pour terminer sur les desseins obscurs que certains croient se cacher derrière l’abondante utilisation de l’expression « peuple québécois », une autre déclaration du ministre Facal mérite d’être soulignée.

351. En effet, lorsqu’il explique qu’il existe une distinction entre le droit à l’autodétermination dont les peuples sont détenteurs et le droit à la sécession, qu’il démontre savoir que ces deux choses ne sont pas des synonymes, qu’il fait ensuite un lien entre eux en référant à ce qu’a énoncé la Cour suprême dans son *Avis consultatif* de 1998 à leur sujet, et qu’il déclare ensuite ceci, il nous aide à comprendre encore un peu plus l’intention du gouvernement :

Ce que la Cour suprême a rejeté, c’est l’idée que le Québec puisse détenir, en vertu du droit à l’autodétermination, **un droit de sécession unilatérale, c’est-à-dire, selon les termes mêmes employés par la Cour, un droit de sécession sans négociations préalables**.

(...) Sur ce point, la Cour suprême n’invente rien de nouveau. On se souviendra que les cinq experts consultés par l’Assemblée nationale en 1992 en étaient déjà arrivés à cette même conclusion<sup>58</sup>.

À ce que je sache, les gouvernements formés par le Parti québécois n’ont jamais proposé autre chose qu’une accession du Québec à la souveraineté réalisée à la suite de négociations menées d’égal à égal avec le reste du Canada. **Il n’a jamais été question d’une accession à la souveraineté sans négociations préalables et sans période de transition.**

This last paragraph is particularly worrisome. It cites with approval the various programs of the Parti Québécois regarding secession. In fact, as we shall demonstrate in an appendix, none of those programs anticipated that Quebec would achieve sovereignty by negotiating an amendment to the Constitution of Canada, as the Supreme Court required. For example, in the referendum of 1995, the negotiations (“an offer”) proposed were for a partnership with the ROC, after a declaration of independence. The negotiations were not to obtain an enabling amendment to the Constitution. And, as

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<sup>58</sup> This is a false assertion. The five international experts said that Quebec did not have a right to secede under international law. They did not define “unilateral secession” as secession without prior negotiations, as does Claude Dallaire and the Quebec government in the debates on *Bill 99*.

Parizeau later admitted, he never took seriously the possibility of a partnership when Quebec was dismembering Canada.

Other examples:

355. Rappelons-nous que la Cour suprême discute de ce sujet dans quelques paragraphes de son *Avis consultatif* de 1998, sous l'angle du droit international, et qu'elle conclut que le Québec ne satisfait pas les conditions pour être qualifié de peuple opprimé et justifié de **faire sécession unilatérale sans négociations préalables**, et qu'ensuite, elle considère ne pas avoir à trancher le sujet qui consiste à déterminer s'il existe bel et bien un peuple québécois pour disposer des questions soulevées, telles que formulées.

571. Nous ne retrouvons également rien dans la *Loi 99* qui aille à l'encontre des énoncés contenus dans l'*Avis consultatif* de la Cour suprême sur la Sécession du Québec, rendu en 1998, pouvant laisser entendre **que le Québec n'entend pas négocier sa sortie si un vote favorable intervient en faveur de la sécession.**

587. Il ne nous revient donc pas d'aller plus loin sur les spéculations ayant comme prémisse **l'échec de négociations entreprises à l'issue d'un référendum favorable à la sécession du Québec.**

By her repeated silence over the Supreme Court's repeated requirement of an amendment to the Constitution for a legal secession, Dallaire implied that the condition set by the Supreme Court for a legal secession was achieved once an attempt was made at negotiations, even if the negotiations then failed. This is totally contrary to the manifest insistence of the Supreme Court judges:

151 Quebec could not, despite a clear referendum result, purport to invoke a right of self-determination to dictate the terms of a proposed secession to the other parties to the federation. The democratic vote, by however strong a majority, would have no legal effect on its own and could not push aside the principles of federalism and the rule of law, the rights of individuals and minorities, or the operation of democracy in the other provinces or in Canada as a whole. Democratic rights under the Constitution cannot be divorced from constitutional obligations.

137 The continuing failure to reach agreement on amendments to the Constitution, while a matter of concern, does not amount to a denial of self-determination. In the absence of amendments to the Canadian Constitution, we must look at the constitutional arrangements presently in effect, and we cannot conclude under current circumstances that those arrangements place Quebecers in a disadvantaged position within the scope of the international law rule.

138. In summary, the international law right to self-determination only generates, at best, a right to external self-determination in situations of former colonies; where a people is oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development. In all three situations, the people in question are entitled to a right to external self-determination because they have been denied the ability to exert internally their right to self-determination. Such exceptional circumstances are manifestly inapplicable to Quebec under existing conditions. Accordingly, **neither the population of the province of Quebec, even if characterized in terms of “people” or “peoples”, nor its representative institutions, the National Assembly, the legislature or government of Quebec, possess a right, under international law, to secede unilaterally from Canada.**

Dallaire tried to bolster her thesis that *Bill 99* is in accord with the Reference while the *Clarity Act* is not. She suggested that the federal government was staggered by the Reference ruling and, in a panic, passed *Bill C-20*. In contrast, Lucien Bouchard welcomed the Reference ruling, as quoted above in paragraph 69.

70. Que l'on soit ou non d'accord avec son interprétation importe peu; ce qui est pertinent est la réaction que les propos de la Cour suprême ont pu raisonnablement provoquer au sein du gouvernement fédéral.
71. Nous sommes d'opinion que l'*Avis consultatif* de 1998 a eu un effet de levier qui a inspiré le fédéral dans la préparation du projet de loi dont le titre choisi est des plus évocateurs : *Loi donnant effet à l'exigence de clarté formulée par la Cour suprême du Canada dans son avis sur le Renvoi sur la sécession du Québec (Loi C-20)*, qu'il a présenté dès décembre 1999, à la Chambre des communes.
72. Cette dernière, ainsi que le Sénat, ont alors fait du pouce sur les pouvoirs que la Cour suprême venait tout juste de reconnaître aux acteurs politiques, en lien avec la clarté référendaire dans un contexte de sécession, se sentant alors clairement interpellés par les propos de la Cour.

In fact, the judge's reasoning here is exactly contrary to the facts. Lucien Bouchard had consistently defended Quebec's right to a unilateral declaration of independence, both when he was leader of the Bloc Québécois, and then, later, as premier. First, after he became leader of the opposition in the Commons following the elections of October 25, 1993, Bouchard constantly put questions to Prime Minister Jean Chrétien inciting him to admit that “democracy” granted Quebec a right to secede without interference from the federal government. He constantly used the expression, “the right to self-determination,” as implying the right to secede unconditionally. I could offer innumerable quotations to demonstrate this. He also asserted that, if the federal government created problems, Quebec would forthwith declare its independence. All this was demonstrated in Chapter I of this essay.

Then, as premier, Bouchard made two lengthy, powerful speeches that denounced the legitimacy of the Constitution of Canada (the *Constitution Act, 1982*) and insisted on Quebec's right to secede outside the constitution. The more recent and more pertinent was his long formal speech at Mont-Tremblant on October 6, 1999, where both he and Joseph Facal defended Quebec's right to secede unilaterally, as was demonstrated earlier in Chapter III. I'll quote again the most significant part of that speech:

**Mon gouvernement et le parti que je dirige ont depuis longtemps tiré les conclusions qui s'imposent : le peuple du Québec doit pouvoir décider seul de son avenir politique et constitutionnel. Il est établi que cette décision se prendra dans le cadre du processus le plus démocratique qui soit. Car les valeurs démocratiques font partie du patrimoine que nous partageons avec nos amis du Canada.**

**Je suis confiant que les Québécoises et les Québécois choisiront, le moment venu, de se doter d'un pays souverain. Leur parcours vers la prise en charge de toutes leurs responsabilités ne restera pas inachevé.**

**Je sais bien que le gouvernement central consacre beaucoup d'énergie pour discréditer ce projet. Il apparaît cependant à un grand nombre de Québécois comme la seule option de rechange à ce régime que l'un de mes prédécesseurs, pourtant fédéraliste, qualifiait de fédéralisme qui met les provinces, et je cite : « à genoux ».**

This speech, given two months before the introduction of *Bill 99*, was really the preamble – the early explanation providing the *raison d'être* – to *Bill 99*. It provided a formal statement by Premier Bouchard to justify unilateral secession. Such was also the interview that Joseph Facal had initiated on October 5 by his call to Paul Wells of the *National Post*, published on October 6, 1999, the morning of the day that Bouchard gave his long speech. Wells summarized the interview as follows, as already reported in Chapter III:

Joseph Facal said in an interview that Canadian law can have no effect on the process of Quebec independence, which is "a political question, not a legal question." Nothing in the Supreme Court opinion, which said other Canadians would have an "obligation to negotiate" secession after a "clear majority" of Quebecers voted Yes to "a clear question," changes that situation, he said.

Minister Facal was then quoted in his own words: "All rules -- let me make it crystal clear -- all rules governing the next referendum on sovereignty are rules that will be determined by the National Assembly of Quebec," Mr. Facal said. "The federal government is absolutely free to dislike these rules, to suggest other rules, but the rules of the game which will effectively be in place are the ones that will have been decided by the elected parliament of the people of Quebec." That is a clear definition of, precisely, unilateral secession.

Further on in that interview, Facal made clear that what the Bouchard government was claiming was the right to ignore the 1982 *Constitution Act* and the authority of the Supreme Court of Canada:

Mr. Facal's most striking remarks yesterday concerned the Supreme Court. He questioned its legitimacy, saying its nine justices were "unilaterally named by the prime minister of Canada," and that the questions in the secession reference were "written by the federal government." Ottawa is free to decide whether it takes the court's opinion seriously, because it's "their court," he said. But Quebec would not be bound by the opinion.

When asked what would happen if the federal government announces it will ignore a question or a result it finds insufficiently clear, Mr. Facal paraphrased one of the most famous statements in Canadian politics -- a warning Pierre Trudeau gave at the height of the 1970 October Crisis: "Just watch us," he said.

Facal and Bouchard, at Mont-Tremblant, were obviously setting the stage for *Bill 99*, which would be introduced by Premier Bouchard two months later, with Facal as the government's minister steering the bill through the legislative process. The testimony of Facal and of Bouchard at Mont-Tremblant reveal the real intention and objective of *Bill 99*. Dallaire was grossly mistaken when she ignored this testimony to rely on Bouchard's immediate response to the ruling on the Reference. In that statement on the Reference, he for once went out of character to recognize the Supreme Court; but all his previous history as well as his subsequent history demonstrates that Bouchard believed that only a unilateral secession could bring Quebec to independence.

Most significant was the earlier motion and the speech that Premier Bouchard had delivered on May 22, 1996, in the National Assembly, in which Bouchard reacted to the federal government's intervention before Justice Robert Pidgeon in the case initiated by Guy Bertrand. As Rock had declared, the federal intervention was merely to oppose the Bouchard government's insistence that secession was entirely a political matter, outside the jurisdiction of the court. Bouchard had then asserted his constant viewpoint on secession: should the federal government pose problems during negotiations before secession, Quebec would secede unilaterally. Here are only a few quotations from that revealing speech:

**M. Bouchard:** M. le Président, j'ai l'honneur de présenter cette motion dont je donne lecture:

**« Que l'Assemblée nationale réaffirme que le peuple du Québec est libre d'assumer son propre destin, de déterminer sans entrave son statut politique et d'assurer son développement économique, social et culturel. »**

...

Il y a 10 jours, le gouvernement fédéral a pris la grave décision d'intervenir devant un tribunal pour affirmer que l'avenir des Québécois ne leur appartenait pas. M. Chrétien et son ministre de la Justice s'étaient d'abord drapés derrière des arguments légaux pour tenter de minimiser la portée de leur geste. Ils affirmaient, un peu comme le chef

de l'opposition, qu'il s'agissait d'obscurs débats d'avocats, de points de droit fins et subtils qui auraient peu d'impact sur le débat politique. Ils protestaient que leurs intentions étaient pures et ne devaient être, en aucun cas, interprétées comme une volonté de bâillonner la démocratie québécoise.

L'urgence, M. le Président, est maintenant plus grande que jamais. Mercredi dernier, à la Chambre des communes, à Ottawa, M. Jean Chrétien a jeté tous les masques, et la vérité a été brutalement dévoilée. Le chef libéral canadien a indiqué, plus clairement que jamais, quelle était sa nouvelle position, sa nouvelle stratégie. Il a déclaré que « même si les Québécois optaient majoritairement pour la souveraineté, même si cette Assemblée nationale votait en conséquence de la souveraineté, même si, donc, la démocratie québécoise s'exprimait, les lois canadiennes – a-t-il dit – doivent être respectées et il n'y aura pas de déclaration unilatérale d'indépendance ». Fin de la citation.

...

Selon M. Chrétien, l'Assemblée nationale du Québec n'est pas souveraine pour fixer les règles référendaires, pour définir la question référendaire et pour en tirer les conclusions. Selon M. Chrétien, l'Assemblée nationale des Québécois n'est rien de plus qu'un club de discussion sans effets et sans pouvoirs. Qui plus est, **le Canada imposera sa volonté aux Québécois par le biais de la Constitution de 1982, une constitution adoptée contre la volonté formellement exprimée par les deux partis représentés à l'Assemblée nationale**, une constitution qui n'existe en droit que dans sa version anglophone, une constitution qui ne respecte pas ses propres critères de validité quant à son adoption. **Bref, au droit sacré des Québécois à disposer d'eux-mêmes, Jean Chrétien oppose une constitution politiquement illégitime et unilingue anglaise dans sa seule version officielle et légale.**

...

Nous avons nous-mêmes eu le souci de cette atteinte du dénominateur commun en utilisant pour la motion formelle que je présente aujourd'hui, M. le Président, un libellé qui reprend presque mot à mot les textes que le Parti libéral du Québec a déjà produits, promus et adoptés. Nous sommes également heureux d'avoir le concours du chef de l'Action démocratique du Québec. Nous nous sommes surtout inspirés d'un texte qui a fait l'unanimité dans cette Assemblée. Il s'agit de la première phrase du préambule de la *loi instituant la Commission sur l'avenir politique et constitutionnel du Québec*, la loi, donc, qui créait la commission Bélanger-Campeau, qui fut, en soi, un grand moment de l'unité des forces fédéralistes et souverainistes au Québec. Les membres de l'Assemblée, dans ce moment important, avaient alors mis de côté leurs divergences.

...

Je pourrais, dans ma motion et dans ce discours, faire la promotion de la souveraineté, c'est mon option. Je ne le ferai pas, car ce n'est pas aujourd'hui le sujet à l'ordre du jour. **Aujourd'hui, il s'agit du droit qui permet aux Québécois de choisir l'une ou l'autre de ces options.** C'est ce que l'Assemblée nationale est appelée à réaffirmer aujourd'hui par la motion solennelle qui est devant elle. À ceux qui l'auraient oublié, à ceux qui voudraient le nier, à ceux qui craignent la force du Québec, mais surtout à nous-mêmes, nous nous devons de dire haut et fort que nous avons le droit de disposer de nous-

mêmes, que nous avons fixé les règles les plus démocratiques qui soient, que nous avons respecté la volonté populaire chaque fois qu'elle s'est exprimée et que, chaque fois, notre démocratie en sort renforcée, chaque fois, notre droit de choisir gagne en solidité.

...

En 1995, le gouvernement de Jacques **Parizeau, avec mon appui, a proposé aux Québécois de réaliser la souveraineté et d'offrir un partenariat au Canada.** Une majorité de Québécois a décliné la proposition. Le gouvernement du Parti québécois respecte ce verdict sans, toutefois, cesser de croire en cette cause et sans cesser d'espérer qu'il y aura un jour une autre occasion de donner ce choix aux Québécois dans le respect de nos règles.

Avec quelle question, M. le Président? Avec celle que déterminera l'Assemblée nationale. Et je dois dire que nous trouvons pour le moins excessif d'entendre les leaders fédéraux affirmer que les Québécoises et les Québécois sont trop simples d'esprit pour savoir ce que signifient les mots « souveraineté » et « offre de partenariat ». La proposition souverainiste est simple, elle est claire, elle est connue des Québécois et, surtout, elle est positive, à l'image des Québécois et de notre projet. Voilà ce qui, au fond, suscite l'ire fédérale. À Ottawa, on veut présenter les choses sous un jour négatif. C'est compréhensible, et rien ne les empêchera, comme la dernière fois, par exemple, de tapisser le Québec du mot « séparation », si le cœur leur en dit.

Il ne peut donc, M. le Président, y avoir d'entente sur une question claire dans cette affaire. Et il ne peut y avoir de compromis sur la règle majoritaire. Elle est historique. Il s'agit de 50 % plus quelque chose.

...

**Notre premier choix est donc d'accéder à la souveraineté après avoir défini un partenariat avec le Canada dans un processus mutuellement acceptable. Nous ajoutons cependant que, si le Canada rejette notre main tendue, si le Canada veut nous imposer des veto, nous retenir dans la Fédération contre notre gré, nous allons nous en retirer en proclamant unilatéralement la souveraineté. C'est notre droit, nous allons l'exercer.**

That was the real Lucien Bouchard and the consistent Lucien Bouchard, speaking very plainly: he defended Quebec's right to unilateral secession, that is, acceding to independence without an amendment to the Constitution of Canada. So how explain his change of tone when the Supreme Court delivered its ruling on August 20, 1998? It contained a surprise, the "obligation to negotiate," and the use of the term, "legitimacy" to describe the heightened influence of a referendum that delivered a clear answer to a clear question on Quebec's independence. So Bouchard seized the occasion to say that the Supreme Court had confirmed Quebec's right to secede, more or less. Here is the first part of the premier's statement issued on August 21, 1998, the day following the publication of the Supreme Court's ruling:

Il s'est produit hier un événement politique important dont nous n'avons pas fini de mesurer les effets. En effet, le gouvernement fédéral, dans une volonté à peine voilée de faire peur aux Québécois, a demandé unilatéralement à neuf juges de sa propre Cour

suprême, neuf personnes dont la foi fédéraliste n'est pas en doute, de se prononcer sur l'argumentaire fédéraliste canadien.

**Le gouvernement québécois, comme c'était sa responsabilité, a refusé de participer à cet épisode de la stratégie politique fédérale et a réitéré fermement que seuls les Québécoises et les Québécois ont le droit de choisir leur avenir, comme l'affirment d'ailleurs tous les partis représentés à l'Assemblée nationale.** Il s'agissait donc, hier, de la tentative du gouvernement canadien de faire valider par sa propre Cour et ses propres juges, les éléments centraux de son Plan B, de son offensive anti-souverainiste. Le contraire s'est produit : **la Cour a démontré que l'argumentaire d'Ottawa ne résiste pas à l'analyse et a frappé au cœur même du discours fédéraliste traditionnel.**

Globalement, **les fédéralistes nous ont affirmé depuis deux ans que la souveraineté est un problème juridique qui relève des tribunaux et du droit. Les juges fédéraux les ont contredits.** Après avoir répondu, de façon parfaitement prévisible et prévue, aux questions réductrices posées par le gouvernement fédéral, la Cour a affirmé, d'un bout à l'autre de son avis, le caractère politique de la démarche qui serait légitimement enclenchée par un référendum québécois sur la souveraineté.

Vous me permettez de prendre un à un les mythes fédéralistes qui ont été enterrés hier par les juges fédéraux. Premier mythe: depuis des décennies, un certain nombre de fédéralistes affirment que le projet souverainiste n'est pas légitime. Les juges de la Cour suprême ont affirmé le contraire, et je les cite: « Un vote qui aboutirait à une majorité claire au Québec en faveur de la sécession, en réponse à une question claire, conférerait au projet de sécession une légitimité démocratique que tous les autres participants à la Confédération auraient l'obligation de reconnaître ». Fin de la citation.

Ils vont même plus loin en déclarant, je les cite toujours: « les autres provinces et le gouvernement fédéral n'auraient aucune raison valable de nier au gouvernement du Québec le droit de chercher à réaliser la sécession ». Fin de citation. Les juges fédéraux ont donc donné raison à ce que les souverainistes disent depuis 30 ans: un référendum gagnant aura non seulement une légitimité démocratique, mais le Canada aura l'obligation de reconnaître cette légitimité et ne pourra nier le droit du Québec de chercher à réaliser la souveraineté.

Deuxième mythe: En 1980 et en 1995, les fédéralistes ont prétendu que si les Québécoises et les Québécois disaient Oui, le Canada refuserait de négocier avec le gouvernement du Québec. On se souvient que Monsieur Pierre Trudeau, en 1980, comparait la volonté québécoise de négocier à celle d'un pays du tiers-monde dont Ottawa n'aurait pas à tenir compte. En 1995, encore, les ténors fédéraux ridiculisaient la main tendue des souverainistes pour une négociation après un Oui. Le 12 octobre 95, Monsieur Jean Chrétien déclarait ce qui suit: « il y a un mythe qui doit être tué, disait-il, à l'effet qu'il y a quelqu'un au Canada qui est autorisé à négocier » avec le Québec. Le

chef actuel du Parti libéral du Québec a également eu quelques déclarations malheureuses à ce sujet.

Hier, les juges fédéraux, unanimes, ont mis un terme à ce qui a constitué l'argument le plus fallacieux du camp fédéraliste. Les juges fédéraux affirment et répètent qu'après un Oui, le Canada aura l'obligation de négocier avec le Québec. Ils en font même une obligation constitutionnelle. Permettez-moi de citer un passage qui se lit comme suit: « Le rejet clairement exprimé par le Peuple du Québec de l'ordre constitutionnel existant conférerait clairement une légitimité aux revendications sécessionnistes, et imposerait aux autres provinces et au gouvernement fédéral l'obligation de prendre en considération et de respecter cette expression de la volonté démocratique en engageant des négociations (...) ». Fin de la citation.

Les juges fédéraux ont donc donné raison à ce que disent les souverainistes depuis 30 ans: après un **Oui, il y aura des négociations. Lors du dernier référendum, nous l'avons répété sur toutes les tribunes. C'était notre conviction. Aujourd'hui, c'est une certitude**, d'autant que les représentants du gouvernement fédéral ont avoué, hier, qu'ils allaient se conformer à l'ordre qu'ils ont eux-mêmes reçus de leur Cour.

**En 1995, nous avons joué franc jeu, nous avons élaboré notre position de Négociation : l'offre de partenariat. Nous avons créé un comité d'orientation et de surveillance des négociations. Je crois même me souvenir que nous avons désigné un négociateur en chef.** Le camp du Non, lui, a voulu susciter la peur chez les Québécois. **La prochaine fois, les femmes et les hommes du Québec pourront voter Oui avec la certitude que des négociations vont avoir lieu et que tout sera mis en œuvre pour une transition ordonnée vers la souveraineté, dans le respect des droits de chacun de nos citoyens, comme nous l'avons toujours dit.** Cet élément de bon sens confère désormais, j'en suis profondément convaincu, un avantage considérable au projet souverainiste et constitue une des conditions gagnantes dont je parle depuis quelques années.

Troisième mythe: La nature des négociations. Certains fédéralistes ont prétendu que, si des négociations finissaient par avoir lieu après un Oui, elles porteraient, non sur la souveraineté, mais sur un renouvellement du fédéralisme. Hier, leur Cour leur a fermé cette avenue à double tour. **Elle a stipulé, et je cite, que « les négociations (...) porteraient sur l'acte potentiel de sécession et sur ses conditions éventuelles si elle devait effectivement être réalisée ».**

Les juges fédéraux mentionnent plusieurs éléments qui devront être abordés pendant ces négociations. Ils rappellent, comme nous l'avons si souvent fait, que le Québec et ses voisins partagent et je cite: « une économie nationale et une dette nationale ». Fin de citation. Ils soulignent aussi que les intérêts du Canada et des provinces devront être abordés dans ces négociations. Nous l'avons toujours dit et nous pensons que l'intérêt économique du Canada, des provinces, de l'économie et de la dette doivent nous

conduire à nous entendre sur un partenariat qui préservera l'espace économique commun entre les deux États souverains.

La Cour parle de la nécessaire protection des droits des minorités et dit qu'il faut prendre en compte les intérêts des autochtones. C'est également notre position et c'est pourquoi nous avons, dans le projet de loi sur l'avenir du Québec, pris l'engagement suivant: « la nouvelle constitution du Québec souverain garantira à la communauté anglophone la préservation de son identité et de ses institutions. Elle reconnaîtra également aux nations autochtones le droit de se gouverner sur des terres leur appartenant en propre et de participer au développement du Québec ; en outre, les droits constitutionnels existants des nations autochtones y seront reconnus ».

Even in this tendentious speech, Bouchard reiterated that « Le gouvernement québécois, comme c'était sa responsabilité, a refusé de participer à cet épisode de la stratégie politique fédérale et a réitéré fermement que seuls les Québécoises et les Québécois ont le droit de choisir leur avenir, comme l'affirment d'ailleurs tous les partis représentés à l'Assemblée nationale. » This would be precisely the message of *Bill 99*. Nowhere, either in that speech from 1996 or in *Bill 99*, did Bouchard ever recognize the obligation to obtain an amendment to the Constitution of Canada. The negotiations that he proposed were not over Quebec's sovereignty, but over economic and other arrangements.

But, even with all these qualifications, Bouchard's discourse that day was entirely contrary to everything he had always said about the invalidity of the 1982 *Constitution Act*, about the Supreme Court having no right to determine the conditions of secession, and that the decision to secede was Quebec's alone to make and then to carry out. He had even refused to send lawyers to defend Quebec's position before the Supreme Court when the court was dealing with the reference on secession. When the court appointed an *amicus curiae* to present Quebec's viewpoint, Bouchard had denounced the fact of making such an appointment.

Then, in his speech<sup>59</sup> to the students of the Université de Montréal on February 12, 1998, just four days before the Supreme Court was to hold public hearings on the questions raised by the Reference, Premier Bouchard had again shown his true colours on the issue of secession and the authority of the Supreme Court. His speech was titled, "Le dernier mot revient au people Québécois." Here are just a few of his statements that denounced the legitimacy of the Supreme Court to pass judgment on the right of the Québécois to secede.

Mais s'il y en a que je n'envie pas, aujourd'hui, ce sont bien les juges actuels de la Cour suprême. Ils sont habitués, de par leur fonction, aux dilemmes cornéliens. Cependant les voilà plongés, contre leur gré, dans un débat politique qui n'est pas le leur. Les voilà

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<sup>59</sup> For this speech and that of August 21, 1998, cited below, cf. <http://www.archivespolitiquesduquebec.com/discours/p-m-du-quebec/lucien-bouchard/autres-discours-officiels-1996-1998/>

surtout conduits dans le pire piège que puisse leur tendre un gouvernement.

...

Depuis, le piège s'est encore resserré autour de la Cour du fait que le requérant, le gouvernement fédéral, a nommé lui-même, d'un trait de plume, en cour d'instance, deux des neuf juges qui devront entendre sa propre cause. Voilà un procédé qui, à lui seul, créerait un vice de forme irrémédiable dans n'importe quel arbitrage – on ne le tolérerait jamais à la cour des petites créances. Le principe même d'indépendance judiciaire est mis en cause. Mais Ottawa, aveugle au tort causé à l'institution de la Cour suprême, continue de procéder.

...

Les deux chefs fédéralistes des deux référendums sur la souveraineté, **Messieurs Claude Ryan et Daniel Johnson, condamnent fermement la démarche fédérale. Ils affirment, très justement, que la volonté démocratique des Québécois ne peut être limitée par une constitution ou un jugement.** Avant-hier, trois partis à la Chambre des Communes, le Bloc Québécois, le Parti Progressiste-Conservateur et le Nouveau Parti Démocratique ont désavoué la stratégie fédérale en votant une motion reconnaissant le droit du peuple Québécois de décider librement de son avenir.

...

Le gouvernement québécois, lui, ne sera pas présent lors de ces audiences. Pas seulement parce que les juges sont nommés par le fédéral, pas seulement parce que la Cour n'a pas juridiction en droit international ou parce qu'elle n'a pas le droit moral de s'occuper de questions politiques. Alors pourquoi ? Répondre à cette question, c'est aller au cœur du différend qui oppose depuis bientôt presque deux siècles la démarche québécoise à celle du Canada. **La réponse, c'est la primauté de la démocratie. L'Assemblée nationale du Québec, le gouvernement des Québécois, sont des émanations de la démocratie québécoise. Nous sommes les dépositaires des choix que font les Québécois aux élections et lors des trois référendums que trois gouvernements ont organisés. Nous respectons les décisions prises par la démocratie québécoise. Mais le droit de choisir – leur gouvernement ou leur avenir – appartient aux Québécoises et aux Québécois. Il n'appartient pas au gouvernement. Le gouvernement du Québec ne peut donc soumettre ce droit à un tiers, à un tribunal ou à un autre gouvernement.** Mettre ce droit en balance, l'exposer au jugement d'autrui, ce serait manquer à la responsabilité, au devoir que nous avons de protéger le droit des Québécois de choisir. **Plaider à la Cour, ce serait cautionner, à l'avance, le jugement qui prétendrait, demain, restreindre, réduire, nier, même, le droit des Québécois.**

Le consensus au Québec sur notre droit de choisir est clair, il transcende les partis. L'Assemblée nationale parle d'une seule voix. La position fédérale, elle, relève du dédoublement de personnalité. Sur la question de la souveraineté, le gouvernement fédéral déclare, d'une part, que le Canada ne peut retenir les Québécois dans la fédération contre leur gré. Mais il affirme d'autre part que, par la constitution, il détient un droit de veto sur la souveraineté du Québec, donc qu'il peut retenir les Québécois dans la fédération contre leur gré.

Ce curieux monstre à deux têtes a pris naissance le jour même de l'annonce, par

**Ottawa, du dépôt de son renvoi en Cour suprême, en septembre 1996. Dans un discours en Chambre, au nom du gouvernement fédéral, le ministre de la Justice – c'était Allan Rock – reconnaissait que le Québec avait parfaitement le droit de tenir un nouveau référendum sur la souveraineté et que les Québécois pouvaient, s'ils le désiraient, devenir souverains.** Mais il ajoutait aussitôt qu'il faudrait d'abord « des négociations et des ententes » entre le Québec et le Canada, sur les sujets suivants – et je le cite – : « les arrangements commerciaux et économiques, les droits des citoyens de se déplacer à l'intérieur du pays, le partage de la dette et des biens publics, l'utilisation de la monnaie et une foule d'autres questions ».

Pendant un instant, j'ai pensé qu'il était en train de lire le programme du Parti Québécois.

Car c'est précisément ce que nous proposons, si les Québécois nous en donnent le mandat, démocratiquement, lors de la prochaine élection : la tenue d'un référendum, l'obtention d'un mandat de réaliser la souveraineté, suivie d'une période de négociations sur toutes ces questions – pour tenter d'en arriver à une entente que nous appelons le partenariat. **Nous pensons, et les expériences étrangères nous donnent raison, qu'une période d'environ un an suffirait à conclure ces négociations, du moins sur tous les points essentiels. Alors, le Québec pourra déclarer sa souveraineté.**

So Dallaire, in evaluating *Bill 99*, took Bouchard's gloating over the surprise of the Reference ruling as representing his true intentions in introducing *Bill 99*: she concluded that he had accepted the ruling of the Reference and had no intention to secede unilaterally. She seems to have known nothing about Bouchard's constant positions, and that *Bill 99* represented precisely his constant position on the constitutional order and on the right to secede, unilaterally and unconditionally. Though she kept quoting Joseph Facal on *Bill 99*, it was Lucien Bouchard alone who set the policy on Quebec's secession and his thinking was constant and clear: Quebec has the right to secede unilaterally. That, whether Dallaire admits it or not, was the central message of *Bill 99*.

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There are many disconcerting arguments presented in Madame Justice Claude Dallaire's decision on *Bill 99*, but perhaps none as worrisome as the way she cited a previous decision by a Quebec Court of Appeal that clearly contradicts the doctrine put forward by the Supreme Court in the Reference.

506. Selon nous, la consultation populaire à laquelle réfère l'article 4 de la *Loi 99* ne peut rationnellement mener à la conclusion que le législateur recherchait un moyen direct ou même détourné de déclarer une sécession unilatérale lui permettant de violer les préceptes énoncés par la Cour suprême sur toute cette question de clarté référendaire.

507. Dans l'arrêt *Alliance Québec c. Directeur général des élections du Québec*, la Cour d'appel réitère qu'en démocratie, chaque citoyen qui se qualifie doit pouvoir prendre part au débat et voter, notamment dans le cadre d'un référendum.

508. La Cour ajoute que les règles constitutionnelles font en sorte que le résultat d'un référendum n'est que consultatif, le véritable pouvoir décisionnel demeurant l'apanage des parlementaires.
509. Elle précise qu'à la limite, l'Assemblée nationale pourrait décider de ne pas donner suite au résultat obtenu à la suite d'un tel référendum, si elle ne considérait pas opportun de le faire, tout en devant ensuite gérer l'impact de sa décision, sur le plan moral.
510. En citant l'*Avis consultatif* de 1998, la Cour d'appel réitère qu'advenant un *oui* à la suite d'un référendum tenu en vertu de la *Loi sur la consultation populaire*, le gouvernement du Québec devra alors entreprendre des négociations avec le reste du Canada sur les modifications à apporter à la Constitution, afin de donner effet à la volonté populaire, si cette direction est toujours celle dans laquelle elle désire aller. Ce qu'elle ajoute ensuite n'est pas banal :
- [...] Ce n'est que si cette négociation est infructueuse que le Parlement du Québec pourra choisir de faire une déclaration unilatérale d'indépendance valide au sens de la Constitution et qui lierait, par voie de conséquence, les institutions politiques du reste du Canada (*Renvoi relatif à la sécession*).**
511. Selon les propos tenus par la Cour suprême dans une autre affaire, la preuve extrinsèque inclut la jurisprudence sur un sujet similaire.
- 512. Ainsi, pour terminer notre interprétation de l'article 4, nous ne pouvons donc ignorer les propos de la Cour d'appel dans l'arrêt *Alliance Québec*.**
513. L'article 4 de la *Loi 99* n'est donc pas inconstitutionnel.

She cited, approvingly, the decision of the Court of Appeal that had found: « Ce n'est que si cette négociation est infructueuse que le Parlement du Québec pourra choisir de faire une déclaration unilatérale d'indépendance valide au sens de la Constitution et qui lierait, par voie de conséquence, les institutions politiques du reste du Canada (*Renvoi relatif à la sécession*). » But this statement directly contradicted the Reference statement that, to be legal, secession requires an enabling amendment to the Constitution of Canada. The Reference also stated clearly that failure of the negotiations on secession would not confer a right for Quebec to secede unilaterally. So there was a serious problem of constitutionality in the decision by the Court of Appeal. And, to make her quotation more concerning still, she added: « nous ne pouvons donc ignorer les propos de l'arrêt *Alliance Québec*. » This meant that she took into account this statement in her evaluation of section 4 of *Bill 99*, which states:

4. Lorsque le peuple Québécois est consulté par un référendum tenu en vertu de la *Loi sur la consultation populaire* (chapitre C-64-1), l'option gagnante est celle qui obtient la majorité des votes déclarés valides, soit 50 % de ces votes plus un vote.

It is hard to see how the quotation from the Court of Appeal bears on Section 4 of *Bill 99*, but it obviously bears much more on the interpretation of *Bill 99* as a whole. The quotation implies that, should negotiations on secession fail to reach an agreement and therefore fail to reach an amendment to the Constitution, then Quebec immediately would enjoy a right to secede

unilaterally. That interpretation, applied to *Bill 99*, means that Quebec now has explicitly the right to secede without an amendment to the Constitution, on condition only that Quebec first negotiates with its partners and that those negotiations then failed. That would never pass the test of the four principles defined by the Supreme Court, notably the principle of federalism, the principle of constitutionality and the rule of law, and the principle of the rights of minorities and Aboriginals.

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The most serious methodological weakness displayed by Justice Dallaire was her failure to place her examination of *Bill 99* within an historical context. *Bill 99* was the culmination of a three-decades escalation of demands by successive Quebec governments for more autonomy. From Maurice Duplessis to Jean Lesage, from Daniel Johnson Sr. to Robert Bourassa, from René Lévesque to Jacques Parizeau, the demands for more constitutional powers were on a constant upwards slope. And they were increasingly accompanied by the conviction that Quebec had the right to any and all constitutional changes it wanted, including, specifically, to secession.

The immediate ideological precedent to *Bill 99* was the 1994-95 attempt at unilateral secession. Jacques Parizeau, supported dramatically by Lucien Bouchard, introduced on December 6, 1994, his *Avant-projet de loi sur la souveraineté du Québec*. It manifestly proposed unilateral secession. In August 1995, lawyer Guy Bertrand appealed to Quebec Superior Court to stop the referendum process outlined in that draft bill. Justice Robert Lesage, on September 8, 1995, pronounced Parizeau's venture as unconstitutional and a violation of the constitutional rights of Guy Bertrand. But, Justice Lesage also noted that all the parties wanted the referendum process to proceed, and so he did not issue an injunction. Parizeau then modified his bill somewhat and, in September 1995, introduced his *Projet de loi sur l'avenir du Québec*.

I mention these significant facts because Justice Dallaire should have studied them. The speeches delivered by Parizeau and Bouchard in 1995, were altogether similar in tenor to the speeches that were then given on *Bill 99*. On both occasions, the objective was to discredit the *Constitution Act, 1982*, the authority of the Supreme Court of Canada, and so lay the groundwork for a unilateral declaration of independence.

But Justice Dallaire had a poor grasp of the facts that occurred during the 1994-95 referendum. For instance, she writes:

39. La preuve permet de faire un bref survol des démarches effectuées par le Parti québécois en lien avec l'avenir du Québec dans la fédération canadienne, entre 1980 et 1995.

40. Dans cette preuve, la loi intitulée *Loi sur l'avenir du Québec*, présentée du temps du premier ministre Parizeau dans le cadre du processus d'accès à la souveraineté, en décembre 1994, retient notre attention, puisqu'elle n'est pas étrangère à certaines réactions des différentes parties en cause, selon nous.

41. En effet, à l'époque où il est présenté, ce projet de loi est perçu par plusieurs comme contenant des articles très forts. Il est finalement soumis à la Cour supérieure, qui juge alors qu'il constitue une « menace grave aux droits et libertés » du citoyen Guy Bertrand, en septembre 2015. Cela se passe tout juste un mois avant le référendum d'octobre 1995.

42. Bien que ce projet de loi soit finalement « mort au feuilleton », il n'est pas encore tombé dans l'oubli et laissera même des séquelles jusqu'à l'époque où la trame factuelle pertinente à notre dossier débute.

There are two historical errors here. The *Loi sur l'avenir du Québec* was not introduced in December 1994, as she stated, but in September 1995. Furthermore, it was not the *Loi sur l'avenir du Québec* that was found by Justice Lesage to threaten Guy Bertrand's rights, it was *l'Avant-projet de loi sur la souveraineté du Québec*.

Her predecessor on Quebec Superior Court, Robert Lesage, had condemned Parizeau's proposal for a unilateral secession that had been so fervently endorsed by Lucien Bouchard. Should not Dallaire, the Superior Court judge, have examined seriously that decision by her predecessor Lesage?

Then there was the decision the following year by Justice Robert Pidgeon. He sustained, against all the arguments made insistently by the Bouchard government, that Guy Bertrand had the right to petition the court to prevent another unconstitutional attempt at secession. Here is how Justice Pidgeon summarized the case before him, in his decision rendered on August 30, 1996.

## IINTRODUCTION

**1** Le gouvernement du Québec, dont l'un des objectifs est la souveraineté, prétend que le Québec est en droit de décider seul de son avenir sans passer par la formule d'amendement prévue à la Constitution canadienne. Dans la poursuite de cet objectif, il a présenté certaines mesures législatives qui n'ont pas été adoptées par l'Assemblée nationale et a entrepris une vaste campagne d'information et de consultation, suivie d'un référendum.

**2** C'est là que le demandeur GUY BERTRAND (LE DEMANDEUR) intente une action en justice, requérant du Tribunal une déclaration à l'effet que ce projet de sécession unilatérale est illégal, puisqu'inconstitutionnel.

**3** Pour contrer ce recours, LE PROCUREUR GÉNÉRAL DU QUÉBEC (LE DÉFENDEUR) présente alors une requête déclinatoire et en irrecevabilité. Il soutient que l'action du DEMANDEUR est irrecevable parce qu'elle concerne des questions non justiciables, essentiellement théoriques et politiques, sur lesquelles les tribunaux n'ont pas juridiction.

**4** En cours d'audition, LE DÉFENDEUR a été autorisé à ajouter un moyen d'irrecevabilité fondé sur l'absence de traduction de certains textes intégrés à la Loi constitutionnelle de 1982.

**5** Le DEMANDEUR oppose que les questions soulevées sont de la compétence du Tribunal puisque certains de ses droits fondamentaux, garantis par la Charte canadienne des droits et libertés (La Charte), sont menacés par la progression de la démarche de sécession unilatérale du gouvernement du Québec. D'ailleurs, illustre-t-il, **l'Assemblée nationale a récemment adopté une résolution affirmant le droit du Québec de procéder unilatéralement à la sécession.**

**6** Enfin, LE PROCUREUR GÉNÉRAL DU CANADA (L'INTERVENANT) soumet que tout le processus d'accession du Québec à la souveraineté ne saurait bénéficier d'une immunité en regard de la Constitution du Canada et de la compétence des tribunaux, notamment de la Cour supérieure.

And Justice Pidgeon had made clear what was the central issue, in his perception of the case: it was that the rule of law and the authority of the courts must govern the process of secession. These principles are exactly what the Bouchard government was rejecting. Pidgeon ruled:

**45** Le principe de la primauté du droit constitue la pierre angulaire de notre système démocratique. Incorporé dans le préambule de La Charte, il garantit aux citoyens, peu importe leur origine, race, couleur, religion ou langue, le respect de leurs droits fondamentaux. Pour en assurer le maintien, il existe une institution indépendante, à l'abri de toute contrainte ou influence de l'exécutif, du législatif, des groupes de pression, de l'opinion publique et même des médias. Son devoir est de veiller à ce que tous, y compris les gouvernements, respectent les lois et à ce que l'action des uns ne porte pas atteinte aux droits des autres. C'est le pouvoir judiciaire.

Recall, too, Premier Bouchard's reaction to Pidgeon's decision rendered August 30, 1995. The Premier responded on September 3: "With all the respect I have for the courts, it's not the courts, a politician, a businessman, a union official or a citizen who will decide the collective future of a people, it is the people itself."

But, unaccountably, Justice Dallaire did not even mention the Pidgeon decision. Had she examined it, she would have found that it went precisely against her conclusion that *Bill 99* presented no threat of a unilateral secession or of unconstitutional behaviour.

Then, Judge Dallaire might have taken notice of the reaction of Premier Bouchard's Minister of Justice Paul Bégin to Allan Rock's announcement of the reference to the Supreme Court of Canada on the secession of Quebec. That same day of September 26, 1996, Minister Bégin put out a statement that began:

J'ai pris connaissance de l'annonce faite aujourd'hui par le Gouvernement fédéral de s'adresser à la Cour Suprême du Canada afin qu'elle se prononce sur l'avenir du peuple québécois.

Comme je l'ai déjà dit, et je le répète aujourd'hui, le seul juge et le seul jury de l'avenir du Québec, c'est le peuple du Québec. Aucun juge, ceci dit en tout respect, ne pourra empêcher l'expression démocratique d'un peuple.

Vous l'aurez compris, le Gouvernement du Québec ne se présentera pas devant la Cour suprême du Canada. Nous n'aiderons pas le Gouvernement fédéral à faire de la Cour suprême un acteur politique. Comme nous l'avons toujours dit devant le Juge Lesage, et comme nous l'avons redit devant le Juge Pidgeon, il s'agit ici d'une question purement politique et non juridique.

Nor did Justice Dallaire examine what Premier Lucien Bouchard had said on December 15, 1999, when he introduced *Bill 99* and simultaneously rejected a motion by Opposition Leader Jean Charest. Charest's motion was typically ambiguous. While it asserted that Quebec alone could make decisions on its future status, nevertheless it recognized the authority of the Supreme Court of Canada. Premier Bouchard waxed indignant:

M. Bouchard : En demandant que l'Assemblée nationale se ligote totalement par l'engagement de s'en remettre à la totale conformité du comportement éventuel de l'Assemblée nationale à la décision de la Cour suprême, c'est trop important, c'est tellement important ce qui se passe présentement...

...

Mais, M. le Président, il y a autre chose dans cette décision, je me tue à le rappeler à l'opposition, qui le sait d'ailleurs, il y a autre chose. Il y a, dans cette décision, l'affirmation très claire et l'acceptation de la légitimité et de la légalité de l'adoption de la Loi constitutionnelle de 1982, qui a limité les pouvoirs de l'Assemblée nationale, qui a été dénoncée ici par une résolution formelle, qui a été refusée par tous les gouvernements du Québec depuis. Et, à la faveur de ce qui se passe présentement, l'opposition libérale voudrait que l'Assemblée nationale se passe la camisole de force définitive en acceptant l'odieux rapatriement de 1982, le ressort qui a été tendu et qui a créé tous les problèmes que nous vivons depuis.

Justice Dallaire refused to read the political history of the previous decades, in which all the Quebec political parties united to claim Quebec's right to secede at will, without an amendment to the Constitution of Canada, and all denounced the reference to the Supreme Court to clarify the constitutionality of unilateral secession. All united to denounce the 2013 decision of the Harper government to intervene in the Henderson case challenging the constitutionality of *Bill 99*. This was a constant pattern of all Quebec parties, but particularly of the Parti Québécois and the Quebec government under Jacques Parizeau and Lucien Bouchard, to insist on the right to a unilateral secession.

It took a great act of faith on her part – or steadfast blindness, or both – to conclude, as Dallaire did, that *Bill 99* offered no threat to the constitutional order. Her own decision simply culminated a 30-year history of Quebec politicians subordinating the constitutional order to the demands of Quebec nationalism, while Prime Ministers like Brian Mulroney and Jean Chrétien simply winked. Her paean to Quebec nationalism will illustrate how judges, like politicians, can decline to defend the constitutional order:

304. Le législateur ne parlant pas pour ne rien dire, s'il choisit ces mots forts « droits fondamentaux » et « prérogatives », qu'il les associe à deux entités distinctes, mais complémentaires, « le peuple québécois » et « l'État du Québec », et qu'il est question d'exercice desdits droits et prérogatives, on ne peut qu'y voir une loi à caractère solennel dont le message fort pointe vers ce qui s'apparente en tous points à une charte constituante.

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A final observation: Claude Dallaire displayed in her judgment a naive populism that surprises in a judge called upon to interpret the Constitution of Canada.

458. Lorsque l'idée derrière cet article<sup>60</sup> est discutée devant l'Assemblée nationale, le ministre Facal attire l'attention de son auditoire sur le fait que le peuple québécois s'est déjà prévalu du droit de choisir lorsqu'il a donné mandat à ses élus de signer la Constitution lorsqu'il était alors intéressé à substituer le statut juridique de province du Dominion par une participation dans un régime fédératif, en 1867.

459. Il [Facal] ajoute que lorsqu'il a fait ce choix, « le peuple » n'a jamais renoncé à la possibilité de faire un autre choix, un jour, pour sortir de cette fédération.

460. Selon nous, ce que vise l'article 2 relève des affaires internes du Québec et envoie le message que la liberté de choisir du peuple ne sera altérée par l'intervention d'aucun tiers.

461. Cette liberté de faire a toujours existé et l'article 2 n'ajoute rien de nouveau. Il ne fait que réaffirmer l'état des choses, tout simplement, et ce, en réaction à la *Loi C-20*.

554. Mais si la matière visée dans la *Loi 99* est si fondamentale, pourquoi n'a-t-elle été adoptée qu'en décembre 2000, alors que le Québec bénéficie du statut de province depuis 1867?

In these observations, she echoes the populism that lies behind *Bill 99*, the assumption that democracy trumps all. She also projects into the past populist concepts that exist today but did not exist at the time of Confederation. In 1864, with the encouragement of the imperial authorities in London, colonial leaders from five British colonies met and developed a package of recommendations that were then given legal status by the *British North America Act*, voted into law by the British Parliament. But the people as a whole in those colonies did not formulate the recommendations, and those who did never spoke of acting as the representatives of "le peuple québécois" or any other "people." And the people were never

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<sup>60</sup> Article 2. Le peuple québécois a le droit inaliénable de choisir librement le régime politique et le statut juridique du Québec.

consulted in a referendum or, in the Province of Canada, even by an election, to endorse the terms of the BNA Act.

But Justice Dallaire ignored these trivial legal distinctions to make an unfounded populist statement.

### **CONCLUSION: The Rule of Law is Systematically Sidelined When Secession is the Issue**

Will Canada remain forever the land of make-believe? For three decades, Quebec's political class, urged on by its intelligentsia, has presumed that Quebec has an unconditional right to gain its independence. The rest of this country must not dare to claim to have a say in the process. Is Canada divisible? *Oui, comme de raison!* Is Québec divisible? *Ben, voyons-donc! Êtes-vous fou?* Shocking!

The latest episode in this long-running soap opera was the decision by Madame Justice Claude Dallaire, published on April 19, 2018, on the constitutionality of Lucien Bouchard's *Bill 99*. This law, passed in the year 2000 by a separatist government, seemed to claim, in plain language, Quebec's right to take on whatever constitutional status it wanted, presumably even independence. The rights of others — of the other provinces, of the rest of Canada, of the Aboriginals and other minorities — were not worth mentioning. But Justice Dallaire celebrated *Bill 99* as a veritable *Charter* enshrining the fundamental rights of Quebec and its people.

We are a country in which every Quebec premier from René Lévesque to Philippe Couillard has refused to recognize the legitimacy of the 1982 *Constitution Act* which, for the first time, gave Canada the power to amend Canada's own Constitution. It also vested in the Constitution the *Canadian Charter of Rights and Freedoms* which, *inter alia*, expanded the right to French schooling across the country. These Quebec premiers spurned that fundamental Act even though Prime Minister Pierre Trudeau had complied totally with the conditions for a legitimate patriation of the Constitution, spelled out in September 1981 by the Supreme Court of Canada at the request of three premiers, including René Lévesque. What the Supreme Court had demanded was a consensus of the provinces, Trudeau obtained the assent of nine out of 10 premiers.

These Quebec premiers renewed periodically their campaign of vilification of the *Constitution Act* by adopting in the National Assembly recurrent unanimous resolutions condemning the Act, even though the Supreme Court of Canada had rendered a landmark decision on December 6, 1982, responding to the referral originated by the three premiers: “The *Constitution Act, 1982* is now in force. Its legality is neither challenged nor assailable.”

On May 19, 1994, then Opposition Leader Jacques Parizeau spoke in the National Assembly to defend the territorial integrity of Quebec in the event of its secession:

Seulement, il y a le droit, M. le Président. Nous sommes un État de droit. Le Canada, le Québec ne sont pas des républiques de bananes. Il y a le droit. Il y a la Constitution. Il y a le droit international. Et nous avons tous été élus pour défendre le droit. Comme législateurs, dit-on, nous avons comme rôle de défendre le droit tel qu’il existe et de le modifier si on juge utile de le modifier. Mais nous appartenons à un État de droit. Or, qu’est-ce qu’il dit, le droit? Le droit dit qu’on ne peut pas modifier les frontières d’une province sans l’acceptation par le Parlement de cette province. C’est ça que dit la Constitution canadienne, et elle le dit depuis fort longtemps.

The same man, who became the Premier of Quebec four months later, defended Quebec’s territorial integrity under the rule of law, but proposed at the same time to secede from Canada unilaterally. That raised a logical question: Were Canada and Quebec respectful of the rule of law, or were they banana republics?

Premier Lucien Bouchard gave a convincing answer to that question in a speech delivered on May 22, 1996, another part of which was quoted previously:

De ce siège aussi, Jean Lesage disait que nous étions maîtres chez nous. Jean Lesage ne proposait pas la souveraineté, mais il savait que la décision nous appartenait. Et, du même fauteuil, Daniel Johnson père défendait *l'égalité ou l'indépendance*. Il ne proposait pas l'indépendance aux citoyens, mais il savait que la décision leur appartenait. Il en fut de même, bien sûr, de René Lévesque, de Pierre Marc Johnson et de Jacques Parizeau.

Mais je parlerai des autres leaders libéraux qui ont défendu ce principe. Je vois devant moi des gens qui ont applaudi lorsque leur chef, Robert Bourassa, notre premier ministre d'alors, a déclaré de ce siège que, et je cite, « quoi qu'on dise et quoi qu'on fasse, le Québec est aujourd'hui et pour toujours une société distincte, libre et capable d'assumer son destin et son développement. » Fin de la citation.

Le rapport de la commission Bélanger-Campeau, qui porte notamment les signatures de l'ancien premier ministre du Québec [Robert Bourassa], de l'actuel député de Viger [Cosmo Maciocia] et du député de Nelligan [Russell Williams], indique que les membres de la commission ont, je cite, « la conviction profonde que l'expression claire de la

volonté du peuple québécois est le fondement du processus politique pouvant conduire à la souveraineté. »

Dans son propre addendum au rapport de la commission, l'ancien chef libéral, Claude Ryan, écrit ce qui suit, et je cite: « Je souscris entièrement à l'orientation voulant qu'en dernier ressort le peuple du Québec soit appelé à décider souverainement de son avenir collectif. » Fin de la citation.

Même l'actuel critique libéral en matière constitutionnelle, le député de Châteauguay [Pierre Moreau], affirmait en décembre [1995] que le droit à l'autodétermination du Québec existe, et il ajoutait: « Le gouvernement élu propose le comment et le quand. » Fin de la citation.

Et nous savons tous que le chef de l'opposition [Daniel Johnson fils] a prononcé dans cette Chambre une phrase belle et forte, que je lui emprunte, et je cite: « Nous sommes maîtres chez nous de décider de notre avenir. C'est un droit fondamental que je défendrai ici et partout, en toutes circonstances. » Fin de la citation.

M. Lesage, M. Bourassa, M. Ryan, l'actuel chef de l'opposition ont incarné cette cause. Ils n'ont jamais hésité à la réaffirmer en toutes circonstances. Voici une circonstance où il faut répéter cette évidence. Voici un rendez-vous avec le droit du peuple québécois. La responsabilité nous incombe ici.

Elle incombe aussi au premier ministre du Canada, qui devrait savoir que ces gestes braquent le Québec et le Canada anglais. Il devrait savoir qu'en engageant ce débat il avive les différences plutôt que de promouvoir la coopération.

M. le Président, nous voici au cœur du sujet. Si les Québécois décident de devenir souverains, comment les choses se dérouleront-elles avec le Canada? Les fédéralistes, les souverainistes et les membres de la société civile qui ont participé à la rédaction du rapport Bélanger-Campeau ont donné une réponse à cette question. Je vais vous la lire car elle est dénuée de toute polémique. Elle est factuelle, et je cite:

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

Et je continue en citant: « Si les autres membres de la Fédération y consentaient, l'accession du Québec au statut d'État indépendant pourrait se faire par accord. Les modifications constitutionnelles requises pourraient être préparées et les divers

arrangements de transition négociés préalablement à la prise d'effet du changement de statut. »

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

Voilà ce qu'ont signé trois personnes qui ont tour à tour eu la charge de premier ministre du Québec: Robert Bourassa, Jacques Parizeau et moi-même, avec l'appui de nos partis. Voilà également le chemin que suivent aujourd'hui les souverainistes. En proposant au Canada une offre formelle de partenariat et une période d'un an pour négocier les arrangements nécessaires, nous affirmons clairement que notre premier choix est une résolution négociée de l'ensemble des questions qui nous intéressent: espace économique commun, partage des responsabilités quant à la dette et aux actifs, organismes conjoints de gestion du partenariat.

Si le Canada et les provinces veulent utiliser cette période pour régler leurs problèmes de droit interne et adopter les amendements appropriés, le gouvernement du Québec ne s'y opposera pas. Nous n'avons cessé de répéter qu'il est dans l'intérêt du Canada et dans l'intérêt du Québec que cette transition vers la souveraineté se fasse dans le calme, dans le respect mutuel et dans l'entente réciproquement avantageuse.

Nous notons que, de la même façon, le Canada et beaucoup d'anciennes colonies d'un Empire britannique qui se disait indivisible ont obtenu leur indépendance avec l'assentiment parfois tardif, parfois regimbant, mais l'assentiment tout de même du pouvoir britannique mis en présence des règles incontournables de la démocratie.

Notre premier choix est donc d'accéder à la souveraineté après avoir défini un partenariat avec le Canada dans un processus mutuellement acceptable. Nous ajoutons cependant que, si le Canada rejette notre main tendue, si le Canada veut nous imposer des veto, nous retenir dans la Fédération contre notre gré, nous allons nous en retirer en proclamant unilatéralement la souveraineté. C'est notre droit, nous allons l'exercer.

Lucien Bouchard recalled the unanimity of Quebec's provincial leaders who all agreed that, ultimately, unilateral secession was Quebec's right. The Quebec Liberals sometimes adopted ambiguous formulas, but they all accepted through several leaders Quebec's right to secede. Were they behaving like the leaders of a banana republic?

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What was the attitude of Canada's federal leaders before this consensus at the National Assembly that Quebec can secede at will? Were they for the rule of law, or for the confusions of a banana republic? In fact, Pierre Trudeau's successors, John Turner, Brian Mulroney, Kim Campbell (briefly), Jean Chrétien and Paul Martin, each bereft of a clear national vision, turned away from Trudeau's policies and compromised them to gain support from Quebec nationalists. The cumulative consequence was to revive in Quebec both nationalism and separatism. Both grew constantly from 1987 to 1992 and reached summits never known before.

John Turner, as Pierre Trudeau's Minister of Finance, had been the star of the cabinet when he resigned in 1975 to work in the private sector. Great things were expected of him when, in 1984, he returned to politics, won the Liberal leadership and became Prime Minister for 79 days. Badly defeated by Brian Mulroney in the elections of September 4 that year, he then remained as Leader of the Liberal Party and Leader of the Opposition until June 1990.

Turner's return to federal politics coincided in 1984 with a crisis in Manitoba that, for a time, paralyzed the Manitoba government. It concerned the fact that Manitoba had been created as a bilingual province in 1870 by the federal *Manitoba Act*. English and French were to be the equal languages of Manitoba's legislature and courts, as they were since 1867 in the Province of Quebec. But, in 1890, the Manitoba legislature passed the *Official Language Act* which purported to remove French as an official language and also ended the government's funding for Catholic schools. The shock of it reverberated in Quebec and undermined French Canadians' faith in the federation of Canada.

In 1981, a Winnipeg lawyer, Roger Bilodeau, received a traffic ticket written in English only and he challenged its constitutionality based on the 1870 founding constitutional document. The case went to the Supreme Court of Canada which, in 1985, would rule that more than 4,000 of Manitoba's laws, adopted in English only, were invalid. The court granted the Manitoba government a reprieve to get the laws translated into French.

But, in February 1984, the NDP Government of Howard Pawley was in the midst of trying to pass legislation that would deal with the constitutional crisis over the French language. The Progressive Conservative opposition filibustered. The issue caught national attention. In Ottawa, the Liberals, with Pierre Trudeau still in command, introduced a resolution that invited the Manitoba government and legislature "to take action as expeditiously as possible in order to fulfill their constitutional obligation and protect effectively the rights of the French-speaking minority of the province."

Brian Mulroney rallied his party to support the resolution and gave a rousing speech in favour of French language rights in Manitoba. But John Turner, at his first press conference as a candidate for the leadership, tried to avoid the issue. He was asked by a reporter: "Mr. Turner, could you elaborate on the language question in Manitoba... an issue that is going to be ongoing and quite important to the fabric of Canadian society?"

In reply, Turner began slowly; “On the Manitoba question, I support the spirit of the parliamentary resolution, but I think we have to recognize that what is at issue here is a provincial initiative, and that the solution will have to be provincial<sup>61</sup>.”

Turner thereby rejected the fundamental commitment of Pierre Trudeau to the nation-wide promotion of French as an official language of Canada. That was the first sign of John Turner’s attitude on a crucial national issue. He later backed the Meech Lake Accord, which Trudeau had vehemently opposed. Trudeau argued that, if you restricted the status of English in Quebec, as the Meech Lake Accord proposed to do in the Constitution of Canada, you could hardly then demand equal status for French in the rest of Canada. Turner trashed the heritage of Trudeau on this central issue and thereby divided his caucus. In the elections of 1984, the Turner Liberals won only 40 seats, a drop from 147 seats under Trudeau in 1980. Moreover, when the vote was called in the Commons on the Meech Lake Accord, 10 of the 40 Liberal MPs voted against it.

That was not all. Free trade with the United States had been a distinctive Liberal legacy from the time of Wilfrid Laurier. Pierre Trudeau had launched in 1982 the *Royal Commission on the Economic Union and Development Prospects for Canada*, under the chairmanship of his former Finance Minister Donald Macdonald. Its main recommendation came down in 1985: it proposed “a leap of faith” in the form of a free trade agreement with the United States. Brian Mulroney immediately reversed his previous opposition to free trade with the United States and embraced the proposal, which he then proceeded to negotiate with U. S. President Ronald Reagan. Turner became strident in his opposition, accusing Mulroney of selling out Canada to the United States. He instructed the Liberal majority in the Senate to obstruct the bill that would authorize the Free Trade Agreement, and Turner made his opposition to the FTA the central issue of his campaign in the 1988 elections – which he lost for a second time. In 1988, a majority of his own MPs signed letters asking him to leave.

John Turner, by abandoning the doctrine of one Canada with two official languages, paved the way for Mulroney’s ascendancy and his attempt to destroy the Trudeau legacy.

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Brian Mulroney first emerged politically as Robert Stanfield’s right-hand man in Quebec. After the elections of 1972, which Stanfield lost to Pierre Trudeau by just two seats, 107 to 109, the Progressive Conservatives turned their attention to Quebec, where they had won only two of Quebec’s 74 seats. Mulroney put together a team there drawn mostly from organizers of the Parti Québécois, who were motivated more by their determination to defeat Trudeau than to elect Stanfield. Mulroney then adopted Quebec’s nationalist rhetoric to build the PC Party in Quebec.

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<sup>61</sup> Greg Weston, *Reign of Error. The Inside Story of John Turner’s Troubled Leadership*, Toronto, McGraw-Hill Ryerson, 1988, p. 47.

During his own campaign for the PC leadership in 1983, Mulroney had Lucien Bouchard as his speech-writer for texts in French. So Mulroney began echoing Bouchard's interpretation of the 1980-82 patriation of the Constitution. Quebec, in this scenario, had been isolated and humiliated, even though the change was initiated by a Quebecer who was motivated above all by a determination to reconcile Quebec with the Canadian federation.

On August 6, 1983, Mulroney, as part of his campaign to gain the Progressive Conservative leadership, gave a speech at Sept-Îles written by Lucien Bouchard. As Bouchard later revealed, Mulroney had asked him to write about his economic platform. But, instead, as Bouchard later recounted, « Je rédigeai le discours comme si je devais le prononcer moi-même, en donnant libre cours à l'indignation que m'inspirait la mise à l'écart du Québec<sup>62</sup>. »

Bouchard said that he presented the text to Mulroney who looked it over. « Il le parcourut et s'en montra content. » Here is how Lucien Bouchard described the speech that he had written:

C'était une dénonciation de « l'ostracisme constitutionnel » dont le gouvernement de Pierre Trudeau avait frappé les Québécois par son coup de force de 1982. Insistant sur la nécessité de soulager le traumatisme collectif ainsi infligé aux nôtres, le discours français lançait un appel passionné à la réconciliation entre Québécois et Canadiens. Le Premier ministre s'engageait à apporter à la Constitution des aménagements qui convaincraient le Québec d'y apposer sa signature. Du même souffle, il vilipendait « des subterfuges, si chers aux libéraux, qui permettent au fédéral de s'immiscer furtivement dans le contenu des politiques provinciales...<sup>63</sup> »

Here is an extract of that speech, translated into English:

After the referendum, the men and women of [Québec] underwent a collective trauma... One thing is certain: not one person in Quebec authorized the federal Liberals to take advantage of the confusion that prevailed in Quebec following the referendum in order to ostracize the province constitutionally. My party takes no pleasure in the politically weak position in which these deplorable events have placed Quebec.

It is interesting to contrast the speech that Mulroney delivered with his previous positions formulated in reaction to Trudeau's patriation of the Constitution. In December 1981, he gave a speech which was later reprinted in a book, a collection of his speeches, titled *Where I stand*:

I am very happy about the remarkable progress made in the constitutional dossier. The federal government, through a remodeling of the Constitution, has obtained the enshrining of the rights of linguistic minorities outside Quebec, and I can only rejoice in this.

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<sup>62</sup> Lucien Bouchard, *À visage découvert*, Montréal, Boréal, 1992, p. 143.

<sup>63</sup> *Loc. cit.*

He rejected, then, the stab-in-the-back theory propagated by separatists and nationalists:

Must we be shocked by the abrupt disintegration of the common front before the following clear realities: a federal government determined to act quickly; a population – other Canadians as well as Quebecers – who, by a huge majority, wanted the constitutional guarantees enunciated; and allies whose vision of Canada was fundamentally different from that of a separatist government?

At the time, Mulroney had supported Trudeau's patriation move against the opposition of PC Leader Joe Clark, as several people have testified. Notably, *Globe and Mail* Columnist Jeff Simpson wrote on January 4, 1990, in reaction to Mulroney's turn-around on this issue:

[Mulroney's] outrageous distortion is too great to let go unchallenged. I remember as if it were yesterday a long lunch at the Mount Royal Club in Montreal in January 1981 with private citizen Brian Mulroney, in which he went on at great length against the "community of communities" approach to Canada of then-Conservative leader Joe Clark.

In the course of that animated soliloquy, Mr. Mulroney said emphatically that Prime Minister Pierre Trudeau, faced with a separatist government in Quebec, would have no choice but to bring home the Constitution over Quebec's objections.

Later on, when the patriation debate heated up, Mr. Mulroney again said privately that he supported what the Liberals were doing, given the circumstances that presented themselves at the time in Quebec. For Mr. Mulroney to say now that the whole exercise was done by people celebrating "in striped pants" is a gross perversion of his own attitudes.

In the *Ottawa Citizen* of January 25, 1990, Peter Maser of Southam News brought new testimony to bear on Mulroney's past positions: "What Mulroney is saying today is a far cry from what he was saying then. Indeed, in the earlier 1980s, his support for the patriation process was so well-known that it passed for accepted fact." Maser quoted Peter Blaikie, the Montreal lawyer who was president of the Conservative Party in 1981-82: "I don't think it's any secret that during the period '80 through '83, Brian Mulroney was very supportive of Pierre Trudeau. He was one of the cheerleaders for all that ... and the revisionism now is absolutely staggering."

Maser also quoted Lowell Murray, who, in 1990, was Mulroney's Minister for Federal-Provincial Relations, but who, at the time, had been a staunch supporter of Joe Clark. Murray had spoken to journalist Ron Graham, author of the book *One-Eyed Kings*: "Brian tends to be pretty simplistic when it comes to strategy. He goes for the big splash. He supported Trudeau's constitutional position not because he'd thought about it for five minutes, but because he was so thrilled by the sheer bravado of it all."

Contrast that testimony with the climax of Bouchard/Mulroney's speech at Sept-Îles:

I know that many men and women in Quebec will not be satisfied with mere words. We will have to make commitments and take concrete steps to reach the objective that I have set for myself and that I repeat here: to convince the Quebec National Assembly to give its consent to the new Canadian Constitution with honour and enthusiasm.

The implications of the Sept-Îles speech were powerful. While the Supreme Court had attested that the legitimacy of the 1982 *Constitution Act* could not be challenged, and while Premier Lévesque thumbed his nose at the Supreme Court by placing a "notwithstanding clause" as a protest in all the bills he was now passing, Mulroney crossed to the other side to say that Trudeau was wrong and Lévesque was right, that the *Constitution Act* was the scandal of the century, a stab in Quebec's back, the betrayal of the people of Quebec and it left them outside of the constitutional family. So now it was up to the federal government to make amends by enticing the Quebec National Assembly to recognize, at last, the legitimacy of Canada's Constitution. This, of course, opened the door to Robert Bourassa, soon to be Premier, to post the ransom he would demand if he was to co-sign the *Constitution Act*: Quebec's five conditions to be vested in the Constitution, not as his final list of constitutional demands, but only as the list of demands in exchange for his signature. The more drastic amendments were to be the subject of a second stage of negotiations, with Quebec's negotiating position strengthened by its recognition in the Constitution as a "distinct society," with the whole Constitution to be interpreted in the light of that recognition.

Mulroney, grandiloquent, already displaying a touch of megalomania, made a Faustian bargain with Lucien Bouchard and with nationalist and separatist Quebec. It was a bargain he had no right to make. As Prime Minister, it was his duty to uphold and defend the constitutional order, not to libel it and reward those who defamed it and refused to recognize its legitimacy. On April 6, 1989, the Prime Minister made this statement in the House of Commons:

A constitution that does not bring Canadians together, that is not accepted by all Canadians, and a constitution that does not protect the inalienable and imprescriptible individual rights of individual Canadians is not worth the paper it is written on.

He was referring to the Constitution of Canada, already contested in Quebec. In the summer of 1991, when separatism had surged to its highest level ever, Mulroney's party held its General Meeting in Toronto and adopted this resolution:

*Be it resolved that recognition of the right of Quebec men and women to self-determination be thus confirmed.*  
*Il est résolu que la reconnaissance du droit des Québécois et des Québécoises à l'autodétermination soit confirmée.*

At the time, out of a generalized ignorance of international law, most people in Quebec equated the right to self-determination with the right to secede. That resolution was an appeal

to separatists and it seemed to endorse the right to secede. Mulroney was still Prime Minister when the five experts on international law produced their opinion in 1992 that Quebec did not have a right to secede. But Mulroney, for one, never echoed that powerful testimony.

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When Mulroney ran for leadership of the PC Party in 1983, as also in 1984 when he became Prime Minister, the nationalist scene in Quebec was, at last, calm. The pollsters had stopped polling on support for separatism because it seemed an issue of the past. In March 1982, an opinion poll by CROP for *La Presse* found that 41 per cent of Quebecers favoured either sovereignty-association or independence. A year later, in March-April 1983, CROP polled again, this time for the Council on Canadian Unity, and found that support for sovereignty-association or independence had dropped by 8 percentage points, to 33 per cent. Separatism had been discredited by the 1980 referendum and neutralized by Trudeau's successful patriation of the Constitution.

In April 1983, Lysiane Gagnon wrote a column in *La Presse* in which she recalled the family gatherings that typically took place at Easter time in Quebec. She found the atmosphere now different compared to earlier years:

Je risque une hypothèse: la plupart de ceux qui, il y a trois ou quatre ans, auraient longuement débattu de questions politiques, ont parlé cette année de cinéma, de cuisine, de voyage, de sport, d'affaires du cœur.

...

Une amie de retour à Montréal après huit ans à l'étranger me dit sa stupéfaction : les amis qu'elle retrouve – tous des gens « politisés, » naguère prêts à la discussion et partisans à des degrés divers de la souveraineté du Québec – ne parlent plus de politique, encore moins de politique québécoise. Ce qui les intéresse, c'est la culture, la culture au sens très large : la vie quotidienne, le style de vie, la vie privée.

A year later, in April 1984 – the year when Brian Mulroney came to power – former Minister Marc Lalonde declared that separatism was obsolete: "It has become literature... It will continue to be there, it will still be talked about in the next election, but as a political force that carries away the new generations, in my opinion, it is dead."<sup>64</sup>

René Lévesque himself, in the three final years of his life, was discouraged about the future of separatism. His widow, Corinne Côté, confided: « En '84-'85, il était pessimiste. Même en '87, la veille de sa mort, c'était déprimant. Il n'y avait plus personne qui parlait de ça [la souveraineté]. C'était devenu le sujet à éviter au Québec.<sup>65</sup> »

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<sup>64</sup> Quoted in Graham Fraser, *René Lévesque & the Parti Québécois in Power*, Toronto, Macmillan of Canada, 1984, p. 353.

<sup>65</sup> Quoted in Louis Falardeau, « René Lévesque avait perdu espoir de voir se réaliser la souveraineté, » *La Presse*, 16 mars 1991, p. A8.

In 1981, veteran Québec journalist Dominique Clift wrote a series of articles in which he maintained that nationalism was already in decline at the time of the 1980 referendum and that it would necessarily continue to decline thereafter<sup>66</sup>.

In 1986, the year before the signature of the Meech Lake Accord, Laval University political scientist Louis Balthazar published a book, *Bilan du nationalisme au Québec*, where he made this evaluation of the political situation:

Sans aucun doute, une page d'histoire a été tournée. Depuis le début des années quatre-vingt, le nationalisme québécois a cessé d'animer l'ensemble des activités d'une société. L'esprit de la Révolution tranquille, qui avait été préservé sous Robert Bourassa de 1970 à 1976 pour être ranimé avec l'arrivée du P.Q. au pouvoir, cet esprit qui est aussi celui du nationalisme étatique est bel et bien disparu. L'État du Québec n'est plus glorifié. La nation québécoise n'est plus la référence privilégiée. Il faut donc signaler la fin d'une période de nationalisme québécois. Il appartiendra aux historiens de déterminer si cette période se termine en 1980 avec le référendum, en novembre 1981 avec la défaite constitutionnelle ou en 1985 avec la victoire libérale aux élections du 2 décembre.<sup>67</sup>

One surprise, more than anything else, had convinced Prof. Balthazar that nationalism was in eclipse: it was the tepid reaction of the Québécois to René Lévesque's disarray and defeat at the November 1981 federal-provincial conference, where nine provincial premiers joined the Prime Minister at the last minute to back his plan to patriate the Constitution. Lévesque had raged and threatened to "take every means" to prevent that great change to the Constitution from happening. But the people remained calm. There were no mass demonstrations. Lévesque had to recognize that he did not have the support he would have needed to take dramatic measures against Trudeau's designs, such as calling elections on the issue.

So Balthazar saw this as the end of a nationalist era:

La grande idée d'un Québec, État national francophone, « expression politique » du Canada français, « province pas comme les autres », était officiellement répudiée par le Canada. C'était la fin d'un grand rêve, une page de l'histoire du peuple québécois aussi triste et noire que celle du rapport Durham de 1839.

Cette situation comprenait en elle-même tous les éléments susceptibles de provoquer de grandes manifestations de nationalisme québécois : le Québec était isolé, bafoué, réduit au silence. Pourtant, rien ne se produisit. Cette majorité de Québécois sans cesse favorable au « fédéralisme renouvelé » demeura étrangement silencieuse et résignée. Pas de rassemblement, pas d'opposition concertée, quelques lettres aux journaux, sans

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<sup>66</sup> Dominique Clift, *Déclin du nationalisme au Québec*, Montréal, Libre expression, 1981, p. 167.

<sup>67</sup> Louis Balthazar, *Bilan du nationalisme au Québec*, Montréal, l'Hexagone, 1986, p. 187.

plus. L'heure était à la morosité, sinon au désintéressement quant à la question constitutionnelle<sup>68</sup>.

As late as April 29, 1988, Keith Spicer and I interviewed Lucien Bouchard for the *Télémedia* television program, "Sur la colline." Bouchard had announced that day that he would be running for Parliament as a Progressive Conservative candidate in Lac St-Jean riding. The by-election was to be held on June 20. As I wrote in my column in the *Montreal Gazette* the next day:

We asked him, of course, about his past as a Péquiste, as someone who gave speeches for sovereignty-association during the 1980 Quebec referendum campaign. He said he no longer believes that Quebec ever will be independent, and that he is working sincerely within the framework of the Canadian federation.

I stress this period of calm that followed the patriation of the Constitution because revisionist history, encouraged by Brian Mulroney and some faithful followers in the news media, has distorted the true flow of events and thereby misrepresented the lessons to be learned. Pierre Trudeau had a clear vision of what was needed to solve the threat of Quebec's secession: the recognition of the French language officially in federal jurisdiction and the promotion of the French language and French schooling across the country. Trudeau was unique in that he had challenged the conventional wisdom prevailing in Quebec during the Quiet Revolution, with its stress on building up the Quebec government and transferring jurisdictions from Ottawa to Quebec. Quebec must have, at a minimum, special status – so it was believed. And many believed that special status would be the intermediary step towards independence. But Trudeau's policies had succeeded in Quebec, even while they alienated Western Canada.

Brian Mulroney tried to put the blame on Pierre Trudeau for the rising support for separatism that developed on his own watch because he had resurrected the briefly buried constitutional ghosts. Mulroney's explanation: it was because Trudeau had patriated the Constitution without the support of Quebec. But that was a self-serving alibi, contradicted by the facts just enumerated. No, it was the reckless and opportunistic Prime Minister who, with the support of Robert Bourassa, reactivated nationalism, undermined the federalist forces in Quebec, discredited the 1982 *Constitution Act* and its vision of one Canada with two official languages. Instead, it was Mulroney who rehabilitated the Quiet Revolution's vision of Quebec as the ethnic state of French speakers. Mulroney recklessly reversed much of the constructive progress that Trudeau had achieved.

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Jean Chrétien won the elections of October 25, 1993 on a promise not to talk about the Constitution. There was a general weariness in the country after all the turbulence and regional polarization that had come to characterize the Mulroney era. Chrétien won a majority, with 177

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<sup>68</sup> *Ibid.*, p. 185.

seats in a Commons with 295 seats. But there were two reasons for concern. In Quebec, the Chrétien Liberals won only 19 of Quebec's 75 seats, and most of those were in ridings with a strong non-French population. Secondly, Lucien Bouchard's Bloc Québécois, contesting general elections for the first time, carried 54 of Quebec's 75 seats and that enabled the Bloc to form the Official Opposition.

Chrétien had some traits in common with Brian Mulroney. Both grew up in small towns far from the big urban centres. Both had then risen high in the world. Both were primarily populists with strong personalities, but without a clear understanding of the logic of liberal democracy and without clear principles to guide them. "I am a democrat," Chrétien would say again and again. But Chrétien clearly had no clear vision of democracy under the rule of law. What he should have said was: "I am a populist."

Neither Brian Mulroney nor Jean Chrétien had the intellectual or political stature of Pierre Trudeau. Chrétien was hampered by a vanity that made him unable to admit that his supposed utterance of the early 1970s, "We will let them separate," was sheer chest thumping. Pierre Trudeau, at that time the only one who mattered, would never have said: "I will let them separate." And Chrétien himself, a junior minister in the early 1970s, had no credibility to say: "I will let them separate."

But Chrétien's vanity had major national and even historical consequences. He distorted the historical record and his boast confirmed that a precedent had been established in 1980: Quebec could separate at will, whatever the Constitution said. Even Trudeau had supposedly said so, according to Chrétien's fictitious account.

After he became Prime Minister, that quotation "We will let them separate," was repeatedly thrown at him in the Commons by Opposition Leader Lucien Bouchard. Instead of confessing the truth, Chrétien usually evaded in his answers, sometimes even seeming to confirm that what he had supposedly said in the early 1970s was then applied in the referendum of 1980. Because of his character flaw, Chrétien betrayed in 1994-95 his duty to protect the constitutional order and the unity of the country.

His greatest betrayal of all occurred when Premier Jacques Parizeau revealed in December 1994 his plan for a referendum on unilateral secession and introduced his *Draft Bill Respecting the Sovereignty of Quebec*. This was the opportunity for Chrétien to correct his account of the past and assert his determination to protect the constitutional order. Instead, Chrétien's silence before a manifestly revolutionary project amounted to tacit consent and even complicity. Then, in 1995, when Guy Bertrand stepped in to defend the constitutional order and requested the support of Chrétien and Justice Minister Allan Rock, both refused him in writing, arguing that the constitutional order was not the pertinent issue. Then, when Superior Court Justice Robert Lesage declared that the *Draft Bill on the Sovereignty of Quebec* threatened the overthrow of the Constitution, Chrétien and Rock failed to act accordingly, or even to speak out against the procedure declared by the Superior Court to be illegal. Judge Lesage had refused to grant

Bertrand an injunction against holding the referendum, pointing out that all the parties including the federal government seemed to want it to proceed.

Finally, during the 1995 referendum campaign, the federal Liberals were complicit with the Quebec Liberals to exclude Guy Bertrand and the Special Committee on Canadian Unity from being allowed to argue, within the No Committee, on behalf of the constitutional order,.

After the close outcome of the referendum vote, Chrétien did refer the issue of the legality of unilateral secession to the Supreme Court of Canada, but at the same time he gave the assurance, through Justice Minister Rock, that no one would stand in the way of secession if that is what the people of Quebec clearly wanted. Then, when the Supreme Court rendered its analysis of the legality of unilateral secession on August 20, 1998, Stéphane Dion put out a press release stating again his theory that the people of Quebec would not be held in Canada against their will:

Our citizens are the big winners. The citizens of Quebec have had their right to remain part of Canada confirmed so long as they have not clearly indicated their desire to leave. In addition, they have obtained the assurance that they will not be held in Canada against their clearly expressed will.

There was absolutely no basis in the response of the Supreme Court to justify that last sentence. But Stéphane Dion would repeat that assurance – of a permission to secede – for decades afterwards. Given his status as a first-class intellectual and his prominent role in the Chrétien government, Dion’s views acquired great resonance in Quebec, encouraging the separatist movement and misleading public opinion. And, ultimately, Jean Chrétien was responsible for his minister’s misreading of the constitutional order. Chrétien himself wrote this in his memoirs: “It’s the prime minister’s duty to make sure that everyone respects both the rule of law and the fundamental laws of the land; otherwise he does not deserve to occupy the office.” But after that unequivocal statement, he returned to his equivocal ways:

“We have to be very clear that we are not preventing a future referendum in Quebec,” I explained to my Cabinet colleagues the next day. ... Our message also has to indicate that if a clear majority of Quebecers vote on a clear question to leave Canada, the country will not be held together by force. However, they cannot expect to ask a confused question and think, on that basis, that the rest of Canada is obliged to negotiate the breakup of the country<sup>69</sup>.”

The Chrétien government then adopted in the year 2000 *Bill C-20*, the *Canadian Clarity Act*. But, as demonstrated at length in Chapter III, Stéphane Dion gave his usual assurance that the people of Quebec would be allowed to secede if that is what they really wanted, thereby subverting the true message of the Supreme Court.

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<sup>69</sup> Jean Chrétien, *My Years as Prime Minister*, A Ron Graham Book (Toronto: Alfred A. Knopf Canada, 2007, p. 164.

In summary, the trio of Chrétien, Rock and Dion twisted the public perception of what the constitutional order required and so favoured illusions about secession as an unconditional choice available to the government and the people of Quebec.

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Paul Martin Jr. had his greatest impact as Jean Chrétien's Minister of Finance. Together, after they came to power towards the end of 1993, they managed a feat rare in Western democracies: they restored the soundness of the public finances of Canada after it had reached a towering debt, and they achieved this without causing a major social upheaval.

But when Paul Martin succeeded Jean Chrétien through an intra-party coup and became Prime Minister on December 12, 2003, he never displayed a clear and firm vision on the issue of secession. Previously, in opposition, after the Liberal defeat of 1984, he had joined John Turner in voting for the Meech Lake Accord and in opposing the Free Trade Agreement. During his unsuccessful leadership campaign to succeed John Turner in 1990, he had again espoused the Meech Lake Accord against Jean Chrétien who opposed it – until almost the end.

Martin showed his ideological colours by choosing as his Quebec lieutenant Jean Lapierre, the Liberal Member of Parliament who had defected in 1991 to join Lucien Bouchard in founding the Bloc Québécois. Lapierre returned to the Liberal Party with Martin as leader. But, at a press conference on February 5, 2004, less than two months after Martin's swearing-in, Lapierre engaged in the following dialogue with a reporter over *the Clarity Act*.

Je pense qu'elle ne sera jamais appliquée parce que je ne vois pas de référendum dans un proche avenir. Et, franchement, si vous voulez mon opinion, je pense qu'elle ne sert à rien.

- Qu'est-ce qui ne sert à rien?
- La loi [de la Clarté]. Parce qu'elle ne changerait pas – s'il y avait une véritable volonté au Québec de se séparer, s'il y avait une volonté claire de se séparer, vous ne pourriez pas arrêter une volonté comme celle-là en essayant de jouer avec des astuces.

So the *Clarity Act* was merely an "astuce", a trick. Prime Minister Martin was questioned that night on Radio-Canada television program *Le Point* about Lapierre's scornful dismissal of the *Clarity Act*:

**Denis Lessard** – Monsieur Paul Martin, concernant la question sur la clarté référendaire, comptez-vous abolir la loi concernant cette question?

**Martin** – Non. Non. Non, mais j'ai certainement – c'est certainement mon intention d'être tellement ouvert, ouvert au Québec, que jamais ce sera nécessaire de l'utiliser.

**Lessard** – Monsieur Jean Lapierre, votre nouvelle recrue, a dit aujourd'hui, M. Martin, que cette loi que vous avez appuyée, elle est inutile, et que, quoi qu'il arrive, les Québécois n'en tiendront pas compte. Vous êtes d'accord avec M. Lapierre?

**Martin** – Bien, ce que monsieur Lapierre a dit, c'est on veut le mettre dans le tiroir, là, parce que le genre de Canada qu'on veut, le genre de Québec qu'on veut, c'est un Québec qui va bâtir pour l'avenir, qui va penser des questions de santé, des questions de chômage; puis ça, c'est des questions vraiment qui touchent le monde. Et si on est capable de bâtir une société juste, et une société où nos jeunes ont beaucoup d'ambition, puis la capacité de réaliser leurs rêves, jamais ça sera nécessaire de l'utiliser.

**Lessard** – Mais si il y a un référendum, vous en tiendriez compte à cette fois-là?

**Martin** – Bien, c'est la loi. Mais je vous dis quelque chose. Moi je pense qu'il y aura jamais – certainement, pendant moi que je suis premier ministre, il y aura pas de référendum parce qu'on va avoir le genre de pays où les Québécois vont vouloir bâtir un Canada plus fort.

The Prime Minister chose to be evasive on an issue concerning the rule of law in the event of a referendum on secession. He chose not to give a clear answer. He spoke of putting the *Clarity Act* into a drawer. And he gave the assurance that it would never be needed while he was Prime Minister. By his silence on the central issue, by not correcting the statement made by Lapierre, by choosing evasion rather than a statement supporting the *Clarity Act*, Martin contributed to the general confusion over the conditions of secession and strengthened the conventional wisdom that secession would occur if a majority in Quebec voted for it in a referendum.

Two years later, Martin was defeated by Stephen Harper.

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Stephen Harper, heading a minority government, was sworn in as Prime Minister on February 6, 2006. He had achieved that improbable goal by successfully uniting two parties, the Progressive Conservative and the Canadian Alliance. He was an introvert, without the populist charm of Jean Chrétien or Brian Mulroney. But he was like Pierre Trudeau in that he had a clear and coherent vision. He and Trudeau had both understood that ideas matter. Both came to their respective national visions after much study and reflection.

Harper was born in 1959 in a suburb of Toronto. After graduating from high school at the top of his class, he dropped out of first year university to move to Edmonton and work for three years at a low-level job before returning to university in Calgary to study economics. He had felt compelled to find his own way rather than take the conventional path to university after high school.

He embraced the interests of Western Canada. In high school, he had been a member of a Young Liberals Club. But he was outraged by the Liberals' nationalist policies on oil following the 1973 Yom Kippur War against Israel, when the Arab-dominated Organization of Petroleum Exporting Countries (OPEC) retaliated by cutting back on output of petroleum and banning oil exports to Israel's ally, the United States. The price of a barrel of oil soared from \$1.80 to \$32. The Trudeau government imposed a tax on exports of oil and used the money to subsidize the

price of oil in the Eastern provinces. Alberta was made a cash cow for the rest of the country. Then, in 1980, the Trudeau government imposed the National Energy Program, which removed governmental control of the oil industry from Alberta to Ottawa. Harper later wrote:

By the time Mr. Trudeau embarked on the National Energy Program, I was living in the West. I witnessed first-hand the movement of an economy from historic boom to deep recession in a matter of months. A radical, interventionist blueprint of economic nationalism, the NEP caused the oil industry to flee, businesses to close, and the real-estate market to crash. The lives of honest, hard-working Albertans were upended, and I came to know many of those who lost their jobs and their homes.

In 1977, economics and finance didn't much matter to me. Beginning with the NEP, Mr. Trudeau would show me that they did matter – a lesson he never bothered to master himself.

In the summer of 1984, Harper became actively involved in the election campaign which would see Brian Mulroney sweep the country with 211 seats on September 4. That included all of Alberta's 21 seats and 58 of Quebec's 75 seats – an astounding turnaround for the Progressive Conservative Party. A year later, after graduating with a B.A. in economics, Harper was invited to Ottawa to work for his member of Parliament, Jim Hawkes. It was another decisive experience.

His boss, Jim Hawkes, was head of a committee of members of Parliament studying the unemployment insurance system in Canada. Three distinct royal commissions, including Donald Macdonald's *Royal Commission on the Economic Union and Development prospects for Canada*, had come to the same conclusion in 1985: that the unemployment insurance system had perverse consequences and must be drastically reformed. There was a need to separate the genuine insurance program for workers between jobs from what had become a welfare program for seasonal workers. In Newfoundland, a *Royal Commission on Employment and Unemployment*, headed by Memorial University Sociologist Douglas House, made this analysis in its report titled *Building on Our Strengths*:

The commission argued that the status quo undermined the intrinsic value of work, good work habits and discipline, the importance of education, personal and community initiatives, and the incentive to work. It also discouraged self-employment and small-scale enterprise. In addition, the make-work aspects of the UI system encourage political patronage and distorted the efforts of local development groups. Finally, the UI system had become "a bureaucratic nightmare" which was vulnerable to manipulation and in which the role of officials had become distorted.

Harper, as Hawke's assistant, was intensely involved with analyzing the UI system. He attended the meetings of the MPs studying UI to formulate their own proposals. In the end, not only did the MPs refuse to separate UI from welfare, but the government decided to further expand the existing system at an additional cost of \$1 billion, for a total annual cost of \$12 billion. Harper

was shocked and disillusioned at the economic irrationality and the political opportunism shown by the Mulroney government. That was in addition to his repugnance for the total phoniness of debates in the House of Commons.

Harper returned to the University of Calgary in 1986 to study for a master's degree in economics. He soon experienced another political shock. In October 1986, the Mulroney government made a decision that outraged all of Western Canada. It announced that the maintenance of the newly acquired fleet of 138 CF-18 fighter jets would be confided to Montreal's Canadair rather than to Winnipeg's Bristol Aerospace. The contract, worth \$1.2 billion, went to Montreal even though the jury that the government had appointed to evaluate both bids had found that the Winnipeg bid represented "the most favourable price and technical proposal."

This event occurred in the context of Mulroney's attempt to revise the Constitution of Canada to the satisfaction of Quebec's nationalists. Six months later, on April 30, 1987, Mulroney would triumphantly announce the agreement he had cajoled from all 10 premiers: the Meech Lake Accord. In Harper's perception, ever since the Quiet Revolution, the constitutional and jurisdictional demands of Quebec had dominated the agenda of successive governments of Canada, while the interests of Western Canada were ignored.

Moreover, the model of government that had emerged in Quebec since the 1960s was that of the welfare state and of the intrusive state that opted for a state-planned economy. All of Quebec's provincial parties, and there were several that came and went, wanted a bigger and better Quebec government.

Both models, the welfare state and the economic planning state, were abhorrent to Harper, who adopted the theories of Austrian economist Friedrich Hayek. Harper read the English translation of a volume by Hayek, published in 1944 under the title of *The Road to Serfdom*. Hayek rejected a planned economy on two grounds. First, it was a threat to freedom. It logically led to a cycle of planning, followed by economic failures because no planner could anticipate all the complexities of reality over time. The failures would then be followed by more planning to remedy the failures, and then again, more failures followed. The logic of a planned economy engaged the society on a course toward totalitarianism. Then, secondly, Hayek opposed the planned economy on strictly economic grounds. He argued that a national economy demanded an incalculable number of decisions and choices spread over time in a process that went from planning to production, to delivery, to consumption. No single mind, no committee of minds, was knowledgeable enough and wise enough to make those decisions for all the members engaged in the economy. On the other hand, a "spontaneous order" emerged if millions of people were left free to make their own choices and decisions in the marketplace, while taking the consequences of their decisions.

This would be Harper's fundamental philosophy. He would not be consistent in applying it, because he was also a compulsive tactician, often at the expense of his principles. But it provided the overall direction of his vision. It also placed him in opposition to the major

directions taken by Quebec's governments. His discontent with the direction of the country led him to join Preston Manning in founding the Reform Party of Canada.

Harper's policies regarding Quebec were best exposed in a speech he delivered at the biennial assembly of the Reform Party in April 1991. There was then tension across the country. After the failure of Meech Lake in June 1990, separatism surged in Quebec. The Quebec Liberal Party had in March adopted in convention the Allaire Commission's recommendation that the Liberal Party hold a referendum on secession no later than the following year. A similar proposal was made after extensive public hearings by the Bélanger-Campeau Commission, as quoted above in Lucien Bouchard's long speech. It seemed that the country was on the verge of rupture. Harper addressed the party as Reform's director of policy. His speech was entitled "The Reform Vision of Canada." In it, he rejected any form of special status for Quebec, as well as the alternative of a massive devolution of powers to all the provinces.

"Will the three major federal parties agree that no major change in the terms of Confederation should take place without the consent of the public?" Harper suggested that change to the Constitution should no longer be decided by "executive federalism," at a meeting between the Prime Minister and the 10 premiers, such as had taken place at Meech Lake. Either a referendum should be held on such change, or, at a minimum, such a change should have been the central issue in a federal election.

Then he laid out his principles for the future:

Reformers want a strong country built by those who want in. For nearly 30 years, political elites have pursued constitutional change on the premise that Canada must accommodate those who wish to divide it in order to stay together. Canadians are rejecting that premise. A country must be built on its strengths. At this point in our history, that means starting to build a constitutional consensus among the nine provinces and the two territories that have a deep commitment to Canada as one nation. The government of Quebec says it wants to know what the rest of Canada wants. This request must be answered.

Reformers want a genuinely federal system, including a strong national government with strong regional representation, and strong provinces to protect cultural identity and regional character.

...

At the same time, it is the proper role of the provinces to protect those things that make them distinct. All provinces must control their own jurisdictions without federal interference, and all provinces must have equal legislative authority.

To protect the jurisdictions of the provinces, Harper proposed a "Triple-E" Senate, that is, a Senate where every senator was Elected, the number of senators representing each of the provinces was Equal, and the Senate would be Effective, that is, not be a mere mouthpiece for the party with a majority in the Commons. That was a proposal that would be unacceptable to

Quebec because it increased the power of the Senate instead of increasing the power of the Quebec government.

But, at the same time, Harper proposed that each province should have priority jurisdiction over the official language or languages in its province:

Most importantly, we would propose that, subject to the Charter of Rights, jurisdiction for matter of language and culture should rest with the provinces. This could be extended to include provincial jurisdiction even in the language of federal administration in the provinces.

One of the significant resolutions adopted at that 1991 Reform assembly, seconded by Harper, was that the party would henceforth present candidates across the country, rather than only in Western Canada as had been the policy. That would take effect in the federal elections of 1993.

After Harper was elected to the Commons on October 25, 1993, the issue of secession would be constantly raised by Opposition Leader Lucien Bouchard. Then, on December 6, 1994, Jacques Parizeau presented his *Draft Bill on the Sovereignty of Quebec* and his plan to mobilize Quebec for a referendum on unilateral secession. It was Stephen Harper, more than anyone else, who defended the constitutional order, abandoned by the Chrétien government. Even Preston Manning vacillated. He defended the constitutional order. But, as a populist, he also believed that a majority vote against the federation would give Quebec the right to secede.

When the referendum campaign took place in September-October 1995, the attitudes of politicians from Quebec, whether in Quebec City or Ottawa, treated it largely as a family matter. The voices from other provinces were mostly ignored. The principle of federalism seemed to be suspended. And, by the end, the mishandling of the entire issue by the Chrétien government became glaringly evident to everyone except possibly Chrétien<sup>70</sup>.

A year after the referendum, concerned by the way the Chrétien government had mishandled the referendum, Harper introduced a private member's bill on October 20, 1996. It was titled *Bill C-341, An Act to establish the terms and conditions that must apply to a referendum relating to the separation of Quebec from Canada before it may be recognized as a proper expression of the will of the people of Quebec*. Its short title was the *Quebec Contingency Act (Referendum Conditions)*.

Section 8 of the bill stated:

A unilateral declaration of independence by the government of Quebec or the legislature of Quebec, or the refusal of either to submit to any Canadian law that applies

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<sup>70</sup> On December 20, 1995, *La Presse* published an article by Presse Canadienne reporter Huguette Young with this headline: « Content de lui-même, Chrétien ne voit pas de raisons de partir. »

in Quebec is unlawful and of no force and effect with respect to the Constitution of Canada and the general laws of Canada and does not affect:

- (a) the jurisdiction of Parliament to pass laws that have effect in Quebec;
- (b) the ability of the Government of Canada to govern Quebec as a province of Canada;
- (c) the jurisdiction of the courts to apply the law of Canada in Quebec; or
- (d) the continuance of Quebec as a part of Canada under Canadian law.

Quebec could hold a referendum on secession, as the bill recognized. But, if the question asked was ambiguous, as it was in 1980 and 1995, Section 2 announced that the referendum would not be recognized as valid. If, in holding the referendum, the Quebec government stated or implied that the results of the referendum would authorize a unilateral declaration of independence, again the referendum would not be recognized. And the non-recognition would not be merely a matter of empty words. Section 4 of the bill spelled out the consequences:

4 (a) The Minister of Foreign Affairs shall advise the representative in Canada of every State with which Canada has diplomatic relations that Canada does not recognize the referendum or plebiscite as valid.

4 (b) The Minister of Intergovernmental Affairs shall inform the Government of Quebec that Canada does not recognize the referendum or plebiscite as valid.

The bill did not declare that secession could not be considered. It simply set conditions. If the referendum question was deemed clear and the process was in accordance with the terms of the Constitution, “the Government is authorized to enter into discussions with the government of Quebec to conclude an agreement on the terms on which Quebec might separate from Canada.”

But Section 7 of the bill made clear that the “discussions” would not be easy:

In any discussion, the Government of Canada must:

- (a) consult with the provinces to seek the consent of each province to the terms;
- (b) obtain the consent of any province to any matter that requires an amendment to the Constitution of Canada to which the province must consent;
- (c) require the inclusion of a provision that the agreement will not become effective until is approved by a majority of voters who reside outside Quebec, decided by a vote in a referendum under the *Referendum Act*; and
- (d) permit the inclusion of a provision allowing for the government of Quebec to seek the approval of voters who reside in Quebec, decided by a vote in a referendum or plebiscite under Quebec law.

Harper’s bill would have brought Canada more in line with the legal systems of most democracies, even while being more permissive towards secession than most. But public opinion on the issue was so corrupted that his bill was considered beyond the pale of reason. It died on April 1997 when the 35<sup>th</sup> Parliament was prorogued for elections. But Harper’s bill

demonstrated better comprehension of the constitutional order than was demonstrated by any other politician in Canada. It was not far removed from the reply that the Supreme Court would deliver to the reference in 1998.

It was also better than the *Clarity Act*. That legislation only spelled out the conditions under which the federal government would consent to enter into negotiations on secession after a referendum with a clear question and a clear answer. But the *Clarity Act* did not enunciate all the conditions to which Quebec must comply to achieve a legal secession. The *Clarity Act*, for instance, did not deal with how the federal government would respond to a unilateral declaration of independence. And yet, to judge by all the official programs of the Parti Québécois, a UDI was the most likely choice of a Quebec bent on secession. Harper's bill dealt with that possibility.

Harper did not complete his first term as a member of Parliament. On January 14, 1997, he announced that he was resigning his seat to join the National Citizens Coalition as vice-president, and eventually to succeed as president. He had views that conflicted with those of Manning, the populist. As head of a conservative lobby group, he would be free to advocate whatever principles he chose. Among the causes that Harper's NCC would support financially was the court case launched by French-speaking parents in Quebec who insisted on their right to choose English schooling for their children. They lost. The NCC also raised money to enable lawyer Brent Tyler to challenge Quebec's law regulating commercial signs, requiring that the French language be twice as prominent on the sign as all other languages combined. That also proved to be a lost cause.

Harper returned to active politics once again after the Reform Party was replaced, first by the "United Alternative" and then, on March 25, 2000, by the Canadian Alliance. Preston Manning was succeeded by Stockwell Day, who, as a member of the Alberta legislature, had supported the Charlottetown Accord. The Canadian Alliance Party had become divided, with 13 of its members of Parliament sitting in the Commons with the Progressive Conservatives. Stockwell Day had accumulated so many gaffes that most of his initial key supporters now turned to Stephen Harper begging him to run for the leadership of the Canadian Alliance. He accepted and won on April 20, 1992. As a candidate for the leadership, he had made clear his position on Quebec's secession: "Any act of secession on the part of any part of the country must be done within the confines of the current Constitution, which includes the rule of law and clear democratic consent."

Harper was elected to Parliament in 2002 in Preston Manning's former seat of Calgary Southwest, and he then became Leader of the Opposition. After the reuniting of the Canadian Alliance and the Progressive Conservative Party in 2004, Harper ran for the leadership of the Conservative Party of Canada and defeated Belinda Stronach. Elections followed in that year of 2004, with Harper's Conservatives leading for a while in the polls, but a lack of discipline among some Conservative candidates and their provocative talk undermined the Conservative campaign. Paul Martin won a minority government. Then, in elections in 2006, the respective situations of the two parties were reversed and Harper formed a minority government.

A key moment in the campaign was his speech in Quebec City on December 19, 1995. He used words that resonated: he promised “un fédéralisme d’ouverture.” And he spoke in a French that was much improved. He also showed his respect for Quebec as the birthplace of Canada:

The foundation of Quebec City is also the birth of the state that became Canada. We must never forget that Canada was founded in Quebec City and founded by Francophones. That is why I say that Quebec is the heart of Canada, and the French language an undeniable part of the identity of all Canadians, although I admit that some of us cannot speak it as well as we should.

In his speech, Harper attacked Paul Martin for the corruption scandals revealed by the Gomery Commission. But the words that were more significant were those in which he defined his policy towards Quebec.

Instead of the old paternalistic and arrogant attitude of the federal Liberals, and the blind and sterile obstruction of the Bloc Québécois, a Conservative government will practice an open federalism. We will recognize provincial autonomy as well as the special cultural and institutional responsibilities of the Quebec government. We will respect federal and provincial jurisdictions, as defined by the Canadian Constitution.

I want to emphasize specifically today that we will develop mechanisms to allow the provinces a greater role in their own jurisdiction as they relate to the international arena. I know, for example, that the Charest government would like Québec to play a greater role in UNESCO-related competencies. A new Conservative government will invite Québec to participate in UNESCO according to the model for the Francophone Summit. We will work to eliminate the fiscal imbalance between Ottawa and the provinces... We will monitor the federal spending power, which has been so abused by the federal Liberals. This outrageous spending power gave rise to domineering and paternalistic federalism, which is a serious threat to the future of our federation. The fiscal imbalance is not just a budget problem – while a lot of money is involved, the functioning and the very spirit of the Canadian federation are at stake.

These words hit the notes of many of Quebec’s traditional demands. On election night, January 23, Harper’s Conservatives won 124 seats to Martin’s 103. In Quebec, the Conservatives won 10 seats, with 24.6 per cent of the vote. In 2004 the Conservatives had won no seat, and only 8.8 per cent of the vote. The Liberals won fewer votes, 20.7 per cent, but took more seats: 13. Gilles Duceppe’s Bloc Québécois won 51 seats, 3 fewer than in 2004, and his share of the vote fell back to 42.1 per cent, from 49.8.

As Prime Minister, Stephen Harper generally chose to show respect for the French language by beginning most of his speeches and press conferences in French. In general, he did not launch programs that would intrude into areas of Quebec’s jurisdiction.

He did take two initiatives that further defined his attitude towards Quebec, and its secession.

On November 22, 2006, Harper introduced a brief but controversial motion:

That this House recognize that the Québécois form a nation within a united Canada..

Que cette Chambre reconnaisse que les Québécoises et les Québécois forment une nation au sein d'un Canada uni.

By using the words “the Québécois” in English and « les Québécoises et les Québécois » in French, Harper made it clear that he was recognizing a sociological nation, not a political nation and it gave the recognition in a language that excluded secession. Afterwards, journalists often wrote that he had recognized “Quebec” as a nation. He did no such thing. He was merely recognizing a reality that had existed since 1867.

The second action was more controversial. In October 2013, his government announced that it would intervene in the court case brought by Keith Henderson against the constitutionality of *Bill 99*. There was an outcry from all the Quebec provincial parties in the National Assembly, which passed a unanimous motion denouncing his action. But Harper made clear by that action that he would enforce the constitutional order against any attempt at unilateral secession.

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We have seen that Quebec’s provincial political parties were unanimous in defending Quebec’s unconditional right to secede from Canada. At the same time, three Prime Ministers of Canada subverted the constitutional order. Stephen Harper was the exception. Now, what about Quebec’s news media and opinion leaders? When the Supreme Court of Canada delivered its response to the reference on secession, would it change their minds?

After the close results of the referendum vote of October 1995, two big questions agitated public opinion in Quebec and in Ottawa. The first question: does Quebec have a right to secede from Canada? The second question: if Quebec secedes, will it retain its current boundaries, or is Quebec indivisible?

As we saw in Chapter I and especially in Chapter II of this essay, public opinion in Quebec overwhelmingly shared the same answer: Canada is divisible, Quebec is indivisible. Not only was that answer firmly held, but those who argued otherwise were generally treated as extremists, as ignorant, as anti-Quebec, as marginals or even as part of the “lunatic fringe.”

Here are some of the opinion leaders for whom Canada was divisible, Quebec indivisible: Charles Taylor, Peter White, Claude Forget, Alex Paterson, Gregory Baum, Françoise David, Desmond Morton, Guy Rocher, Neil Bissoondath, Joseph Rabinovitch, Claude Corbo, Senator Pietro Rizzuto, Marion Dove, Jane Jenson, Andrew F. Johnson, Antonia Maioni, Margie Mendell,

F. Leslie Seidle, Elizabeth Abbott, Arabella Bowen, Gary Caldwell, Anne Michèle Meggs, Henry Milner, Consolato Gattuso, Alfredo Folco, Donato Taddeo and Renzo Viero.

Here are some journalists who declared that Canada was divisible, Quebec indivisible: Lysiane Gagnon, Alain Dubuc, Joan Fraser, Don Macpherson, Gretta Chambers, Jennifer Robinson, Rosemary Speirs, Jeffrey Simpson, Michel C. Auger, Michel Venne, Michel David, Raymond Giroux, Michel Vastel, Murray Maltais, Jean-Jacques Samson, Manon Corneillier, Gilles Lesage, Pierre Gravel and Philip Preville.

In the event, the Supreme Court, in its reply to the reference, repudiated the conventional wisdom shared by the list of people named above. The court declared that Quebec did not have a right to secession, but, constitutionally, secession was possible. In the event of secession, the court also indicated, Quebec was divisible. Negotiations must be engaged after a clear answer was given to a clear referendum question on secession. But, in these negotiations, Quebec's interest in achieving independence did not trump the interests and rights of the other provinces, of Aboriginals and minorities. And everything must be done within the framework of the constitutional order. If the negotiations failed to reach an agreement, this would not confer on Quebec a right to secede. Secession can only be done legally by an enabling amendment to the Constitution.

That, in sum, was the message of the Supreme Court. But that message was not understood by the journalists who covered the event on that August 20. And why? Because most of them misunderstood a new and unexpected requirement introduced by the Supreme Court: the obligation for the partners of the Canadian federation to meet and negotiate in the event that a referendum on secession yielded a clear answer to a clear question.

Three journalists covered the event for *Le Devoir*. The news story on the Supreme Court's advisory opinion was written in Ottawa by reporter Michel Venne. The news story on the reaction of the leaders of the Parti Québécois and the Liberals was written in Quebec City by Mario Cloutier. Then, the editorial commenting on the court's advisory opinion was written by Bernard Descôteaux, *Le Devoir's* editor-in-chief and newly appointed publisher.

What is remarkable is that neither of the three did an analysis of the Supreme Court's central message that secession must be carried out in accordance with four fundamental principles, namely democracy, federalism, constitutionalism and the rule of law, and the rights of minorities, notably the Aboriginals. Not one of the three journalists even mentioned the four principles, never mind analyzing them and bringing out their implications. Instead, the three mostly celebrated aspects of the advisory opinion that they judged favourable to the separatist cause.

Michel Venne's reportage was carried on the front page the next day under the headline: "Une accalmie" – the calm, presumably, after an expected storm. The theme of Venne's report was that the separatists were relieved, and the federalists were worried by what the Supreme Court had laid down.

Hier, les marchés financiers autant que Jean Charest appréhendaient la réaction du Québec à cet avis du plus haut tribunal au pays. M. Bouchard allait-il profiter de l'opinion des juges suprêmes pour déclencher des élections? Lui-même y avait déjà fait allusion dans des discours passés. Si la cour avait nié le droit du Québec de décider de son propre avenir, il aurait pu appeler le peuple aux urnes pour faire mentir les juges et affirmer le droit du Québec à l'autodétermination.

Venne was assuming that the court had not denied that Quebec had a right to choose its future. That was untrue. The court had denied that Quebec had a *right* to secede, either under Canadian or international law. It had only recognized a conditional possibility, not a right. Moreover, Venne confused the issue by citing the right to self-determination as though it implied the right to secede – a common mistaken assumption in Quebec.

Venne then went on to assume that the government of Lucien Bouchard had been vindicated in its constant presumption that Quebec could secede unilaterally:

Or l'opinion de la cour donne au contraire satisfaction au gouvernement Bouchard, qui n'y trouve aucun prétexte à déclencher des élections existentielles. Certes, certains péquistes pourraient le regretter. Une campagne électorale déclenchée dans un contexte aussi dramatique aurait pu faciliter la tâche au PQ en faisant glisser au second rang des préoccupations le bilan du gouvernement.

Mais l'argument électoral perdu est compensé par le fait que l'avis de la Cour suprême donne aux souverainistes des arguments plus forts et plus précieux à utiliser lors d'un éventuel débat référendaire.

...

Rasséréné par la cour, le gouvernement Bouchard ne semble voir aucune raison de raviver le débat sur la souveraineté, ni au sein de la population ni au sein du parti. Le PQ semble satisfait de son programme actuel, il trouve que la question posée en 1995 était claire et que la majorité absolue est assez claire pour répondre aux critères de la Cour suprême.

Venne was suggesting here that Premier Bouchard found no incompatibility between the PQ official program, which proposed unilateral secession with negotiations on other matters than the acquisition of sovereignty, and the doctrine spelled out by the Supreme Court. But Venne could only write that because he had not considered the impediments to unilateral secession that the court had raised.

I will give only one more example to illustrate Venne's superficial understanding of what the court had really said:

Enfin, lorsque, dans le reste du Canada, on va s'apercevoir des effets positifs de cet avis de la Cour suprême pour le mouvement souverainiste du Québec, c'est toute la

stratégie fédérale qui sera remise en cause par ses allies partout au Canada, ce qui risque d'affaiblir encore davantage le leadership du gouvernement libéral à Ottawa et susciter la prudence de sa part plutôt que l'initiative.

Now let us consider the celebrative report of Mario Cloutier from Quebec City:

Le ministre des Affaires intergouvernementales canadiennes, Jacques Brassard, a qualifié le gouvernement fédéral « d'arroseur arrosé » et a indiqué que la position du Québec demeurerait « claire et inchangée »; tandis que le chef libéral Jean Charest pense qu'il s'agit de la « fin du plan B » et d'un retour à la case départ ».

Les deux principales formations politiques québécoises sont d'accord pour lire dans l'avis de la Cour suprême que le droit du Québec de décider de son avenir est confirmé et qu'il doit être débattu dans l'arène politique. Bref, personne ne s'est dit surpris hier.

So both Péquistes and Liberals believed that Quebec's right to decide its future was confirmed by the Supreme Court. There was not the slightest reference to the fact that the court had denied a *right* to secede and had raised very demanding conditions for secession to take place legally.

Another misreading by both parties concerned the Supreme Court's repeated insistence on a clear answer to a clear question and an "enhanced majority" before negotiations could be precipitated. That posed no question at all for Péquistes or Quebec Liberals:

Le gouvernement et l'opposition sont également d'accord sur le fait que seule l'Assemblée nationale doit décider du contenu de la question référendaire. Quant aux résultats, un vote de 50 % plus une voix sera suffisant aux yeux des deux partis, mais des nuances ont tout de même été apportées hier.

« C'est cette règle qui s'appliquait en 1995 et en 1980, explique le ministre Brassard, c'est cette règle qui s'applique dans toutes les démocraties du monde. C'est cette règle qui va continuer de s'appliquer. Pour nous, cette règle constitue une majorité claire. »

Perhaps no better example can be offered of how the advisory opinion was totally distorted by Quebec's politicians than the following words attributed to Minister Brassard:

Il a rappelé que le gouvernement du Québec était absent du processus de renvoi parce qu'il ne voulait pas reconnaître à la Cour la capacité de se prononcer sur le droit du Québec de décider de son propre avenir. Il se dit rassuré maintenant de voir que le plus haut tribunal du pays reconnaît ce droit inaliénable.

Bernard Descôteaux's editorial was somewhat more sophisticated than the texts by Venne and Cloutier. But Descôteaux also took short-cuts with the advisory opinion and failed to render the real thrust of what the advisory opinion meant for Quebec. He expressed his satisfaction that

Jean Chrétien and Stéphane Dion had been taught an unexpected lesson after sending a reference to the court:

Eux qui voulaient clarifier le processus d'accession à la souveraineté ont obtenu des clarifications qu'ils ne recherchaient pas. Ainsi, les juges consacrent, au grand plaisir de Québec, trois idées qui sont généralement plutôt mal reçues par les fédéralistes : le caractère légitime du projet souverainiste, la divisibilité du Canada et l'obligation de négocier avec le Québec advenant un vote favorable à la souveraineté.

Descôteaux uttered a big lie here. The court did not “consecrate” the legitimate character of the sovereignist project. The sovereignist project was carried by the Parti Québécois, and its official program proposed a secession or independence proclaimed by the National Assembly, not obtained by an amendment to the Constitution of Canada. So the court was speaking of the legitimacy to move on to the next stage, that of negotiations, not the legitimacy of secession as such.

Then, Descôteaux had the court recognizing the divisibility of Canada, but he omitted to mention the onerous conditions set by the court for that partitioning of Canada to take place. One of the subjects proposed by the court for negotiations was establishing the frontiers of a seceding Quebec. Finally, he celebrated the court's requirement for negotiations, but without mentioning the requirement of a clear answer to a clear condition as a precondition.

Descôteaux, like other reporters covering the event, failed to examine what the court meant by the obligation to negotiate. This was not linked specifically to a referendum. It was proposed as an obligation imposed by mutual respect between the partners in the federation. So that obligation to negotiate applies equally to any proposal by any province to amend the Constitution. This means that there is no presumption that the negotiations will result in the province obtaining exactly what it wanted: the rights and interests of all the partners are to receive equal weight. This is what neither Descôteaux, Venne nor Cloutier nor the leaders quoted in Quebec City understood.

Similarly, Descôteaux misunderstood the requirement of a clear question and a clear answer to precipitate the obligation to negotiate. He saw it strictly from a one-sided perspective:

Les juges ont su être prudents et ne pas intervenir dans ce qui est à leurs yeux du ressort du politique. Ils ne définissent pas ce que doit être une question claire et une majorité claire et ils se gardent bien de donner au gouvernement fédéral et aux provinces le droit d'intervenir dans la définition de l'un ou de l'autre. Or, en toute logique, il s'agit d'une responsabilité qui revient au Québec. Personne ne peut le contester. Dans le même esprit, ils préviennent que la négociation qui suivra un éventuel référendum sera strictement politique. Ceux qui imaginent la Cour suprême surveiller cette négociation doivent oublier cela.

Contrary to what Descôteaux stated, nowhere did the court withhold from the federal government and the other provinces the right to “intervene in the definition” of a clear question and a clear answer. The need to ensure that the question was clear and the answer clear was stated repeatedly by the Supreme Court, without ever giving the Quebec government a monopoly on defining both.

The editorialist returned to the position argued before the courts by the Quebec government, namely that secession is a purely political matter and the court has no jurisdiction over it. Clearly that is nonsense. The constitutional structure remains in place for the negotiations following a referendum, and if one side tries to abuse the procedure, the other side can appeal to the court. The very fact that the court insisted that an amendment to the Constitution must be adopted before secession can legally occur means that the federal government and the provinces have active roles to play. They would not be rubber stamps.

Another twisting of what the court said: « La négociation qui suivra un referendum gagnant était aux yeux de tous les acteurs politiques, y compris des souverainistes, une nécessité. » The court insisted that the negotiations must deal with obtaining an amendment to the Constitution enabling Quebec to secede. That was never what the PQ program entailed.

From his several misrepresentations of what the court said, Descôteaux drew a false conclusion:

Quoi qu’en dise aujourd’hui Stéphane Dion, le plan B aura fait boomerang à plus d’un égard. Il serait sage pour le gouvernement de Jean Chrétien de faire une pause et de revenir au Plan A, le plan de l’apaisement, du dialogue avec le Québec et les autres provinces.

In fact, Plan B had boomeranged only in the minds of those who, like Descôteaux and Venne, did not understand what the Supreme Court ruled.

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Canada’s most influential newspaper, the *Globe and Mail*, assigned two journalists to cover the unveiling of the Supreme Court’s reply to the reference on secession. One was to cover both the ruling itself, but also the various reactions to the ruling by a number of politicians. That was a lot of ground for one reporter to cover. The other journalist was a member of the newspaper’s editorial board and his assignment was to pass judgment on the ruling in an editorial.

The reporter was the well-known political journalist Graham Fraser – the future Commissioner of Official Languages – who had covered politics in Quebec during the turbulent years before and after the 1980 referendum. He authored a book on the subject, *PQ: René Lévesque and the Parti Québécois in Power*, published in 1984.

His report, appearing the next day on the front page of the *Globe and Mail*, was titled:

#### DAY OF DECISION

The Quebec ruling: Canada must negotiate after Yes vote  
Supreme Court rejects unilateral secession, but says Quebecers' wishes can't be ignored

Graham Fraser focused his report on the court's imposition of an obligation to negotiate in the event of a clear question and a clear answer in a referendum on secession.

OTTAWA ONT - The Supreme Court of Canada has made it clear that the rest of Canada would have to negotiate with Quebec after a clear referendum result in favour of secession.

In a unanimous decision, the nine judges found that while it would not be possible for Quebec to secede unilaterally, the provinces and the federal government would be obliged to negotiate with Quebec in good faith if a clear majority voted Yes to secession in a referendum on an unambiguous question.

Response to the decision was muted yesterday, with none of the interested parties -- federalists, Quebec nationalists, native leaders or the provinces -- emerging either jubilant or irate. But constitutional authorities stressed the importance of the obligation to negotiate.

"The constitutional obligation to negotiate -- that's new in the jurisprudence," said Conservative senator and constitutional law professor Gerald Beaudoin. "I am very impressed -- that's quite something."

However, Fraser, like the journalists of *Le Devoir*, failed to explore the origin of the obligation to negotiate as a general principle rather than a defining obligation in the context of secession. He therefore failed to bring out the limited consequences of the obligation to negotiate and to examine its (limited) implications in the context where each provincial partner has an equal right to assert its own provincial rights and interests.

Where Michel Venne, Mario Cloutier and Bernard Descôteaux had each presented a biased and superficial analysis of what the Supreme Court had said, Fraser passed up altogether an analysis and its implications. He mostly quoted a few lines from the Supreme Court's ruling, but without analysis. He did not, for example, discuss the central issue which the Supreme Court raised, which was that secession must be considered as the interplay and the tension between four fundamental principles, democracy, constitutionalism and the rule of law, federalism and the rights of minorities.

Instead, Fraser concentrated on reactions to the ruling. He noted the muted response of the financial markets. He quoted the reactions of Gérald Beaudoin, Jean Chrétien, Stéphane Dion,

Anne McLellan, Jacques Brassard, Gilles Duceppe, Preston Manning, Jean Charest and Guy Bertrand. But on the central issue of the day – what the Supreme Court really said and what it meant for the future of Canada – Graham’s report remained vague. He did not note, for example, one important fact that the court made plain: the frontiers of a seceding Quebec would be established by negotiations. So Quebec, like Canada was divisible.

The unsigned editorial that was published in the *Globe* the next day was a catastrophe. It got several key issues dead wrong. It was titled:

Confederation is voluntary

Quebec can’t leave of its own accord – but neither can Canada force it to stay.

Confederation is *voluntary*? The court said no such thing. But the editorial writer distorted the court’s definition of “unilateral secession” so as to make secession seem easily accessible:

Is this what Ottawa had in mind when it asked the Supreme Court whether Quebec had a narrow right to “unilateral” secession under Canadian or international law? The court’s answers were predictable. No. Indeed, Quebec’s separatist governments have never officially proposed unilateral secession in the meaning adopted by the court – “that is, without principled negotiation with other participants in Confederation...”

On the other hand, Ottawa has already conceded in words what the court now defines as constitutional law. Speaking to Parliament two years ago, former justice minister Allan Rock said, “The leading political figures of all the provinces and, indeed, the Canadian public have long agreed that this country will not be held together against the will of Quebecers, clearly expressed. And this government agrees with that statement.”

The court did not define unilateral secession as merely “without principled negotiations with other participants in Confederation.” That is taken out of context. The court insisted that secession must be achieved by *successful* negotiations, that is, negotiations that ended with an agreement and an amendment to the Constitution.

The editorial writer quoted Allan Rock’s statement of September 26, 1996. But he should have realized, after reading the Supreme Court’s reply, that Rock’s statement was incompatible with the doctrine of the Supreme Court.

Another gaffe was committed in the editorial:

The “principle of federalism” must be recognized by both sides. This appears to be directed at Canadians outside Quebec, who must acknowledge that “the social and demographic reality of Quebec explains the existence of the province of Quebec as a political unit and, indeed, was one of the essential reasons for establishing a federal structure for the Canadian union in 1867.” This seems to imply that Quebec has a social

and territorial integrity above that of its various parts and, under the federal principle has a right to act as one.

The principle of federalism guarantees Quebec's territorial integrity? The editorial writer read the reference ruling askance. The principle of federalism meant that Quebec could not leave the federation unless the other partners agreed by amending the Constitution. The Supreme Court also made it plain that Quebec does not enjoy territorial integrity in the event of secession.

The editorial writer seemed intent on getting it wrong all the way. He wrote:

What happens if good-faith negotiations based on the court's principles simply reach an impasse? "We need not speculate here as to what would then transpire," says the court, but it's not difficult to do so: With four of the five basic principles satisfied, final disagreements over terms would be settled between two independent states.

Nonsense. The court specified that, should an impasse be reached, Quebec could not for that reason have a right to secede. It would always require an amendment to the Constitution.

The confusion over what the Supreme Court said that day was sown across the country by journalists covering the decision. It was further compounded by Stéphane Dion's fallacious statement in a press release:

Les citoyens sont les grands gagnants. Les citoyens du Québec se voient confirmer le droit de rester dans le Canada tant qu'ils n'auront pas clairement indiqué leur volonté d'en sortir. De plus, ils ont obtenu l'assurance que jamais ils ne seront retenus dans le Canada contre leur volonté clairement exprimée.

Misrepresented in the media, misrepresented by senior politicians like Stéphane Dion and Jean Chrétien, a deformed Supreme Court doctrine on secession spread across the land. It became repeated that the Supreme Court had confirmed Quebec's right to secede on condition only that the question be clear and the answer be clear. I will give a telling example. Here is an editorial published in the *Globe and Mail* on December 9, 2000 – two years after the Supreme Court had issued its ruling on secession.

#### **The *Clarity Act* versus *Bill 99*.**

Let's be clear about the *Clarity Act*. When Parliament passed the controversial bill earlier this year, it did not rob Quebecers of the right to vote for independence if they choose. To the contrary, by setting out a possible road map to independence, it implicitly recognized Quebec's right to self-determination. All Ottawa said was: Do it right. Ask a clear question. Get a clear majority. Then we will have no choice but to negotiate the terms of your secession.

Yet the government of Quebec persists in portraying this eminently reasonable law as an attempt to thwart the democratic will of Quebecers. In *Bill 99*, its reply to the *Clarity*

*Act*, it states that “the Quebec people, acting through its own political institutions, shall determine alone the mode of exercise of its right to choose the political regime and legal status of Quebec.”

Well, no. The Supreme Court of Canada, ruling against unilateral secession, has explicitly stated that Quebec cannot decide its legal status “alone.” If Quebec wants to go, it must negotiate its departure with Ottawa, just as husbands or wives must negotiate their departure from a legal marriage. Ottawa, for its part, is obliged to enter those secession talks, but only if a “clear majority” of Quebecers has voted on a “clear question” to secede.

These are fair and generous terms. Under the *Clarity Act*, **Quebec has the right to secede** providing it does not try to baffle Quebecers with another muddy referendum question or bolt from Confederation with a razor-thin referendum win, as it was about to do in 1995. Ottawa, by the same token, has the right to resist any move to break up the country that is not based on the rule of law and backed by the democratic will. Far from an effort to “change the rules of the game” (as Premier Lucien Bouchard has put it), the *Clarity Act* sets out clear and reasonable rules to govern what could otherwise be a chaotic and disastrous event.

Mr. Bouchard’s insistence that only Quebec can set the rules underlines his contempt for democratic process. **Yes, Quebec has the right to secede. Both the Supreme Court and Parliament have affirmed that.** But the government of Canada has an equal right to ensure that, if Quebecers vote to separate, the decision clearly reflects the wishes of the majority. **Far from crushing the democratic rights of Quebecers, the *Clarity Act* aims to ensure that those rights – and the rights of all Canadians – receive due respect.**

Quebec has the right to secede? That is the superstition that corrupts this country’s political culture. It is why the long list of people, cited above, who were wrong on Quebec’s right to secede and wrong on Quebec’s territorial integrity, never had to admit that they had been wrong in 1994-98 on so fundamental a matter. They never had to retract, apologize and henceforth put forward the doctrine enunciated by the Supreme Court of Canada on August 20, 1998.

The superstition finally received its definitive formulation in the Quebec Superior Court’s decision of April 2018 in the case of *Henderson c. Québec (Procureur general)*. Since that decision, we are governed in Canada by two contradictory laws, the *Clarity Act* and *Bill 99*. This is a dangerous constitutional impasse that must not be allowed to continue.

The people have a right to know the law. The people have a more important right to know the law when what is at stake is the very legal foundation of the country. It is not enough to appeal Madame Justice Claude D’Alaire’s misinformed decision on *Bill 99*. That would take years, and even a new decision might be unable to rectify the false consciousness of the people on the issue of session. In this case, it might be appropriate to say: the Justice has no robes.

Prime Minister Justin Trudeau must recognize that this is a unique case in Canadian history and that it is the Prime Minister's duty above all to defend the constitutional order and the unity of Canada. He can send a suitably formulated reference to the Supreme Court of Canada so that all its citizens can, finally, be given an authoritative declaration on the rules governing secession.