

# DEMOCRACY, LEGITIMACY, AND SECESSION: THE QUEBEC QUESTION AND THE CANADIAN DILEMMA

BY ERROL P. MENDES & CLARE ETTINGHAUSEN

There are some mighty charges being thrown around in this gentle northern land. The secessionist government in Quebec is arguing that the federal government is giving grave affront to the democratic rights of Quebecers by initiating and joining legal arguments in the courts, including the September 30, 1996, Reference to the Supreme Court, on the unilateral right of secession asserted by the government of Quebec and their partners in the Canadian Parliament, the Bloc Québécois.

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The secessionists are particularly incensed that the federal government will be arguing that the rule of law under the Canadian Constitution will still be applicable to any process of secession from Canada if ever there were to be a vote for separation by the people

of Quebec in a future referendum.

Thus the so-called battle over the rule of law versus the democratic rights of Quebecers is joined. But there is a fundamental missing issue yet to fully surface in informed debate, that is, the legitimacy component of both the rule of law under the Canadian Constitution and the fundamental democratic rights of Quebecers.

## THE RULE OF LAW AND LEGITIMACY

The concept of the rule of law has a well-recognized procedural content, discussed for well over a century and dissected by the British jurist Dicey. Its fundamental procedural content includes the principle that no one, especially the government of a democratic society, should be above the law.

Experience the world over has shown that, beyond the procedural content, the rule of law must also have legitimacy. The rule of law without legitimacy can turn into rule by law and can and has become an instrument in the hands of skilful dictators.

If a state merely possesses a procedural interpretation, then it will assert only legality rather than the rule of law or democracy. A leading theorist, Beehler, asserts that the only defensible definition of the rule of law is rule of a certain kind which is just and therefore legitimate, in contrast with arbitrary rule which requires human beings to submit to it. The substantive concept is that which we define as

the rule of law.

This thesis stands as a direct rebuke to the secessionist government in Quebec, which has repeatedly claimed its plan for unilateral secession is immune from the jurisdiction of the courts. Therefore a challenge that must be thrown out to the secessionist government in Quebec is, what is their concept of the rule of law if it does not accept the constitutional principle put forward by the federal government? Does the secessionist concept of the rule of law amount to no more than a "smorgasbord rule of law"? In other words, the secessionist government proposes to choose which parts of the Canadian Constitution and legal system it will abide by and which it will not before and after any future referendum on separation. This is not the rule of law or a fundamental democratic process. It is anarchy.

As well as involving substantive interpretation of the rule of law, the concept of legitimacy also implies a system in which citizens actively consent to the system of rules and are thereby obligated by them. This is opposed to a system of rule by law where notions of obedience or enforcement and subjection, rather than citizenship, are implicit. Therefore, in terms of the rule of law and legitimacy as it applies to the assertion of the right of unilateral secession by the current government in Quebec, the fundamental issue is the following: is the Canadian Constitution, including the *Canadian Charter of Rights and Freedoms*, so illegitimate in Quebec that it can be ignored in an attempt at unilateral secession following a vote for separation by a majority of Quebecers? Most secessionist leaders in Quebec, the most notable be-

ing Professor Turp, argue that the patriation of the Constitution of Canada in 1982 without the consent of the National Assembly of Quebec and the failure of the Meech Lake Accord were a denial of the right of self-determination in the context of Quebec, and therefore provide a legal (and, we presume, a legitimate) foundation for a right to unilateral secession from Canada. [D. Turp, "Le Droit à la sécession: l'expression du principe démocratique" in A.-G. Gagnon & F. Rocher, eds., *Repliques aux détracteurs de la souveraineté* (Montreal: vlb éditeur, 1992) 49 at 57-58.]

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A fundamental flaw in this argument is equating the views of elites in Quebec with legitimacy. In the daily lives of Quebecers, the legitimacy of the Canadian Constitution goes unquestioned as they abide by the laws of the land and willingly submit to the framework of the Constitution in a

myriad of ways. Indeed, at the time of writing this paper, the secessionist government itself is impliedly accepting the legitimacy of the amending formula brought in with the patriation of the Constitution in 1982 in the context of seeking a constitutional amendment to replace denominational school boards, whose existence is guaranteed in the *Constitution Act, 1867*, with linguistic (i.e., French and English) boards.

The rule of law implies a sense of citizenship, obligation, and consent. The rule by law implies subjection and compliance or enforcement. We would therefore say that the rule by law implies legality or, as Weber stated, "a monopoly over the legitimate use of force". The fear or threat of force may be legal but it is not a legitimate factor of a rule of law; it implies only rule by law.

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The leader of the secessionist government in Quebec, Premier Bouchard, has argued that the insistence of the federal government that the rule of law under the Canadian Constitution is applicable to any attempt at secession by Quebec, is an assertion of the threat of force which makes the Canadian Constitution a prison, from which Quebecers could not escape even if they expressed their democratic wish to do so.

As usual, Premier Bouchard uses political imagery with devastating effectiveness, even if it is not completely accurate. The power behind having legitimacy as a touchstone for the rule of law is that it permits flexibility in its application. If a clear majority of Quebecers, permitted to express their democratic choice with a transparent referendum question, were to demonstrate their desire to secede from Canada, the Canadian Constitution would have to accommodate this desire or it would lose legitimacy not only in Quebec, but in the rest of Canada as well.

The factum of the federal government in the Quebec Secession Reference acknowledges the legitimacy aspect of the rule of law when it states: "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". (Factum of the Attorney-General of Canada, p. 29.) The factum goes on to state that secession would require a constitutional amendment beyond the unilateral power of a province and would therefore

involve institutional participants beyond those of the province of Quebec alone. The federal government felt it was not necessary for the Supreme Court to consider arguments as to which of the amending procedures under the Constitution of Canada or what other constitutional principles would apply in the event of a potential secession. This position leaves unexplored how the concept of legitimacy applies to the rule of law under the Canadian Constitution. The exploration must commence.

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#### DEMOCRATIC LEGITIMACY

What is missing from the rhetoric of the secessionist government in Quebec is the fundamental principle that the exercise of a majority's democratic rights must also be infused with legitimacy. Democracy and legitimacy do not necessarily coincide. Democratic legitimacy must also include a substantive concept of the rule of law.

Democracies which are prone to power being achieved and exercised on racial or ethnic lines have particular challenges with respect to democratic legitimacy. [P.H. Merkl, in M. Dogan, ed., *Comparing Pluralist Democra-*

*cies: Strains on Legitimacy* (Boulder, Colorado: Westview Press, 1988.) Barker asserts that legitimacy can be differently composed for different groups in society. There need not be rejection of the existing legitimacy by all the people for a crisis of democratic legitimacy to be claimed: "The breakdown of liberal democratic stability can come either from a failure of government to represent society, or of a failure of groups within society to recognize the complex nature of the social whole." This was exemplified by Jacques Brassard when he said that Quebec has authority over the whole province, irrespective of those who may vote against separation: "The government of Quebec will exercise its effective authority over all of its territory. That includes the parts of the territory where the majority of the population would have voted 'No' at the moment of the referendum ... If they don't respect the laws of Quebec, 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. [The *Montreal Gazette*, "Partition Forbidden: Brassard", 30 January 1997.]

A democracy cannot be legitimate if only one section of a society, no matter how powerful, unilaterally determines the terms and conditions of a fundamental nature and affecting the future of all members of that society. Like the rule of law, the rules of the game by which the people exercise their democratic rights must be predictable, transparent, and accountable to all sections of the population. Legitimacy quickly departs from a democracy if the majority

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rides roughshod over the rights and dignity of minorities and, in the case of Canada, its special responsibilities to its First Nations.

It was clear that, prior to the 1995 referendum, the secessionist government in Quebec led by Premier Jacques Parizeau was intent on ignoring the legitimate concerns of the rest of Canada, the minorities within Quebec and the First Nations in the province, including the Cree of Northern Quebec who had voted overwhelmingly to stay in Canada just before the referendum. Bill

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1, titled *An Act Respecting the Future of Quebec*, introduced in the Quebec National Assembly by Premier Parizeau on September 7, 1995, authorized the National Assembly, within the scope of its provisions, to proclaim the

sovereignty of Quebec and to give effect to the Declaration of Sovereignty appearing in the preamble to the *Act*. This would follow a majority vote on the referendum question which was drafted as follows: "Do you agree that Quebec 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 Quebec and of the agreement signed on June 12, 1995?" The reference to the June 12, 1995 agreement in the convoluted and we would assert non-transparent question concerned a tripartite agreement between the leaders of the Parti Québécois, the Bloc Québécois, and Action Democratique outlining their common project for the sovereignty of Quebec. The referendum result was 50.58% for the "No" side and 49.42% for the "Yes" side.

Was not the structure of the October 30, 1995 referendum question designed to manipulate a certain response from Quebecers? Can a slim majority in favour of a non-transparent and manipulative referendum question be a legitimate basis for shattering the constitutional order in the entire Canadian federation and, based on the above analysis, the shattering of democratic legitimacy in Quebec itself?

It could be argued that such a non-transparent and manipulative referendum question is itself an abuse of the democratic rights of Quebecers.

The necessity of transparency and legitimacy with respect to the referendum ques-

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## THE LETTER WARS

BY DANIEL LATOUCHE

Recent "letters" by Intergovernmental Affairs Minister, M. Stéphane Dion—the man who could read and write at the same time—are quite revealing, much more so than the response by M. Bernard Landry, who obviously has much better things to do than to check Dion's footnotes and style. Here's what I learn reading them:

1. I have always thought that democracy's greatest strength was its capacity to tap one of human nature's basic instincts: laziness. When given the chance—no mafia running the country—human societies tend to prefer democratic solutions to un-democratic ones for the simple reason that they are easier to enforce and to live with. It is certainly easier to try and live with the result of an election or a referendum than to organize a massive rebellion, a military coup, or a hunger strike. Clearly, M. Dion does not share in this view. In a previous life, he must have been a Jesuit and now certainly aspires to become a new "Saint-Martyr-Canadien" (check your history book or ask any French-Canadian for the key to that one).

2. I also know that Queen's is Canada's Mecca for the study of federalism. According to a recent study produced in one of Kingston's "think-tanks" (a contradiction in terms, I agree), studies on federalism are on a downward spiral in Canada. Canadian political scientists, especially the younger ones, are no longer interested in federalism as an academic discipline. For their part, Québec political scientists have entirely given up on the topic. Now I understand

why: it has to be the world's most boring, irrelevant, and useless field of research. You don't believe me? Read Dion's letters. Maybe there is hope for political scientists after all. They're looking for greener intellectual pastures.

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*It is always amusing to watch university professors and intellectuals make the jump for active politics. If, by chance, they end up in the Opposition or in the back benches, many usually manage to escape with a minimum of integrity and dignity. They become rather irrelevant but at least they will do no harm.*

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3. When a human problem gets "legalized" and "judicialized", then it's time for all reasonable and intelligent people to move away. If, indeed, the Minister of Intergovernmental Affairs has nothing better to do in life than to legalize Canadian democracy to its political death, then indeed this is a sad day. When you read Stéphane Dion's argument, you can't even find the beginning of a political idea. The day is not only sad, it is also full of despair.

4. It is always amusing to watch university professors and intellectuals make the jump for active politics. If, by chance, they end up in the

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ans but can win the active support of Quebecers. 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.*

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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 obli-

gated 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 prohib-

ited, 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. 

*José Woehrling is a Professor at the Faculté de droit, Université de Montréal.*

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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 Quebecers 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 Quebecers are not in opposition to each other. They are natural allies. 

*Errol P. Mendes is Professor of Law and Director, Human Rights Research and Education Centre, University of Ottawa.*

*Clare Ettinghausen is a graduate student in Political Science at Carleton University.*


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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. 

*Daniel Latouche is Professor at the INRS-Urbanisation, Institut national de la recherche, Université du Québec.*