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

possibly become sovereign by respecting the Constitution. Quebeckers well remember that the failure of Meech Lake resulted from the opposition of two small provinces amounting to less than 8 % of the Canadian population. In addition, it is now widely asserted that the agreement of the Aboriginal peoples will also be required and that, because of the precedent of the Charlottetown Accord referendum of 1992, Canadian politicians now feel themselves politically bound to hold a referendum before amending the Constitution in any significant way.

If the Supreme Court admits that international law does not prohibit a unilateral secession of Quebec and, on the contrary, clearly recognizes such a possibility, its decision could be considered as a great political victory by the Bouchard government. Conversely, if the Court only puts the emphasis on the absence of a right to secession, its impartiality would be seriously questioned, at least in Quebec.

However, insisting on compliance with such a cumbersome and uncontrollable amending formula would amount to an outright denial of the right of Quebeckers to decide their own political future. It would then be easy for the Bouchard government to claim that the Canadian Constitution has become a prison for the Quebec people.

SECESSION AND INTERNATIONAL LAW

The federal government rightly claims that international law does not confer on Quebeckers any right to external self-determination, or secession. The same view is shared by almost all international law scholars (including the five authors of the study that the Quebec government usually invokes in its support). The right to external self-determination is only accorded to colonial peoples and in some rare cases of external domination or racist regimes. Only in a situation of flagrant oppression can a non-colonial people claim the right to secede under international law.

However, a similar consensus exists to the effect that, if non-colonial and non-oppressed peoples have no right to secession, international law does not prohibit them from attempting to secede. If the secession becomes effective, international law will recognize the new state. Thus, under international law, a unilateral secession of Quebec would be considered as successful if the Quebec authorities were able to enforce their own decisions and to block the enforcement of Canadian law. If the Supreme Court admits that international law does not prohibit a unilateral secession of Quebec and, on the contrary, clearly recognizes such a possibility, its decision could be considered as a great political victory by the Bouchard government. Conversely, if the Court only puts the emphasis on the absence of a right to secession, its impartiality would be seriously questioned, at least in Quebec.

QUEBEC'S TERRITORIAL INTEGRITY UNDER UNILATERAL SECESSION

This issue has not been put before the Court by the federal government, but it has been squarely raised by some of the interveners, most notably Mr. Guy Bertrand, a former sovereigntist lawyer from Quebec City who has now become a passionate proselyte for Canadian unity.

At the moment, with opinion polls showing a decline in the support for sovereignty, it would be a significant error for Ottawa to drive the Quebec government into illegal acts and, in so doing, to force Quebeckers to chose between the rule of law and democratic legitimacy.

The Bouchard government claims that, after a unilateral secession, Quebec's territorial integrity would be wholly protected by international law. On the contrary, Mr. Bertrand affirms that the secessionist authorities could only claim so much of the present territory that they would be able to effectively control. Some ROC scholars have proposed that all regions of Quebec adjacent to Canada, in which there was a majority against secession, should be allowed, in a separate referendum, to decide if they want to stay inside Canada.

If the Supreme Court ruled that Quebec can be dismembered and partitioned after a unilateral secession, this would probably motivate a number of "weak" sovereigntists to change their mind. But it would also deal a severe blow to Quebec federalists by dividing them along linguistic lines and leading a number of them to join the sovereigntists in the defense of Quebec's territorial integrity. For example, Mr. Daniel Johnson, leader of the Quebec Liberal Party, has forcefully affirmed that Quebec could never be partitioned. If he keeps true to that position, he will have to reject a contrary ruling of the Supreme Court.

WHAT IF THE COURT PROHIBITS A NEW REFERENDUM ON SOVEREIGNTY?

It is obvious that the federal government, as much as it looks for a ruling declaring a unilateral secession illegal, does not want a decision prohibiting a new referendum on sovereignty. Such a court order would appear as an odious fetter on the democratic will of the Quebec people and, in the end, its effect could well be to bolster support for sovereignty. As for the Quebec government, it would have to chose between obeying the decision, which is very improbable, and directly defying it.

At the moment, with opinion polls showing a decline in the support for sovereignty, it would be a significant error for Ottawa to drive the Quebec government into illegal acts and, in so doing, to force Quebeckers to chose between the rule of law and democratic legitimacy. Rather than seeking to have a new referendum prohibited by a court ruling, the desirable strategy for Ottawa is to erode support for sovereignty to the point where the PQ government, which does not want to lose a third refer-

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THE CALGARY DECLARATION: "NATIONAL UNITY" FOR A CHANGE? *from page 95*

ans but can win the active support of Quebeckers. In the meantime, as politicians feel compelled to discard yet another term for describing Quebec and its place in Canada, one cannot help but be struck by how we have lost the very vocabulary for conducting a meaningful debate over the future of Canada. It's for this reason that Plan B strategies come so much more easily, and the debate over "national unity" becomes a debate about Canada's break-up.

Kenneth McRoberts has recently published Misconceiving Canada: The Struggle for National Unity, *with Oxford University Press.*

THE QUEBEC SECESSION REFERENCE: PITFALLS AHEAD FOR THE FEDERAL GOVERNMENT *from page 97*

endum, decides to postpone it indefinitely.

However, some of the interveners in the reference, most notably Mr. Guy Bertrand, urgently press the Supreme Court for a declaration that the federal government is constitutionally obligated to oppose a new referendum. Also, once the Supreme Court has given its answer, the action filed by Mr. Bertrand in the Superior Court of Quebec for a permanent injunction against another referendum will be revived. Yet, if a new referendum were prohibited, the only other conduct open to the Bouchard government would be to hold an election on sovereignty (which would be much easier to win than a referendum). And it would surely be quite arduous for the federal government or for Mr. Bertrand to ask for a court order prohibiting democratic elections in Quebec.

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THE QUEBEC QUESTION AND THE CANADIAN DILEMMA *from page 102*

tion has become paramount in light of the revelations by former Premier Parizeau that he would have unilaterally declared sovereignty as little as ten days after the narrowest of victories in the last referendum. Parizeau would not only have betrayed the compact among his sovereigntist partners to enter into a period of negotiations for a new partnership with the rest of Canada; he would also have betrayed the democratic rights of Quebeckers to determine the most fundamental nature and true future course of their own society. The instrument of the betrayal would have been the non-transparent referendum question.

CONCLUSION

The concept of legitimacy imposes conditions to both the exercise of democratic rights and the assertion of the rule of law under the Canadian Constitution. Because of the imperatives of legitimacy, the rule of law under the Canadian Constitution and the exercise of democratic rights of Quebeckers are not in opposition to each other. They are natural allies.

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THE LETTER WARS *from page 103*

course, all of this is old stuff.

13. There is one thing new in the Landry rebuttal, the "rappel" that, in 1982, Pierre Trudeau repeated a number of times that if the U.K. Parliament ever refused to give Canada the constitutional amendment it required in order to patriate the *BNA Act*, then Canada would proceed on its own and declare its unilateral independence. What a strange idea. I always knew you could count on Pierre.

14. Bernard Landry is an economist by profession and training. It must mean something that he has found the time to engage in a high-level intellectual debate with Stéphane Dion. Yes, but what exactly? It can't be a "rational choice" decision.

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