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to know will peak and at what cost is anybody's guess.

While undercutting the judiciary's authority to control the trial process, the Charter has granted judges extraordinary powers to shape and decide public policy. By recalibrating the scales of criminal justice, the judiciary has triggered demands for greater accountability and transparency in the justice system. The judiciary has responded to its loss of authority with publication bans, sealing orders and other restrictions on access. In the circumstances, measures that frustrate the public's demand for accountability can only arouse suspicion and cause a loss of legitimacy.

"By recalibrating the scales of criminal justice, the judiciary has triggered demands for greater accountability and transparency in the justice system."

A Sea Change

We are witnessing a sea change in Canada's justice system. The upheaval of traditional assumptions about the trial process is accompanied by dramatic shifts in the public's perceptions and expectations of the system. The time is now for a response. First and foremost, legislation is needed to establish rules of access and participation in criminal proceedings. Just as important, we must begin the difficult task of rethinking the underlying assumptions of our justice system.

Jamie Cameron is an Associate Professor at Osgoode Hall Law School, York University. The Centre for Public Law and Public Policy will publish a book titled The Charter's Impact on the Criminal Justice System *later this year.*

Let's Talk—The Quebec Referendum and Canada's Future

Part One

by James Tully

Slightly different uses of the key terms of Canadian constitutionalism provide most Canadians with their identity as citizens. This is where the constitutional problem arises. The last five rounds of negotiations have shown that there is no single comprehensive description of Canada's constitutional characteristics agreeable to all. For example, Quebeckers tend to see Canada first as an association of two nations, but federal governments regard it first and foremost as a single, bilingual and multicultural nation. Many westerners recognize Canada as a union of ten identical provinces while the majority of Aboriginal peoples identify it as an assembly of 600 First Nations in treaty relations with the non-Aboriginal federation. Charter sovereigntists construe Canada as a single society of free and equal persons, but to linguistic minorities or the Maritime provinces, yet other characteristics are given priority. If Canadians are to recognize the diverse character of their association, they must be willing to enter into negotiations of mutual recognition with the aim of reaching agreement on a form of accommodation that gives due recognition to the similarities and differences of the different descriptions of the association.

The Meech Lake and Charlottetown accords provide evidence that this form of negotiation works. In both cases, the participants in the multilateral negotiations and public dialogues surrounding them were able to reach agreement on a form of constitutional accommodation acceptable to all. Conversely, those who did not participate, and who judged the accords unilaterally from within their customary descriptions of the association, tended to misunderstand the accommodative nature of the accords, to take the most intolerant stances and to vote them down.

In the current impasse, the claim to the sovereignty of Quebec is said to be incompatible with Canadian federalism. Is there a way to recognize and accommodate both positions? Let us see by listening first to the sovereigntists, then to the federalists.

Quebec's Right to Secede and Two Concepts of Federalism

There are four constitutional arguments that justify Quebec's right to secede.

1) The *Canadian Charter of Rights and Freedoms* was enacted in 1982 without the consent of the people of Quebec through their representatives in the provincial assembly. This constituted an injustice from Quebec's viewpoint because it violated one of the basic constitutional conventions of the federation: the common law and liberal convention of *quod omnes tangit* (what affects all must be agreed to by all or by their representatives). On this view of liberal federalism, a fundamental amendment to the constitution requires the consent of the provincial assemblies affected. Yet, although the Supreme Court ruled that the convention would be breached, nine provinces and the

federal government, all of whose consent was given, proceeded without the consent of the Quebec Assembly, and with its express dissent, even though Quebec was affected the most. This was unprecedented. The Supreme Court was unable to find one constitutional amendment prior to 1981 that was passed without the consent of the province most affected.

2) The 1982 amendment violated not only the procedural convention of consent, but it also transferred to the federal court final jurisdiction over aspects of language, education, cultural and civil rights, and other areas that have always been under provincial jurisdiction. Furthermore, it brought in a 7/50 amending formula that unilaterally abolished the convention of consent of the provincial assembly affected. This breached a second fundamental convention of federalism from the viewpoint of Quebec: the common law convention of political and legal continuity. That is, the political and legal constitution by which a province governs itself continues into any federation a province joins and it cannot be altered or diminished by the other provinces or the federal government unless and until the provincial assembly agrees to the alteration.

This longstanding convention was guaranteed to Quebec in 1760, reaffirmed in the *Quebec Act of 1774*, put beyond doubt in *Campbell v. Hall* (1774), challenged by the *Durham Report* and the *Act of Union of 1840* and reaffirmed and extended to every province in 1867. This enlightened convention of global constitutionalism (first used in the common law to protect Anglo-Saxon liberties through the Norman Conquest) has always stood in opposition to the feudal or Hobbesian counter-convention of discontinuity: that is, in joining a federation, the political and legal constitutions of the members are discontinued, either by subordination or extinguishment, to federal sovereignty. Prior to 1982 in Canada, discontinuity had been attempted against Quebec only twice: in 1763, but this was overturned in 1774, and in the *Durham Report* and the *Act of Union of 1840*, but this was overturned in 1867.

Hence, the conventions of consent and continuity protect the coordinate sovereignty of the provincial assemblies. Lord Watson authoritatively interpreted the 1867 constitution in explicit opposition to discontinuity or Hobbesian federalism in the following way:

> The object of the Act of Confederation was neither to weld the provinces into one, nor to subordinate provincial governments to a central authority, but to create a federal government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy.

"The effect of the Charter is thus to assimilate Quebec to a pan-Canadian national culture, exactly what the 1867 constitution, according to Lord Watson, was established to prevent."

It is unsurprising, therefore, that the Charter is often described in Quebec as a new form of conquest or Durhamism.

In addition, the Charter cut very deeply into the political and legal character of Quebec. When the Quebec Assembly seeks to preserve and enhance Quebec's character as a modern, predominantly French-speaking society, it finds that its traditional sovereignty in this area is capped by a Charter in terms of which all its legislation must be phrased and justified, but from which any recognition of Quebec's distinct character has been completely excluded. The effect of the Charter is thus to assimilate Quebec to a pan-Canadian national culture, exactly what the 1867 constitution, according to Lord Watson, was established to prevent. Hence, from this perspective, the Charter is "imperial" in the precise sense of the term that has always been used to justify independence: it is an alien yoke imposed over a people without their consent and thwarting their freedom to govern themselves by their own laws and ways.

It is important not to misunderstand Quebeckers' objection to the Charter. They have no objection to the individual and collective rights and freedoms in the Charter. They have their own charter of rights and they have a better record of recognizing and protecting the rights of the Anglophone minority and the 11 First Nations than the other provinces. And the ways in which Quebeckers are dealing with their multicultural character while preserving French as the host language is surely no worse than the other provinces.

Rather, their objection is that the Charter is not pluralistic enough. For all its recognition of the multicultural members of Canada, it fails to recognize one further aspect, namely, Quebec's distinctness. The majority of Quebeckers want a way to affirm their commitment to the values of the Charter and to affirm their equal commitment to Quebec as a distinct society, or nation, in the light of which the rights and freedoms of the Charter can be in-

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terpreted and applied. What I am emphatically saying here is that contemporary Quebec citizens are able to relate to Canada under these two overlapping aspects, whereas, say, charter patriots and older Quebec nationalists, are not. In Quebec, this is called the "patriotism of ambiguity," but for me, it is simply a sign that Quebeckers recognize and affirm the diverse character of the Canadian association.

3) Since the 1950s, the provincial economies have grown enormously, and Quebec, along with the other provinces, has grown into a modern society in the global economy. At the same time, the provincial and federal governments have grown in a tug-of-war fashion, much like the arms race of the cold war, in which growth by one partner stimulates the growth of the other. This dynamic has been beneficial in some respects due to economies of scale, but it has also created an overlapping, duplicating and expensive edifice of federal and provincial bureaucracies which is under no one's control. For over thirty years, Quebec governments have requested that this costly labyrinth be streamlined and rendered efficient by two means: a reduction in federal spending powers in provincial jurisdictions, and the transfer of some powers to Quebec and other provinces, if they wish.

Apart from a few highly successful exceptions, such as the Quebec Pension Plan, these two requests have been consistently denied and the federal government has continued to expand into provincial jurisdictions. The inability to eliminate overlap and duplication so Quebec can exercise the powers appropriate to its economic circumstances, and so Canada can become a more efficient association, has become the single most important argument for the right to secede over the last four years.

4) The procedural and substantive injustices of the previous twelve years are now the unalterable constitutional status quo. Quebeckers were told in 1982 that the other provinces and the federal government were free to pass the constitutional amendment they wanted without the consent of Quebec, even though it affected Quebec the most. Quebeckers were told that the constitutional amendment that they wanted in Meech, and which affected it the most, required the consent of every single province. Because the conventional avenue of redress (*i.e.*, further negotiations) is now blocked by the parties who committed the breach, a majority of Quebeckers voted both provincially and federally for parties pledged to a referendum on sovereignty and secession. Neither the federal nor any provincial governments have denied Quebec's right to hold such a referendum.

These then are the four constitutional reasons that justify Quebec's right to secede. The precedent is the secession of the 13 US provinces in 1776. In this case, all the provincial assemblies, except Quebec, protested that the Crown and imperial parliament passed legislation without the consent of the provincial assemblies and in violation of the coordinate sovereignty. Quebec did not join in the protest because it was protected from this violation by the *Quebec Act of 1774* and was unaffected by the legislation. Many British Whigs, as well as Loyalists in the affected provinces, agreed with the secessionists that they had a legitimate constitutional grievance. However instead of supporting the unilateral declaration of independence in 1776, they argued that the correct constitutional step to take was to seek redress by entering into negotiations to amend the imperial constitution so it recognized the coordinate sovereignty of the provincial assemblies.

Although these provincial Loyalists failed, they brought their common law constitutionalism with them when they moved to Canada and formed the associations of 1791 and 1867. The tragic irony is that Quebec is now the greatest defender of this most tolerant and enlightened form of constitutionalism in the world today. The rest of Canada has forgotten it and since 1982 has embraced a kind of constitutional imperialism. This forces Quebeckers reluctantly to follow in the footsteps of the American secessionists of 1776. I say "reluctantly" because even such a staunch sovereigntist as Premier Parizeau has insisted as recently as January 27, in Paris, that he is for secession only because coordinate sovereignty has been denied to Quebec within Canadian federalism.

So, at the constitutional level, Quebeckers cannot determine themselves within Canada. They are determined by a power outside of themselves. The other provinces and the federal government have the power to impose constitutional change on Quebec as they please without Quebec's consent, as in 1982. They also have the power to block any attempt by Quebec to introduce a constitutional amendment that protects Quebec's political and legal identity, as in 1990, and to block the reform of federal-provincial overlap and duplication. Finally, they have the power to break off constitutional negotiations at will, as in 1992. Quebec's right of self-determination in Canada is thwarted at every turn. If, then, in international law when a right of self-determination is thwarted and constitutional redress is blocked, the people have a right to

secede, then Quebeckers have such a right. But there is still more to the story.

Sovereignty

What do Quebeckers mean by "sovereignty"? Like "federalism," sovereignty has a range of uses and we should not presume that we know what Quebeckers mean without listening to what they say. The most striking aspect of sovereignty is the way it is used in a "limited" sense in the Draft Bill tabled in the National Assembly in 1994.

The first limit is that the Draft Bill recognizes that sovereignty resides in the people themselves and is only delegated to the Quebec Assembly. The commitment to popular sovereignty is acknowledged by the role a referendum would play in bringing the Bill into force once it has been enacted by the Assembly and, as well, by the role popular consultation plays in formulating the Declaration of Sovereignty in the final drafting of the Bill itself and in the timing of the referendum. Further, sovereignty is limited by a provincial Charter, a guarantee to protect the identity and institutions of the Anglophone minority and the recognition of the right of self-government of the 11 First Nations over their own territories.

The limits to external sovereignty are just as striking. An economic association would be maintained with the rest of Canada. Canadian citizenship and currency would be retained. Quebec would assume all the obligations of the treaties and international conventions to which Canada is a signatory. A sovereign Quebec would also apply to the UN and retain membership in the Commonwealth, NATO, NAFTA, GATT, and others. Finally, the entire system of Canadian laws and institutions now in force will continue into the new country unless and until they are amended or repealed by the Quebec Assembly.

Hence, "sovereignty" is definitely not equivalent to "separation," as the leaders of the No campaign constantly assert. Far from it. A great deal would remain the same. There are two main differences. First, although the economic and citizenship association with Canada remains, the political association is thinned down to the minimum required to regulate the harmonization of the two economies, like NAFTA, but with a higher level of integration. Second, the delegated and limited sovereignty is located wholly in the Quebec Assembly rather than being shared with the federal government.

"Like 'federalism,' sovereignty has a range of uses and we should not presume that we know what Quebeckers mean without listening to what they say."

This is a fully modern, or perhaps post-modern, concept of sovereignty. It recognizes the cultural diversity of the sovereign citizens internally and dense relations of interdependence externally. Nevertheless, the majority of Quebeckers rejected this formulation of sovereignty because it does not express fully the limits they associate with sovereignty.

The first objection is that since Quebec's right to secede is based on the failure of Canada to accord Quebec the constitutional recognition and consent it deserves, then a sovereign Quebec must ensure that it recognizes the cultural diversity of Quebec society in an analogous manner. The Draft Bill does not do this. The rights of the Anglophone minority need to be specified more clearly through consultation with them and entrenched in the constitution. The increasingly multicultural character of Quebec citizens is absent from the Draft Bill and needs to be included. Further, the 11 First Nations have a claim to sovereignty that is similar to Quebec's in many respects. This should be acknowledged and negotiations undertaken to try to work out a compatible form of mutual recognition and accommodation. The way to proceed is to separate the negotiations with the First Nations from the referendum and negotiations with Canada. This has not been done.

These recommendations relate to the majority view that sovereignty should be the expression of a "project of society." Although this phrase has taken on a number of meanings, I believe the core meaning is still the one given to it by Louis Balthazar in an interview in 1993 and reiterated by Guy Laforest. The idea is that the sovereignty movement must attract the trust of citizens from all areas of Quebec society, not just the Francophone majority. Thus, it is incumbent on the government to make their option attractive to all Quebeckers before the referendum, by governing successfully in accord with the ideals they hope to realize more fully in a sovereign country.

The second objection is that the citizenship dimension is not sufficiently clarified. For a majority of Quebeckers, "sovereignty" includes not only economic association, but also political association. Indeed, it includes not only confederal political association as envisaged by the Democratic Action Party, but federal political association by means of representation in a federal parliament. The most recent formulation of the question is a response to this objection. Canadians shake their heads at this and say Quebeckers do not know what sovereignty means. But this just shows that Canadians

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have forgotten their own constitutional history and Quebeckers have remembered it. The term "sovereignty" has always been used to describe the status of the provincial assemblies in the Canadian federation as well as in the US federation from the seventeenth to the twentieth century. Even the 1787 constitution in our sister federation to the south, which diminished provincial sovereignty more than the 1867 constitution did in Canada, was unable to eliminate the term "sovereignty" from the provincial assemblies.

Quebeckers' attachment to a degree of political association is based on the considerable benefits of being a member of a larger federation. The crux of the argument for the purpose at hand is that Quebeckers have realized through the course of the pre-referendum discussions that they would enjoy more sovereignty in a Canadian federation that recognizes their provincial sovereignty than in a sovereign nation-state. If Quebec were to secede and retain the Canadian dollar, it would reduce its control over economic policy. Quebec would have to make concessions in negotiating its way back into GATT, NAFTA, and other associations, and it would have to adopt GATT and NAFTA rules from which it is currently shielded by the Canadian federation. In taking on a portion of the Canadian debt, Quebec would pay one percentage point more in interest than it presently does (1.5 billion dollars more per year). Equalization payments and agricultural subsidies would end. These and similar arguments of economy of scale and partnership thus corroborate the good federal sense of most Quebeckers: a properly ordered federation enhances rather than diminishes the sovereignty of its members.

The attachment to Canada runs deeper still. This desire to remain part of Canada is not the weight of habit or the calculation of utility. The overwhelming majority of Quebeckers are proud of being Canadian when Canadians reciprocally recognize them for who they are: citizens of the only self-governing, French-speaking society in the Americas. They are also attached to the Francophone communities outside of Quebec and to the Quebec presence in the federal government. They are proud of sharing a history and a destiny with Canadians whose public language and culture are different, yet to whom they are related in endless ways. They respect this difference. I have never, for example, met a Quebecker who wishes to impose the Quebec Charter on the rest of Canada without their consent. They ask only that Canadians do the same. As poll after poll shows, Canada is under their skin.

This explains why the campaign strategy of the No side to equate a vote for sovereignty with "separation" has proved so effective. If Quebec were to separate without any association, this would literally sever a crucial aspect of the identity of Quebeckers. The threat by the federal government to revoke Canadian citizenship in the event of a "yes" vote has the same powerful effect. The Yes campaign counters this by equating a "no" with the constitutional status quo, which, as we have seen, severs the other crucial aspect of Quebeckers' identity.

The Quebec government can respond by writing a higher degree of association into the Draft Bill, but this will not meet the objection. The government cannot guarantee that Canada will accept this degree of association in the negotiations after a "yes" vote. Canada would probably negotiate a fair degree of economic association—less than the present yet probably more than NAFTA. But dual citizenship would probably be phased out within two years and both Quebeckers and Canadians would be less well-off in the short- to medium-term. Finally, to respect popular sovereignty, a second referendum is required at the end of the negotiations following a "yes" vote, so that the people can accept or reject whatever . . . .

Two conclusions follow. First, an independent nation-state is not the solution to Quebec's struggle for recognition of sovereignty. An independent nation-state does not provide the kind of sovereignty the overwhelming majority aspire to achieve. Therefore, the exercise of the right to secede without a guarantee of association is not the solution to Quebeckers' aspirations. Second, for the last 14 years, Canadians outside Quebec have unjustly imposed a form of unilateral constitutionalism that elevates the Charter above other characteristics of the federation, subordinated Quebec's sovereignty to the will of the majority of the other provinces and the federal government, and made it clear that they have no intention of negotiating away their position of domination.

So Quebeckers are faced with two unsatisfactory choices: accept an unjust status quo that fails to recognize their sovereignty and discontinues their distinct constitutional identity that has been defended through centuries of struggle, or opt for an independent nation-state that, again, fails to realize the kind of sovereignty they seek.

But is this true? Is Canadian federalism as non-negotiable as it appears from the side of Quebec sovereigntists? To answer this, we need to cross over to the other side and listen to what they have to say about federalism.

James Tully is Professor of Philosophy at McGill University, Montreal, Quebec.