

# QUEBEC SECESSION: SCRUTINY OF LEGAL ASPECTS IS CRITICAL

BY PAUL JOFFE

The Bouchard government in Quebec alleges that secession is strictly a political question. Thus, the government has refused to participate in the Supreme Court of Canada Reference on Quebec secession. Basic legal arguments concerning unilateral secession

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will be considered directly by Canada's highest court. The

Reference questions posed to the Court by the federal government relate both to Canadian constitutional and international law. They also embrace important human rights matters.

Separatists insist that Quebec secession is not the business of Canadian or international courts. According to the logic of Quebec government leaders, an affirmative vote of 50% plus one within the province would be the only criterion necessary to proceed with unilateral secession. An offer to Canada of economic and political partnership would still likely be made.

This erroneous, absolutist view of unilateral secession could prove destabilizing internationally, if seen as some kind of precedent for secessionist groups in other countries. In Canada, it would have especially harsh and undemocratic consequences for Aboriginal peoples in the province. An affirmative vote by Quebecers in their own referendum would purportedly prevail, so as to legitimize the secession of Quebec with its current boundaries intact. The opposing results (over 95%) in referendums held amongst the James Bay Cree, Inuit and Innu people in Quebec would have little or no impact. Despite the constitutional and international human rights of Aboriginal peoples in Quebec, they would in effect be forcibly included with their ancestral territories into a new Quebec "state".

## CHANGE IN SECESSIONIST STRATEGY

During the past two or three years, the legal foundations of

the secessionist arguments were noticeably crumbling. Only then did the Quebec government begin to claim that independence is solely a political matter. Prior to that, an examination of the secession debate in Quebec reveals a serious appreciation of the far-ranging significance of legal factors.

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The 1980 referendum in Quebec implicitly acknowledged the limits of unilateralism, when a mandate was sought from Quebecers to "negotiate" sovereignty-association. Committees established by the National Assembly to examine Quebec sovereignty have addressed consistently both the political and legal dimensions of the question under Canadian constitutional and international law. Similarly, the largest study favouring secession in Quebec, entitled *L'accession à la souveraineté et le cas du Québec*, written by Jacques Brossard in 1976 (1995 Supplement by Daniel Turp), shapes its whole 840-page analysis within a "politico-juridical" framework.

In the context of Quebec secession, issues of democracy, human rights and the rule of law are closely interrelated. Assessments of the democratic

nature of the different positions taken are fully considered. For the Quebec government to continue to impose its own conception of democracy, in the absence of the rule of law, is in itself an anti-democratic and perilous action. It impedes fair and balanced debate.

Amid claims that secession is purely political, Quebec government leaders regularly invoke legal arguments on a selective and incomplete basis. The legal opinion most often cited by the Quebec government is the study commissioned from five international law experts by the National Assembly's committee on sovereignty in 1992. According to government leaders, the study clearly supports their claim that the territory in the province of Quebec is indivisible should Quebec secede.

But does the study really conclude that Quebec's borders are guaranteed to be maintained in the event of secession? Claude Charron, an author and member of *Intellectuels pour la souveraineté*, claims in a recent article (*Le Devoir*, 3 September 1997, at A7) that federal Minister Stéphane Dion has so misused the five-expert study as to constitute "one of the most pernicious forms of disinformation".

In explaining the basis for this conclusion, Charron describes what he believes is the essence of the two questions posed to the five experts by the National Assembly's committee on sovereignty. In Charron's view, the questions ask "whether Quebec, once it would have declared—unilaterally or otherwise—its sovereignty, would keep the totality of its present territory". However, in the context of a unilateral secession, this interpretation of the questions is incorrect. It does not correspond to the meaning as-

sumed and stated by the five experts. As a result, Charron has misconstrued the scope and implications of the experts' concluding responses.

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Both questions posed to the five experts are premised by the ambiguous phrase "assuming that Quebec were to attain sovereignty". The five experts make clear that the date they are using to reply to the posed questions is not (as Charron assumes) the moment when Quebec would unilaterally declare its independence. Rather, the date that Quebec would attain sovereignty would be after effective control is achieved by a seceding Quebec. Quebec, the five experts say, could not be regarded as having achieved independence until it prevented the Canadian authorities from exercising control over its territory. The experts add that the test of this effectiveness is the recognition by third-party

states (and the state from which the territory was severed).

#### **STRUGGLE FOR EFFECTIVE CONTROL**

As soon as a unilateral declaration of independence (UDI) were proclaimed by Quebec, a struggle of indeterminate length would begin for effective control of all territory currently included within provincial boundaries. As the five experts emphasize in their study, indigenous peoples have access to the principle of "effective control" on the same terms as Quebec. In other words, there is no guarantee of Quebec retaining its present borders following a UDI.


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The five-expert study is not the last word on the question of territorial division, in the event of a secession attempt in Quebec. The study has been strongly criticized by numerous international jurists, in areas of analysis that might have lent weight to Quebec. Also, since the time that the study was completed, the government of Canada publicly declared to the international community on October 31, 1996 that Canada is "legally and morally committed to the observance and protection of this right [of self-determination]" under international law in relation to indigenous and non-indigenous peoples.


These developments are further indication that careful scrutiny of all relevant legal perspectives is critical. Human rights and democracy must receive full and fair meaning in the Quebec secession debate. In particular, the rights of Aboriginal peoples cannot be cast aside based on questionable political positions by the government in Quebec. 

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ence will be made in a responsible and honest fashion and will not attempt to denigrate Canada. It will emphasize the need to put an end to the impasse which characterizes the relationship between Canada and Québec and to find innovative solutions to bind, albeit in a different fashion, the future of their peoples.

#### **NATIONAL UNITY AND NATIONAL SOVEREIGNTY**

National unity of Canada and national sovereignty for Québec are two legitimate goals. The promotion of these goals in the international community is inescapable, and it is in both Canada and Québec's interest that the debate, as it extends in international circles and becomes a foreign affairs issue, remains dignified. It is my hope that both federalists and sovereigntists overcome the temptation to disrespect the beliefs and ideals of their rivals and that they provide the international community with an example of a debate carried on in a civilized fashion. The ideals of friendly relations between peoples and states, cherished by Quebecers and other Canadians alike, would be better served in this way. It would prove that even in the dramatic and emotional discussion on the future of Canada and Québec, the shared value of democratic expression can prevail. 

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