Ottawa, the Prime Minister and Finance Minister, for example, and still wants more in Quebec City. The proposal for asymmetrical federalism that would mean a transfer of powers from Ottawa to Quebec City would be acceptable to most Quebec nationalists and, I believe, most Canadians outside Quebec, but would mean a reduction of power of the Montreal potentates who have played a central role in Ottawa since Trudeau was first elected. In fact, creating a Quebec elite with a strong self-interest in maintaining status quo federalism was central to the strategy of Lester Pearson, Pierre Trudeau, and Brian Mulroney in their battles against Quebec nationalists. This elite has now become a major barrier to any new solutions to the Quebec-Canada relationship.

These two problems combined with economic fundamentalism have led to radical decentralization as a solution. Instead of recognizing that a new partnership is needed between Canada and Quebec, politicians with a not-so-hidden agenda of reducing the size of government are pushing for all power to the provinces. This is really the recipe for a break-up of the country. Preserving our social cohesion in a globalized economy is the keystone of a country. Decentralization will mean a race to the bottom among the provinces and a destruction of the national social programs that, for most Canadians, are synonymous with Canadian identity. What is more, decentralization alone does not respond to the aspiration of the people of Quebec for recognition as a nation. Ironically, there has been more resistance in Quebec to the destruction of national social programs such as family allowance, pensions, and unemployment insurance than almost anywhere else in the country. The decentralization of social programs will probably weaken Québécois ties to Canada even further.

*Instead of debating how to hold on to a federalist system that is not working well for any of its citizens, we could be debating what kind of social and economic union we need to face the world of the 1990s together in partnership.*

By demanding more of a people's voice in the process of constitutional change, most Canadians are recognizing that the politicians who have led the process have done so more from self-interest than the common interest. But for a Constituent Assembly to have any success, there must be some new parameters to the discussion.

What we need is Plan C, a new partnership between Canada and Quebec that meets the needs of people across the country. Plan C could mean federalism with most powers being transferred from Ottawa to Quebec, with a corresponding loss of political representation in and cash transfers from Ottawa. Plan C could mean a confederal state with two national houses of Parliament, one in Quebec City representing Quebec, and one in Ottawa representing the rest of Canada, with common concerns like foreign affairs, defence, monetary policy, and social standards being decided by a new binational structure. There would still be a country called Canada, but it would be structured very differently.

Aboriginal self-government could be dealt with through tri-national negotiations, equal to equal as the Aboriginal leaders have demanded. Minority language rights and equality rights for women and minorities could also be guaranteed at the tri-national level. People in the rest of Canada could decide the relationship of their provincial governments to the national government without reference to Quebec's needs.

Instead of debating how to hold on to a federalist system that is not working well for any of its citizens, we could be debating what kind of social and economic union we need to face the world of the 1990s together in partnership. Plan C can help us thrive on our diversity rather than being torn apart by it.

*Judy Rebick is former president of NAC and co-host of the CBC TV program "Face-off."*

# PLANNING FOR PLAN B

**BY PATRICK J. MONAHAN & MICHAEL J. BRYANT**

*In a recent study published by the C.D. Howe Institute, Canada Watch Co-Editor Patrick Monahan and Toronto lawyer Michael Bryant set out a series of principles for guiding the federal government in developing a Plan B strategy. We have reprinted two excerpts from this study. The first summarizes the authors' conclusions based on a review of the international approaches to secession. The second discusses three of the authors' key proposals—a reference of certain important legal issues to the Supreme Court of Canada; the enactment of so-called "contingency legislation" by Parliament; and the appointment of a panel of internationally recognized experts. [Original citations are omitted from this excerpt.]*

**THE INTERNATIONAL EXPERIENCE**

Before attempting to design a set of ground rules to govern secession in Canada, we believe it essential to review the manner in which other states have approached the issue(and in which Canada and some other states have approached other kinds of referendums). ...

Our first task was to examine all constitutions that contain provisions dealing directly or indirectly with the issue of secession. We then studied the referendums of other nations and subnational groups considering secession or a similar infringement on a nation's sovereignty.

On the basis of this review, we offer the following generalizations about the international approach to secession and similar issues:

1. Secession is usually prohibited.

2. Unilateral secession is always prohibited.

3. The wording of the referendum question is the subject of negotiation and agreement between secessionist and national forces.

4. There is no uniform practice regarding the relevant population entitled to vote in a referendum on secession.

5. Referendums on sovereignty tend to be supervised by national and/or international institutions.

6. There is no uniformity in the majority required to support a successful sovereignty referendum.

7. The effect of the referendum depends on the existing constitutional system.

8. The boundaries of the seceding unit are not guaranteed to remain unchanged following independence.

*The Commonwealth experience suggests that referendums are consultative rather than binding.*

9. The Swiss experience in creating the canton of Jura provides some model principles for resolving border disputes.

10. The Commonwealth experience suggests that referendums are consultative rather than binding.

**Constitutional Provisions**

...

A 1992 study by Markku Suksi identifies 85 constitutions that include some form of referendum mechanism. On the assumption that any modern constitution with a procedure for secession would involve a referendum or plebiscite, we reviewed each of the constitutions Suksi identified. We also updated his list by including constitutions that have incorporated some form of referendum procedure since 1992. In all, we reviewed the constitutions of 89 states.

From this data we drew the first eight points in the list above. Each demands some explanation.

**Prohibition of Secession**

The most obvious point that emerges from our review is that states are generally hostile to secession movements. Of the 89 constitutions we examined, 82 do not permit secession of a part of the state's territory under any circumstances. In most cases, the constitution is simply silent on the matter. A total of 22 of the constitutions examined, however, contain explicit affirmation of the primacy of the state's territorial integrity—it is not to be called into question under any circumstances. ...

**Unilateral Secession**

Quebec sovereigntists argue repeatedly that Quebec has a right under international law to unilaterally proclaim its sovereignty, regardless of whether Canada has agreed. This, indeed, is the position taken in Quebec's Bill 1, which authorizes its National Assembly to proclaim sovereignty after making Canada a formal offer of a political and economic partnership. The fact that Canada might reject the offer is relevant only in the sense that such a rejection would make it possible for Quebec to declare sovereignty more quickly. Bill 1 provides that, if an independent review committee concludes that negotiations with Canada are fruitless, the National Assembly may declare sovereignty immediately. In any event, Quebec need not obtain Canada's agreement before declaring sovereignty under Bill 1.

Of the 89 constitutions we surveyed, not one approaches secession in this fashion. Table 1 summarizes the relevant provisions in the seven constitutions that regard secession as permissible in certain circumstances. As the column headed "Legal Authority" indicates, the secession process is never governed by a statute or law passed by the seceding unit alone. Rather, secession is subject to requirements set at the national level, either in the national constitution or in national legislation. Failure to satisfy these requirements would lead the courts to declare that the secession was unlawful.

*Quebec's claim—that the terms and conditions governing secession are a matter for its National Assembly alone to decide—is simply unknown in the constitution of any other country.*

In short, Quebec's claim—that the terms and conditions governing secession are a matter for its National Assembly alone to decide—is simply unknown in the constitution of any other country.

**The Referendum Question**

In both 1980 and 1995, the Quebec government asserted that the wording of the referendum question was the exclusive responsibility of the pro-sovereigntist forces. Under the *Quebec Referendum Act*, the question is determined by the premier and endorsed by the National Assembly. Assuming the government has a majority, neither the opposition parties in the National Assembly nor the federal government has a way to participate in setting the question.

No constitution anywhere in the world today provides for the referendum question to be formulated in this fashion. As Table 1 indicates, in five of the seven countries whose constitutions contemplate secession, the national authorities, not the secessionist forces, determine the question. In the remaining two instances, the national government or pronationalist forces have an opportunity to participate effectively in the wording. ...

**The Population Entitled to Vote**

If a referendum on secession is to be held, is the vote conducted only among the population of the territory that is proposing to secede or among the entire national population? As Table 1 indicates, this question has no uniform answer. In Austria, Ethiopia, and Singapore, the entire national population is entitled to participate in any secession referendum; the same was true in the Czech and Slovak Federative Republic. In contrast, in St. Christopher and Nevis, the former Soviet Union, and France, the referendum is held only in the territory that is proposing to secede.

We conclude that either approach is consistent with existing international practice.

**Supervision by National/ International Institutions**

The need for supervision obviously is connected with whether the population that is to vote is the subnational group or the national electorate. Where the referendum process is carried out by the potentially seceding unit, the national unit and/or interna-

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## *Table 1: Constitutional Provisions Governing Secession*

| Country[a] | Legal Authority to Conduct and Supervise Secession Referendum | Referendum Question Formulated by | Relevant Population to Vote in Referendum | Decision Rule (Vote Required for Process to Continue) | Boundaries |
|---|---|---|---|---|---|
| Austria | national legislation | national authorities[b] | national population | majority of valid votes cast | changes must be approved by national and subnational governments |
| Ethiopia | national legislation[c] | national authorities | local population | majority of votes cast | absent agreement, federal council to decide borders based on settlement patterns of peoples and the wishes of the people or peoples concerned[d] |
| France | national legislation[e] | national and local government[f] | local population | majority of votes cast | assumption that former colonial borders would become borders of the independent state |
| Singapore | national legislation | national authorities | national population | two-thirds of total votes cast | changes require approval of two-thirds of all voters in national referendum |
| St. Christopher and Nevis | national legislation[g] | national constitution[h] | local population | two-thirds of total votes cast[i] | Nevis would automatically retain its current borders[j] |
| Soviet Union | national legislation or law of autonomous republic if the latter is not inconsistent with national law[k] | commission formed by the supreme soviet of the seceding republic, including representatives of "all interested parties" within the republic | local population | two-thirds of eligible voters | specific provision for "autonomous regions" within a seceding republic to remain part of the Soviet Union[l] |
| Czech and Slovak Federative Republic | national legislation | national president and Czech and Slovak national councils; proposed questions are to be "unequivocal and understandable"; in the absence of agreement and after a waiting period, each republic can insist that its wording be posed[m] | national population | absolute majority of voters in each republic[n] | assumption that borders of existing republics would remain unchanged following secession |

[a] Most of the constitutions referred to here are the texts found in A.P. Blaustein & G.H. Flanz, eds., *Constitutions of the Countries of the World*, looseleaf edition (New York: Oceana Publications): For Austria, *The Federal Constitutional Law*, issued December 1985 (hereafter cited as *Austria*); for Ethiopia, *The Constitution of the Federal Democratic Republic of Ethiopia*, issued December 1994 (hereafter cited as *Ethiopia*); for France, *The French Constitution*, issued June 1988 (hereafter cited as *France*); for Singapore, *The Constitution of the Republic of Singapore*, issued September 1995 (hereafter cited as *Singapore*); for St. Christopher and Nevis, *St. Christopher and Nevis Constitution Order*, issued April 1984 (hereafter cited as *St. Christopher and Nevis*); for the Czech and Slovak Federative Republic, *Constitutional Law of 18 July 1991*, issued September 1992 (hereafter cited as *Czech and Slovak*). The exception is the USSR, for which we used *Constitution (Basic Law) of the Union of Soviet Socialist Republics* and *On the Procedure for Deciding Questions Connected with the Secession of a Union Republic from the USSR* (law of the Soviet Union adopted April 3, 1990 (hereafter cited as *Soviet Secession Law*) reproduced in W.E. Butler, *Basic Documents of the Soviet Legal System*, 2d ed. (New York: Oceana Publications, 1994).

[b] *Austria*, article 44(1), states that any constitutional change must be approved by a two-thirds vote of the house of representatives.

[c] Secession must first be approved by a two-thirds majority of the members of the legislative council of any "nation, nationality or people" (*Ethiopia*, article 39(4)); the federal government must organize a referendum on secession within three years of the request from the legislative council.

[d] *Ethiopia*, article 39(5), defines a "nation, nationality or people" as "a group of people who have or share a large measure of a common culture, or similar customs, mutual intelligibility of language, belief in a common or related identities, and who predominantly inhabit an identifiable, contiguous territory."

[e] But secession is possible only in respect of the overseas territories under *France*, article 86. Article 2 provides that the territory of the republic itself is "indivisible."

[f] "The procedures governing this change [in status] shall be determined by an agreement approved by the Parliament of the Republic and the legislative assembly concerned" (*France*, article 86).

[g] The referendum is conducted and supervised by the "supervisor of elections," appointed by the governor-general after consultations with the prime minister, the premier, and the leader of the opposition.

[h] *St. Christopher and Nevis*, article 113(2)(c), provides that "full and detailed proposals for the future constitution of the island of Nevis (whether as a separate state or as part of or in association with some other country) [shall] have been laid before the Assembly at least six months before the holding of the referendum." Moreover, the constitution sets out a number of changes that will automatically occur in the event of Nevis' secession, including that Nevis will not be entitled to representation in parliament and that parliament will have specific authority to deprive Nevis citizens of their citizenship in St. Christopher.

[i] The bill authorizing secession must also be approved by a two-thirds majority of the elected members of the Nevis Island assembly.

[j] *St. Christopher and Nevis*, schedule 3, section 1, sets out the territory of the new state of St. Christopher that would automatically come into existence following the secession of Nevis.

[k] Under *Soviet Secession Law*, articles 1, 2, and 4, the referendum is to be conducted and supervised by a commission formed by the supreme soviet of the seceding republic, and the commission is to include representatives of "all interested parties," including representatives of any autonomous regions or national areas within the seceding republic. Further, article 5 provides for the participation of outside observers, including authorized representatives of the USSR, of autonomous regions within the republic, and of the United Nations, in order to monitor the vote; the exact role is to be agreed on by the supreme soviets of the USSR and the seceding republic.

[l] Under *Soviet Secession Law*, article 3, "The right to autonomously decide the question of whether to stay in the USSR or the seceding union republic, as well as the question of its State- law status, shall be retained for the peoples of autonomous republics and autonomous formations." Border issues will ultimately be determined by the USSR congress of peoples' deputies, after preparation of proposals by the USSR council of ministers, with the participation of the government of the seceding republic (article 12).

[m] *Czech and Slovak* , article 3(3). It appears that, in the absence of an agreement, either of the republics may propose questions.

[n] However, if the proposal passes in only one republic, the federation ceases to exist within a year (article 6(2)), and a federal law must be passed dealing with division of assets and liabilities (*Czech and Slovak*, article 6(3)).

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tional observers tend to supply some form of supervision or scrutiny. ... Presumably, legitimacy can be obtained by permitting supervision by a combination of interests, including local, national, and international observers. We conclude that some checks and balances over the registration and scrutiny of ballots are normally instituted in circumstances involving a secession referendum.

**The Majority Required**

The majority required to attain a mandate for sovereignty emerged as a significant issue in the campaign before the last Quebec referendum. The Quebec government has consistently said that all that should be required is 50 percent plus one of the total valid ballots cast. But federalists (including Prime Minister Chrétien and Intergovernmental Affairs Minister Stéphane Dion) have suggested that a greater threshold should be required.

As Table 1 indicates, existing international practice provides support for both approaches. Three of the constitutions reviewed require that a supermajority of two-thirds of the ballots cast favour independence. Note, moreover, that, in these three cases, the referendum is to be held among the entire national population, making this threshold extremely difficult to achieve. The remaining five constitutions require only a majority of 50 percent of valid votes cast (although the Czech and Slovak Federative Republic required a majority favouring independence in each republic, if the separation proposal passed in only one of them the federation would cease to exist a year after the referendum results were announced [article 6(2)]).

*continued on page 108*

We conclude that either of the approaches suggested is consistent with international practice. ...

**Effect of the Referendum**

Another important aspect of a referendum's decision rule is the legal effect of the vote. If the answer to a secession vote is in theaffirmative and a UDI is illegal, what then is the effect of the referendum?

*[M]ost referendums are consultative in the sense that the legal status quo remains until a resulting negotiation and eventual legislative measure addresses the referendum result.*

The short answer is that the effect of a referendum depends on the constitutional system in operation. Some nations, such as Denmark, have a qualified majority requirement to bring about constitutional change, but the corollary is that a referendum is binding. The United Kingdom also has some experience with qualified majorities, yet a binding referendum is an impossibility there since parliament cannot bind itself. Thus, as one commentator concludes about Western European nations, although popular sovereignty is their *raison d'etre*, the practice is different.

Indeed, it is impossible to generalize about the effect of a secession referendum without resort to a nation's constitution. Basically, if it is silent on the subject, a referendum is consultative, if only because there is no legal basis for making it binding. Thus, most referendums are consultative in the sense that the legal status quo remains until a resulting negotiation and eventual legislative measure addresses the referendum result. As one study concludes, "[b]inding referendums are rare in parliamentary democracies, and are best suited to countries with a tradition of direct democracy, such as Switzerland." ...

**The Boundaries of the Seceding Unit**

Whether the borders of an independent Quebec would be identical to the borders of the existing province has also emerged as significant, particularly in the period since the October 1995 referendum.

The Quebec government has always maintained that the borders of an independent Quebec would remain unchanged following sovereignty and would not be the subject of negotiations between the Canadian and Quebec governments. It claims that international law supports this conclusion, pointing in particular to a 1992 legal opinion rendered by five international law experts to a Quebec National Assembly committee studying this question.

*[T]here is no uniform or general rule supporting the claim that the borders of the seceding unit cannot be changed upon independence.*

Some federalists say, however, that the borders of an independent Quebec would necessarily be subject to negotiation and agreement between the Canadian and Quebec governments. According to them, no rule of international law would preclude Canada from raising this issue, nor does international law guarantee or even support Quebec's claim to all of its existing territory in the absence of agreement with the government of Canada.

Legal disputes aside, existing international practice, as reflected in the constitutions that we surveyed, directly contradicts Quebec's claim that existing provincial borders would be guaranteed upon independence. Simply put, there is no uniform or general rule supporting the claim that the borders of the seceding unit cannot be changed upon independence.

For example, the *Soviet Secession Law* (article 12) provided a transition period during which the USSR council of ministers was to prepare, along with the government of the seceding republic, "proposals" regarding questions affecting the state boundary of the USSR. The proposals were to be considered ultimately by the USSR congress of people's deputies; although it might confirm the existing republican borders as the borders of the new state, there was no requirement or even presumption favouring this result.

Similarly, the Ethiopian constitution (article 48) provides that border disputes between or among states be settled by agreement of the concerned states; if they are unable to agree, the federal council, which is composed of representatives of Ethiopia's nations, nationalities, and peoples, is instructed to decide the issue on the basis of the settlement patterns of peoples and the wishes of the people or peoples concerned. Again, there is no presumption that existing borders will remain unchanged.

A similar result obtains in both Singapore and Austria, although no explicit provisions are directed to the resolution of border questions. In Singapore, the terms of secession must be approved in a national referendum; in Austria, they are a matter of agreement to be reached between the federal authority and the local authority. Thus, the seceding unit would have to resolve any border disputes in a satisfactory manner.

Of course, borders are sometimes not an issue. In St. Christopher and Nevis, for example, the state's existing territory comprises two islands; the secession of Nevis, were it to occur, would naturally include all the territory of that island. In France, the constitution contemplates the secession of colonial territories that are not contiguous to the French mainland; in the case of the Czech and Slovak republics, neither side questioned the existing borders. (Note, however, that the borders of these two states were altered slightly in early 1996.)

The point is simply that no generalized practice favours guaranteeing or protecting existing local or provincial borders at the time of secession. Indeed, it is commonplace to contemplate border adjustments as part of the negotiations between the host state and the seceding unit.

## A REFERENCE TO THE SUPREME COURT OF CANADA

The truism that courts are a safety valve, without which no

democratic society can survive, is tested in times of national crisis. In the past, the Supreme Court of Canada has proven up to the challenge. To what extent should it be called on to address discrete legal questions on the constitutional validity of a secession process?

In answering this question, it is useful to recall that the Supreme Court of Canada has previously been consulted on legal aspects of the process of constitutional reform. In the *Patriation Reference* (1981), the Court was asked whether the Parliament of Canada could patriate the Constitution without provincial consent. The answer was that, legally, the federal government was unconstrained, but such unilateral federal action would be contrary to the constitutional convention requiring a "substantial degree" of provincial consent.

*We believe some form of judicial reference to the Supreme Court of Canada is appropriate now because there is total confusion about the legal framework that would apply in the event of an affirmative vote in a sovereignty referendum.*

The Court has also been asked to outline the operation of the rule of law in circumstances involving a legal vacuum, a prospect of considerable relevance to those contemplating the aftermath of an affirmative secession vote in Quebec. In *Re: Manitoba Language Rights* (1985), the Court was asked to rule on the validity of Manitoba's laws, all of which were unilingual and thus contrary to the language guarantees under the *Charter of Rights and Freedoms*. Did it follow, therefore, that all unilingual laws passed by the Manitoba legislature from 1890 to 1982 were "of no force or effect" pursuant to section 52 of the *Constitution Act, 1982*?

*Does any principle of Canadian or international law guarantee that the existing borders of the province of Quebec would be the borders of an independent Quebec state?*

The Court did not opt for nullifying all Manitoba laws, giving rise to legal "chaos," because, it held, that such a course would "undermine the principle of the rule of law, a fundamental principle of our Constitution [which requires] that the law is supreme over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power [and] the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order. Law and order are indispensable elements of civilized life."

Accordingly, the Court refused to abdicate "its responsibility as protector and preserver of the Constitution." In so holding, it relied on a number of legal doctrines that will be of considerable relevance in the event of a referendum on the outstanding legal issues facing a Quebec secession process.

The relevance of these cases is twofold. First, the Supreme Court of Canada has a history of undertaking judicial references that, in its words, combine "legal and constitutional questions of the utmost subtlety and complexity with political questions of great sensitivity." In fact, we find that labeling a question "political" or "legal" is of less import than the need for the Court to address certain rudimentary questions better suited for the judiciary than the necessarily partisan and tempestuous legislative branch. Regardless, the Court has expressed a guarded willingness to fulfill its role as safety valve for the state.

Second, the Court had been able to complete its balancing act with prudent reliance on the rule of law, thereby retaining its legitimacy. Some issues truly are best left to a court of law, provided that the scope of the remedy and the questions are limited. Thus, as long as the Court relies on the rule of law as its mantra, its holding is entitled to appropriate respect and weight.

We believe some form of judicial reference to the Supreme Court of Canada is appropriate now because there is total confusion about the legal framework that would apply in the event of an affirmative vote in a sovereignty referendum. The Quebec government maintains that Canadian domestic law would no longer apply, claiming that principles of international law would recognize its right to secede unilaterally. The federal government, after considerable equivocation on the issue, has finally asserted that Canadian law would continue to apply until such time as a formal constitutional amendment approving secession were proclaimed.

As we have argued throughout this *Commentary*, it is in no one's interest to allow such legal confusion to persist. The only way to resolve the issue authoritatively is through a declaration by Canada's highest court as to the relevant legal principles that would apply.

*[C]onsistent with the principles of democratic accountability, a judicial reference ought to address only the narrow legal issues involving an interpretation of existing constitutional provisions. Nothing more would or could be asserted by the Supreme Court of Canada.*

**The Content of a Court Reference**

What the country needs is a judicial reference that suitably addresses some of the principles we have discussed, particularly those underscoring the rule of law and the need for clear ground rules. Nevertheless, consistent with the principles of democratic accountability, a judicial reference ought to address only the narrow legal issues involving an interpretation of existing constitutional provisions. Nothing more would or could be asserted by the Supreme Court of Canada.

With the scope of this

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alternative of a constitutional reference thus limited, what questions should be referred to the Court? We suggest the following:

1. Does the secession of part or all of a province from Canada require a constitutional amendment, in accordance with the amending formula in the *Constitution Act, 1982*?

*That partition is controversial is not reason enough to seclude the matter from the Supreme Court of Canada, which has proved more than capable of addressing matters of great sensitivity.*

2. If the answer to question 1 is "yes," what constitutional amending formula would apply to permit secession?

3. In the absence of a constitutional amendment proclaimed in accordance with the amending formula, what would be the legal effect of a UDI by the Quebec National Assembly? Would Canadian laws continue to apply and be enforced in Quebec after such an event?

4. Would a majority vote in favour of secession in a Quebec referendum entitle the province, under either domestic or international law, to secede from Canada?

5. Would either the government of Canada or the government of Quebec be required to obtain the consent of the Aboriginal peoples of Canada presently residing in Quebec prior to consenting to the secession of the province?

6. If the answer to question 5 is "no," would meaningful consultation be required before the Crown could give consent?

7. Does any principle of Canadian or international law guarantee that the existing borders of the province of Quebec would be the borders of an independent Quebec state?

The first five questions focus on different aspects of the rule-of-law principle that we have emphasized throughout this *Commentary*. Question 1 seeks to ascertain whether a constitutional amendment is required in order to effect secession, and Question 2 seeks to determine which of the two amending formulas in the *Constitution Act, 1982* would apply to the secession of a province: the seven-fifty procedure of section 38 or the unanimity procedure of section 41. Question 3 explores a related aspect of the same issue, focusing specifically on the legality of a UDI by the Quebec National Assembly.

*[G]iven the present political climate demanding that the federal government take some action to exercise leadership in a time of national crisis, federal contingency legislation is perhaps inevitable.*

This question also seeks to introduce the concept of the continuing application of Canadian law within Quebec territory, even in the face of a UDI.

Question 4 speaks not to the political effect of a referendum but to its effect on the rule of law; we seek here to confirm that Canadian law remains the legal status quo, notwithstanding the results of a referendum. As well, we introduce the issue of whether any principle of international law would entitle the Quebec government to issue a declaration of independence following a referendum result favouring that option.

Questions 5 and 6 seek clarification of the federal and Quebec governments' constitutional obligations to Aboriginal peoples under section 35 of the *Constitution Act, 1982*. These questions are relevant not only in determining the limits on Parliament's authority to negotiate but also in ascertaining any fiduciary obligation and potential liability of Quebec as Crown to the Aboriginal peoples living in that territory. Whether Aboriginal peoples have a constitutional right to consultation or consent as to the terms of a provincial secession is a question suitable for judicial reference. After all, it was the Supreme Court of Canada that fashioned the Crown-Aboriginal relationship as being fiduciary or fiduciary-like. The issue should be clarified by a constitutional reference *before* any potential abdication of the Crown's fiduciary duty.

Finally, question 7 raises the legal issue of partition. Whether the legal viability of partition ought to be put to the Court is not self-evident. One can argue that whether partition is legally possible is too important a determination to be left solely to political negotiations. On the other hand, since the issue of partitioning a sovereign Quebec is currently among the most sensitive issues in the political arena, this question might be best left out of a constitutional reference.

On balance, however, we believe that it would be appropriate to seek the Supreme Court's views on Question 7. The question as framed focuses on the narrow issue of whether any legal principle prohibits the partition of an independent Quebec. In short, it asks whether partition would be legally possible, not whether it would be politically wise or likely.

*The most effective means for the national government to establish such ground rules is through legislation enacted by Parliament. Federal contingency legislation would attempt to define, by statute, the legal framework that would apply in the context of an affirmative vote in a secession referendum.*

Of course, the Court's answer would have an important political impact because, as noted elsewhere, the Quebec government has consistently

maintained that partition would be contrary to principles of both domestic and international law. But it is precisely because the Quebec government has elected to frame this issue in legal terms, arguing that partition is legally prohibited, that we regard it as appropriate for a court reference. That partition is controversial is not reason enough to seclude the matter from the Supreme Court of Canada, which has proved more than capable of addressing matters of great sensitivity.

## CONTINGENCY LEGISLATION

A judicial reference can go only partway toward providing the certainty and due process necessary for a secession process consistent with the principles we have articulated. The advance setting of ground rules is the major premise of this *Commentary*, so it is paramount that the legislative branch go beyond the limited agenda of a judicial reference and provide the ground rules for a secession process in their entirety. The most effective means for the national government to establish such ground rules is through legislation enacted by Parliament. Federal contingency legislation would attempt to define, by statute, the legal framework that would apply in the context of an affirmative vote in a secession referendum.

Indeed, given the present political climate demanding that the federal government take some action to exercise leadership in a time of national crisis, federal contingency legislation is perhaps inevitable. By its very nature, it would alleviate the inevitable economic and social turbulence resulting from an affirmative secession vote.

In this sense, this option need not be accepted or rejected outright but rather be considered as an approach in parallel with the remaining alternatives. In fact, the enactment of contingency legislation could be seen as a logical consequence of the court reference we have recommended. Such legislation could be introduced into Parliament following the judgment of the Supreme Court of Canada, incorporating and building on the legal framework laid down by the Court.

### Scope and Objectives

An initial question is the scope and objectives of such legislation. At one end of the spectrum is affirmation of the operation of the rule of law throughout any secession negotiations. Such minimalist legislation would merely confirm any holding by the Supreme Court of Canada on the legal terms governing secession. At the other end of the spectrum lies some facsimile of the legislation contemplated by the Reform Party of Canada; it would enact practically all terms of secession, from the procedural rules governing a referendum to the specific terms of an agreement to be negotiated in the event of an affirmative vote.

The minimalist legislation would likely provide little in the way of achieving many of our principles. For example, the negotiating structure we envisage, including establishment and appointment of a CNA [Canadian negotiating authority], would require detailed legislation far beyond concerns associated with maintaining the rule of law. On the other hand, if contingency legislation is overinclusive, creeping into areas for which the legislators lack a popular mandate, this alternative loses its appeal. We thus believe that the main focus of contingency legislation should be on the *process* for negotiating secession, rather than the *outcomes* that would result from that process.

## PROPOSED CONTENT

What might such contingency legislation contain? We suggest that it ought to include provisions as to the following:

1. The secession of part of the territory of Canada is legally possible. No part of that territory shall be permitted to secede, however, except by a constitutional amendment enacted in accordance with the procedure set out in Part V of the *Constitution Act, 1982*.

*Although we believe it essential that a referendum be on a clear question and that the process be fairly administered, we do not believe it is possible or desirable for the federal government to attempt to intervene directly to regulate the process. Rather, it should indicate in advance whether it regards the question and the process as legitimate.*

2. Any laws, orders, or declarations of any person, including the government or legislature of a province, that are inconsistent with paragraph 1 are hereby declared absolutely void and of no force and effect.

3. No secession of any part of a province of Canada shall be permitted unless a majority of the population residing in that province has indicated its desire to secede through a referendum.

4. If at least 5 percent of the persons eligible to vote in a referendum referred to in paragraph 3 object to the wording of the referendum question or to the manner in which the referendum is to be administered or supervised, they may submit a petition to the governor-in-council stating the nature of their objections. The governor-in-council shall appoint a commissioner to investigate and report on the objections and to make recommendations within 30 days of his or her appointment. (We make this suggestion in an attempt to give effect to Principle 4. Although we believe it essential that a referendum be on a clear question and that the process be fairly administered, we do not believe it is possible or desirable for the federal government to attempt to intervene directly to regulate the process. Rather, it should indicate in advance whether it regards the question and the process as legitimate. Requiring the government to report to Parliament on any significant objections is one way to give effect to this analysis.)

5. The governor-in-council shall table in the House of Commons, within 30 days of the receipt of the report referred to in paragraph 4, a response indicating how the government has acted or proposes to act on the recommendations of the commissioner.

6. No resolution authorizing the secession of any part of the territory of Canada may be introduced into the House of Commons by a member of the governor-in-council unless the response referred to in paragraph 5 has been tabled in the House of Commons.

*continued on page 112*

7. In the event that (a) a referendum referred to in paragraph 3 is held in which a majority of the votes cast favour secession and (b) any report required pursuant to paragraph 5 has been duly tabled in the House of Commons, a Canadian negotiating authority (CNA) shall be established within 30 days of the publication of the final results of the referendum.

8. The affairs of the CNA shall be directed by a governing board consisting of 21 members: nine appointed by the governor-in-council, nine by the governments of the provinces (notice that we leave open the question of whether each province would appoint a single representative or whether provincial representation would be weighted according to relative populations), and three by and on behalf of the Aboriginal peoples of Canada. The chief executive officer of the CNA, who shall also chair its governing board, shall be nominated by the governor-in-council and shall be confirmed by a two-thirds vote of the entire governing board.

9. The CNA shall negotiate in good faith with the government of the province in which the referendum referred to in paragraph 3 has taken place, with a view to concluding an agreement on the terms of a constitutional amendment authorizing the province or a portion thereof to secede from Canada.

10. No resolution authorizing the secession of part of the territory of Canada shall be introduced into the House of Commons by a member of the governor-in-council unless (a) it has been approved by a resolution of the governing board of the CNA, supported by a two-thirds vote of the members of the board; (b) a second referendum has been held in the province that proposes to secede in which the terms of the proposed secession have been approved by a majority of votes cast; and (c) in that second referendum, persons residing in the province that proposes to secede are permitted to express their views as to whether they wish to remain within Canada, and the borders of any new entity are drawn in such a manner as to take account of those views to the greatest extent practical.

*The secession of any part of the territory of Canada must be consistent with the fiduciary obligations of the government of Canada toward the Aboriginal peoples of Canada.*

(The phrase "to the greatest extent practical" is intended to refer to the two limiting principles we discussed in relation to Principle 8, that the right to dissent can be exercised only by a geographic entity that has a recognized legal existence, such as a municipal corporation, and that the area is territorially contiguous with Canada.)

11. The secession of any part of the territory of Canada must be consistent with the fiduciary obligations of the government of Canada toward the Aboriginal peoples of Canada.

12. In the event that the secession of part of the territory of Canada occurs in accordance with the aforementioned procedure, the Constitution of Canada remains in force in the territory of Canada that is not affected by the amendment, with such changes as are necessary to take account of the amendment.

### A PANEL OF INTERNATIONALLY RECOGNIZED EXPERTS

One of the greatest challenges facing the federal government in implementing any form of Plan B would be dealing with the charge that it is attempting to undermine the right of Quebeckers to self-determination. The overwhelmingly negative reaction in Quebec to the federal government's decision to intervene in the *Bertrand* case illustrates the difficulties quite clearly. It is possible that any good-faith attempt to propose fair and impartial ground rules would be denounced in a similar fashion. One way to respond to this challenge is to create a body of internationally recognized experts who might be seen in Quebec and in the rest of Canada as being impartial and whose opinions would be taken seriously. These experts could be asked to recommend a model set of rules to govern the secession of a province from Canada. Their report should be debated in Parliament and could form the basis for contingency legislation.

**Membership**

The two questions that immediately arise about such a body are its membership and its terms of reference. Clearly, the panel would have to have Canadian representatives. In light of our desire to establish a body that would be seen as impartial and credible in all parts of the country, we believe, however, that a majority of members should be non-Canadians. Ordinarily, domestic matters are the exclusive jurisdiction of the sovereign, so non-Canadian membership on this panel would be somewhat exceptional. But extraordinary times often call for extraordinary measures. A possible model would be two Canadians, one from Quebec and the second from another part of the country, plus three non-Canadians, one of whom would chair the panel. The appointees should all be individuals who have occupied high office in Canada or elsewhere (persons of recognized high standing such as former prime ministers, premiers, governors-general, or supreme court justices) and whose judgment on these delicate political matters would be seen as credible.

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**CORRECTION**

At page 78 in the last issue of *Canada Watch* (Volume 4, No. 4, April/May 1996), Mr. Charles M. Gastle, a partner with Shibley Righton, was mistakenly described as also a "Professor of Law at Osgoode Hall Law School." We apologize for this inadvertent error.