shows a greater respect for the legitimate aspirations of sovereigntists within Quebec to respond to their arguments on the basis of law and logic, rather than to insult them with bland political rhetoric and expressions of love, which can only ring hollow. Whether or not we win the battle for Canadian unity, it is worth fighting on the higher ground. Quebec and the ROC must be able to respect each other the next morning—regardless of whether they decide to live together or go their separate ways.

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THE CALGARY DECLARATION: "NATIONAL UNITY" FOR A CHANGE? *from page 91*

laration fare in Quebec as simply a "framework for discussion"?

After the 1995 referendum, no less a figure than Claude Ryan had proposed that Quebec be recognized as a "people". More recently, he has mentioned "nation" as an alternative. Just as Ryan's credentials as a federalist are indisputable, so there is nothing inherently "separatist" about either term.

In the end, the document may be tripped up by the very strategy that was designed to secure its approval in English Canada. And Reform's tacit blessings may become a curse.

After all, the term "distinct society" has become a benchmark in Quebec. The Meech Lake Accord made the term famous. English Canada's rejection of the Accord ensured that Quebeckers would look for it, or an equivalent, in any new proposal. It's one thing to surround the term with other principles, such as the seemingly contradictory notion of equality of the provinces. It's yet another to remove "distinct society" altogether.

Of course, there are other terms than "distinct society" that would resonate well in Quebec. After the 1995 referendum, no less a figure than Claude Ryan had proposed that Quebec be recognized as a "people". More recently, he has mentioned "nation" as an alternative. Just as Ryan's credentials as a federalist are indisputable, so there is nothing inherently "separatist" about either term. Indeed, as the recent referenda campaigns demonstrated, British leaders quite freely refer to Scotland and Wales as "nations".

WHAT WE HAVE LOST

For that matter, there was a time when even English-Canadian leaders applied such terms to Quebec. Back in the 1960s, Prime Minister Pearson called Quebec "a nation within a nation" and "the homeland of a people". Both the Progressive Conservatives and the New Democratic Party adopted the language of "two nations".

Of course, Pierre Trudeau's tenure as Prime Minister put an end to such talk. And the premiers' invocation of Quebec's "unique character" is itself testimony to the hold which the Trudeau vision of Canada has secured outside Quebec. The term it replaced, "distinct society", apparently had been itself adopted to avoid such words as "nation" or "people". But even it violated the Trudeau vision, and during the debate over Meech Trudeau personally made sure that all Canadians were aware of this. Now, apparently, it too has disappeared from the lexicon of Canadian politics.

Time will tell whether the Calgary Declaration provides a framework that is not only acceptable to English Canadi-

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COLONY, NATION, EMPIRE

BY GUY LAFOREST

In earlier times, just prior to the referendum of May 1980 on sovereignty-association, when our political lives were much simpler, the late Donald Smiley wrote that Canada almost had a unified judicial system. I shall use Smiley's comments, and his overall evaluation of the nature of the Canadian federation, as a springboard in my analysis of the political context linked to the Reference soon to be heard by the Supreme Court of Canada.

In his book, *Canada in Question: Federalism in the Eighties* [3d ed. (Toronto: McGraw-Hill Ryerson, 1980) at 22-24], Smiley argued that the Canadian political system was quasi-federal. This judgment was based on the recognition of the imperial context which presided over the birth of the Canadian federation. Westminster named the judges whose task it was to oversee the Dominion, while Ottawa named the judges whose duty it was to oversee the provinces. This included the judges of superior and appellate courts of all provinces and, from 1875 onwards, the members of the Supreme Court of Canada. In 1949, British judges disappeared from our affairs. Since 1982, Canada is no longer a colony. But the provinces remain subordinate to Ottawa in judicial matters.

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Smiley used the expression "colonial subordination" to describe the relationship of the provinces *vis-à-vis* Ottawa produced by such powers as reservation and disallowance. The passing of provincial legislation can be deferred and, ultimately, blocked. The lieutenant-governor, whose nomination is recommended by the Prime Minister, is essentially in my understanding an imperial envoy in the provincial capitals. Smiley mentioned other matters: spending powers, emergency powers, the de-

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claratory power.

These quasi-federal elements, imperial remnants to call them by their real name, could have been eliminated by the drive towards institutional modernization which characterized Canadian politics after 1945 and, with a greater sense of urgency, after 1960 and the upheavals of the Quiet Revolution in Québec. The fact of the matter is that the imperial remnants were kept intact. Undeniably, we have been through some serious institutional modernization, but of a different kind. Ottawa asked a series of judges it had nominated whether they agreed with a reform, the primary effect of which would be to augment significantly the power of the judiciary in our political system. With regard to the Québec Reference on the issue of its provincial veto, Ottawa did not take any chances: the law was promulgated before the Québec Court of Appeal and the Supreme Court of Canada could have their say. In my judgment, there is but one way to see this: intimidation of the judiciary by the executive branch of government. Peter Russell summarized the matter in these terms: "I believe it was illegitimate to go ahead and make those changes without the consent of Québec, politically illegitimate, and against the traditions and practices of this country. I think the Supreme Court of Canada, when that issue was put to it after patriation, couldn't give an intellectually honest answer" [quoted in R. Bothwell, *Canada and Québec: One Country, Two Histories* (Vancouver: U.B.C. Press, 1995) at 179].

With regard to the Québec Reference on the issue of its provincial veto, Ottawa did not take any chances: the law was promulgated before the Québec Court of Appeal and the Supreme Court of Canada could have their say. [T]here is but one way to see this: intimidation of the judiciary by the executive branch of government.

We have now almost reached the end of the century, with a new rendezvous with the Supreme Court of Canada. The Judicial Committee of our own Privy Council will tell Quebeckers that they cannot remove themselves unilaterally from the confines of Canada. In a manner reminiscent of the most glorious days of indirect rule in the conduct of imperial governance, the key roles will belong to Quebeckers: Chrétien, Dion, Bertrand, Lamer.

Canada was a British colony for many decades. In attempting to remake itself into a single nation, against its history, it became an empire. This is the part of Canada's political identity that has come to the surface, with a vengeance, since the Québec referendum of October 1995. It is not pretty. There is nothing dishonourable about the federalist doctrine in political philosophy, or with the way in which federalism is practiced by many regimes in our world. I would not make the same judgment about what currently passes for federalism in this country.

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THE QUEBEC SECESSION REFERENCE: PITFALLS AHEAD FOR THE FEDERAL GOVERNMENT

BY JOSÉ WOEHRLING

The federal government has asked the Supreme Court for an advisory opinion on the legal rules applying to the secession of Quebec from Canada. Ottawa apparently hopes that the ruling will be helpful in opposing a new referendum on sovereignty, which has already been announced by Mr. Lucien Bouchard. However, such a strategy could well backfire and lead to political consequences harmful to Canadian unity.

The Attorney General of Canada has taken the position that neither Canadian domestic law nor international law allow Quebec to unilaterally secede from Canada. At the same time, however, he stresses that he "does not question the authority of the government of Quebec to consult Quebeckers through a consultative referendum or the right of Quebeckers to express themselves in this way".

SECESSION AND THE CONSTITUTIONAL AMENDING FORMULA

In his factum, the Attorney General of Canada rightly asserts that the secession of a Canadian province is not allowed under the unilateral amending power of the provincial legislatures set out in s. 45 of the *Constitution Act, 1982.* As a matter of fact, this provision only authorizes modifications to the internal constitution of each province. Obviously, the secession of a province from Canada would affect the whole fabric of the Canadian Constitution and not only the separating province.

On the other hand, the federal government clearly admits that the entire content of the Canadian Constitution is changeable and therefore that the secession of a province must logically be possible under one of the five amending formulas, since it is nowhere expressly prohibited. For the great majority of constitutional lawyers, secession would require the unanimity procedure (both Houses of Parliament and all ten provincial legislative assemblies). If the Court takes the same view it will, in fact, say that Quebec cannot