VOLUME 5, NUMBER 6 OCTOBER 1997

CanadaWatch

PRACTICAL AND AUTHORITATIVE ANALYSIS OF KEY NATIONAL ISSUES

a publication of the York University Centre for Public Law and Public Policy and the Robarts Centre for Canadian Studies of York University

SPECIAL ISSUE: THE QUEBEC SEPARATION REFERENCE

STÉPHANE DION: BEARER OF THE UNITY TORCH OR ANOTHER CANDLE IN THE WIND?

BY A. WAYNE MACKAY

The line between law and politics has never been a distinct one and it is rarely more blurred than in matters constitutional. This point is clearly illustrated by the recurring issues concerned with the separation of Quebec from Canada. Traditionally, the federal government has fought the battle against Quebec sovereignty in the political rather than the legal arena. There was a sense that to even enter the legal debate would lend a credibility to separation and in some subtle way make the departure of Quebec more likely.

After Canada's near-death experience in the 1995 referendum in Quebec, the federal government decided to reconsider its strategies with respect to Quebec and the thorny issue of separation. The first sign of this new approach came with the appointment of Stéphane Dion as Minister of Intergovernmental Affairs. Mr. Dion brings to this challenging portfolio an enthusiasm, credibility, and academic credentials that have not been seen since the days of Pierre Elliott Trudeau. While Dion brings a Trudeauesque intellect to the unity debate, he does not carry the same federalist baggage as did Mr. Trudeau. Like Trudeau, Stéphane Dion turned to the Supreme Court of Canada to provide the legal foundation for the federalist edifice.

In 1981, then Prime Minister Trudeau defended the unilateral federal patriation of the Constitution in the Supreme Court of Canada. While the original legal references arose in the provinces of Manitoba, Newfoundland, and Quebec, the federalists did not shrink from a fight in the Supreme Court of Canada. The Court, speaking through the late Chief Justice Bora Laskin, in its first televized decision, (ironically and, some would say, significantly, the sound system failed for the first part of the broadcast), held that unilateral patriation by the federal government was constitu-

continued on page 90

FOREIGN AFFAIRS, NATIONAL UNITY, AND SOVEREIGNTY

BY DANIEL TURP

Canada has always been a country proud of its foreign affairs record. As a middle power, Canada has played a significant role in the post-1945 period and has earned the reputation of a responsible state actor. Building on the legacy of Nobel Prize winner Lester B. Pearson, Canada has been committed to the peacekeeping efforts of the United Nations and of other international organizations in which it continues to play a key role. The active involvement of Canadian governmental departments and agencies in the processes of electoral monitoring and democratic development has also given Canada an enviable reputation.

The most recent, and daring, initiative of the minister of Foreign Affairs, M. Lloyd Axworthy, in the area of anti-personnel land mines has also proven the ability of the government of Canada to go beyond peace-keeping and to ensure that measures of peace-building become a priority

continued on page 93

UNIVERSITÉ YORK UNIVERSITY

FEATURES

tional in the legal sense, but unconstitutional in the conventional sense. This remarkable act of judicial evasion drove the federal and provincial forces back to the bargaining table and ultimately produced the *Constitution Act, 1982* (complete with the *Charter of Rights and Freedoms*), which became part of the supreme law of the land without the consent of Quebec.

The *Patriation Reference* is a clear precedent for turning to the courts for the dispensing of constitutional wisdom, when the political avenues to constitutional reform have come to a dead end. Stéphane Dion may also have appreciated the value of making the constitutional reference—a strategy that allows the federalist forces to formulate the questions and control the evolution of the case. In the earlier *Anti-Inflation Reference*, former Prime Minister Trudeau did seize this strategic advantage by referring his controversial *Wage and Price Restraint Act* to the Supreme Court, as a pre-emptive strike against challenges from the labour unions. The Court upheld the federal legislation on the basis of the emergency (or crisis) branch of "peace, order and good government", rather than the national dimensions branch which the drafters of the law expected to emerge as the constitutional foundation. Nonetheless, the Supreme Court did provide the needed legal buttress to the economic strategy of the federal government.

This rejection of legal processes in favour of democratic political processes would have more credibility if the Quebec government did not, in its next breath, resort to international law to buttress its political claims.

In contrast to the *Patriation Reference*, the federalist forces in the *Separation Reference* are arguing against unilateral action but, as in the *Anti-Inflation Reference*, they are hoping to provide a secure legal foundation upon which to build the federal unity strategy. The official Quebec government response has been to decry the legitimacy of the Supreme Court of Canada to make decisions affecting the sovereignty of Quebec. The Parti Québécois has taken the position that any Court decision would be an interference in the democratic processes within Quebec.

This rejection of legal processes in favour of democratic political processes would have more credibility if the Quebec government did not, in its next breath, resort to international law to buttress its political claims. As Minister Dion emphasized in his exchange of letters with Mr. Bernard Landry, Quebec cannot rely on law when it appears to favour her and reject it when it goes against her. Either we are operating under the rule of law or we are not. Stéphane Dion in his reference to the Supreme Court of Canada and in his exchange of letters has succeeded in exposing some of the contradictions in the separatist arguments and in giving the rest of Canada (ROC) the sense that the federalists are prepared to fight for Canada within the realm of law as well as politics.

A further blow to the Quebec reliance on democratic political processes in Quebec is the apparent reluctance of the Quebec government to give the same respect to the First Nations within the province. If Quebec can by unilateral, albeit democratic, processes partition Canada, why could not the First Nations do the same? The same international law principles which Quebec claims would result in the recognition of a sovereign Quebec could also result in the recognition of a sovereign Cree First Nation within the existing boundaries of Quebec.

Another weakness in the Quebec position at both a political and a legal level is the assertion that the separation of Quebec from Canada is an issue for Quebeckers alone. Surely the separation of Quebec from the rest of Canada has a significant impact on the other 22 or so million Canadians, and nowhere is this effect more apparent than in Atlantic Canada. In practical political, as well as legal, terms the

continued on page 94

CanadaWatch

PRACTICAL AND AUTHORITATIVE ANALYSIS OF KEY NATIONAL ISSUES

Canada Watch is produced jointly by The York University Centre for Public Law and Public Policy, and The Robarts Centre for Canadian Studies of York University.

For information, call (416) 736-5499, fax (416) 736-5739, write to *Canada Watch*, 227 York Lanes, 4700 Keele St., North York, Ontario M3J 1P3, or visit us at www.yorku.ca/faculty/osgoode/canwatch/cwhome.htm.

SUBSCRIPTION INFORMATION

Canada Watch is published six times per year.

Annual subscription rates
Institutions $75.00
Individuals $35.00
Students $20.00
(Outside Canada add $10.00)

Printed in Canada

ISSN 1191-7733

THE CALGARY DECLARATION: "NATIONAL UNITY" FOR A CHANGE?

BY KENNETH MCROBERTS

By signing the Calgary Declaration, the nine premiers raised a tantalizing prospect: just maybe public discussion of "national unity" will return to finding ways to bring the country together. For months now, the "national unity" debate has focussed not on unity but the conditions under which Canada might come apart. By definition, "Plan B" campaigns about such issues as whether secession would entail partition, or whether a unilateral declaration of independence would be legal, cannot produce "national unity"; indeed, they can produce the opposite. Rather, they commend themselves as a strategy for securing a "No" vote in a future referendum. Even then, their effectiveness is far from assured.

What is needed is a political order that can accommodate the distinct identity and concerns of Quebeckers.

There is no mystery about what is needed to reconcile Quebeckers with the rest of Canada, giving them a positive reason to reject sovereignty. After all, survey after survey shows that most Quebeckers want to remain part of Canada. Indeed, about half of those who voted "Yes" in the 1995 referendum defined themselves as Canadians, while seeing themselves as Quebeckers first. What is needed is a political order that can accommodate the distinct identity and concerns of Quebeckers.

Clearly, such an accommodation involves securing for the Quebec government the powers that Quebeckers feel it must have to meet its particular responsibilities. These powers must be guaranteed constitutionally. But accommodating Quebeckers also means recognizing and accepting their sense of identity. To be meaningful, this too must be constitutionally entrenched.

With obvious reluctance, Jean Chrétien bowed to this necessity in the last panic-stricken week of the 1995 referendum and pledged his support to recognizing Quebec as a distinct society. Yet, in the wake of the referendum, Chrétien settled for a simple Commons resolution to this effect, leaving to his new Minister of Intergovernmental Affairs, Stéphane Dion, the awesome task of persuading English-Canadian public opinion to accept constitutional entrenchment. Of course, Jean Chrétien is the one Liberal francophone in Ottawa who has enjoyed real popularity in English Canada. For whatever reason, he refused to bring it to bear.

RISING TO THE CHALLENGE

In short, through their initiative the premiers are seeking to assert a leadership that their federal counterpart has failed to provide. Indeed, no less a body than the Business Council on National Issues has been beseeching them to do so. Still, if the premiers have risen to the challenge of providing leadership on "national unity", to what extent have they in fact met the challenge?

[U]nlike Charlottetown, the document places the Quebec issue towards the end (fifth among seven sections) and then manages to avoid the fateful "distinct society" phrase by evoking the "unique character" of Quebec society.

The document clearly betrays the premiers' trepidation in tackling the Quebec question. They follow the Charlottetown Accord's strategy of surrounding recognition of Quebec with a variety of other defining characteristics of Canada, such as equality of the provinces, equality of citizens, tolerance and compassion, multiculturalism, linguistic duality, and the place of Aboriginal peoples. In fact, unlike Charlottetown, the document places the Quebec issue towards the end (fifth among seven sections), and then manages to avoid the fateful "distinct society" phrase by evoking the "unique character" of Quebec society. As for any new powers that Quebec might somehow secure through constitutional change, they would be automatically available to all the provincial governments. One might have thought that they, like Quebec, should demonstrate a need for such powers, whether through a two-thirds legislative resolution or a referendum. But such is the pressure to adhere to the formal equality of the provinces.

Perhaps this approach will succeed and the declaration will be acceptable to English-Canadian public opinion. To be sure, it may be necessary to broaden the document further. After all, Charlottetown referred to "the equality of female and male persons"; there is no such phrase here. Pressure will have to be brought on some premiers, such as Glen Clark, to push the matter forward. Nor is it clear that the Premiers can really compensate for the absence of leadership from the Prime Minister. The mere fact that popular consultation will be organized on a provincial basis could mean that regional grievances may gain the upper hand over the "national unity" concern with Quebec. Still, Reform leader Preston Manning's apparent support of the initiative may spare it from some attacks.

Yet, even if the premiers should secure passage of the Declaration in their respective legislatures, will the document have the hoped-for effect in Quebec? In particular, can it help to ensure a victory for Daniel Johnson's Liberals in the next provincial election? It is too early to tell.

CAN IT ATTRACT QUEBECKERS?

Initial survey results suggest that the initiative is welcomed by Quebeckers. But then why wouldn't it be welcome after months of "Plan B"? Whether the document will bear up under the scrutiny of Quebec opinion leaders, federalist as well as sovereignist, is another matter.

To be sure, as critics have been quick to point out, the Declaration offers no more than a set of principles. It does not show how these principles might be placed in the constitution nor does it outline any changes in the division of powers that might stem from them. Its authors acknowledge all that. But how will the Dec-

continued on page 95

EDITORIAL

OTTAWA'S LEGAL OFFENSIVE: AN EASY WIN

BY DANIEL DRACHE

If we look candidly at it, Ottawa has every reason to think that making the Supreme Court of Canada a central element in its unity campaign is an astute move. It is looking for an easy win against Bouchard and it is obvious why it has such confidence in its legal offensive.

First, Ottawa is counting on the Court to defend Canada's integrity as a matter of law and uphold the constitution. The operative word is the way the Court plans to uphold the constitution. The judges of the Supreme Court do not need the federal government to instruct them on their responsibilities to ensure "the peace, order, and good government" of Canada. As the highest legal authority in Canada, the Court is duty-bound to defend and protect Canada as it is currently constituted. None of English Canada's high-powered legal scholars disagree.

In any other context, [Mr. Justice Bastarache's] federalist activities should have disqualified him from the top legal post; in Canada, it was a crucial reason for his appointment to the job.

They can quibble about the fine print, but the bottom line is that the federal government's rendezvous with the rule of law appears on course.

A second compelling reason for Ottawa's bullishness is that it has convinced itself that its use of the Court for stark political ends holds few risks. Its constitutional arithmetic is simple to grasp. As a general principle, constitutions permit the "addition" of territory, but never the "subtraction" of a part. Even if there are exceptions to the rule, every state looks kindly on its own expansion; secession is another story entirely. This is why Ottawa has few doubts that the Supreme Court is going to let one of Canada's founding nations go, without first imposing an unreasonable number of conditions that Quebec will have to meet.

BUYING EXTRA INSURANCE

Even so, Ottawa is leaving nothing to chance. It has adopted a much tougher stance towards Quebec than at any time in the last thirty years of Liberal rule. This is why Prime Minister Chrétien and Stéphane Dion, his chief Quebec adviser, have bought extra insurance by appointing Mr. Justice Michel Bastarache, a former legal associate of the Prime Minister and a leading scholar, as the new judge to the Supreme Court. In the United States, under the gaze of Congressional scrutiny, Chrétien's choice would have raised a holy furor. In Canada, where such appointments are made without any public consultation, English Canada's opinion makers (at least those outside Quebec) generally applauded Chrétien's choice to beef up the Court's bench. Mr. Justice Bastarache is a leading federalist who headed the "Yes" campaign in support of the Charlottetown Accord. In any other context, his federalist activities should have disqualified him from the top legal post; in Canada, it was a crucial reason for his appointment to the job.

In a recent issue, The Economist ridiculed Ottawa's legal arguments as "essentially political propaganda" and pointed out that when the issue is independence, it is the primacy of the vote that matters, not what courts decide.

For a country that prides itself on having an independent judiciary, the last thing the Court requires is more federalist muscle. Rather, what the judges cannot afford to ignore is the other half of their mandate, namely, to defend Quebec's democratic rights up to and including self-determination. The Court may disagree with Quebec's commitment to self-determination, but it has a clear and irrevocable duty to protect Quebec's democratic rights to decide its future.

A FAIR HEARING?

Stéphane Dion, the Minister in charge of Canada's constitutional future, has the merit of speaking candidly in assessing Quebec's chances to get a "fair" hearing from a strongly federalist Court. According to Dion, he intends to make it as difficult as possible for Quebec to achieve its democratic goals legally. For the international press, this is hardly an earth-shattering revelation. In a recent issue, *The Economist* ridiculed Ottawa's legal arguments as "essentially political propaganda" and pointed out that when the issue is independence, it is the primacy of the vote that matters, not what courts decide. If the Court cannot stop Quebec from leaving, what is the point of compromising the independence of Canada's highest court in such an ill-conceived, last-ditch effort?

This is the real issue that should worry the Premiers and send a clear wake-up call to the rest of Canada. The pseudo-respect for the rule of law is not going to help Canada end its constitutional wars and arrive at a settlement that includes Quebec. Inevitably, there is a price to be paid for the politicization of the Court in this overt way.

Daniel Johnson, Quebec's Liberal leader, will likely be the first casualty. The prospect that he will shortly be teaching constitutional reform at a university near you seems increasingly likely. Bouchard is already calling him English Canada's candidate in the next provincial election. In the eyes of Quebec's voters, he looks more like a certain loser than a confident winner of the next provincial election. None of this qualifies as good news for Quebec's federalist forces.

THE GENERATION GAP

What is depressing today is the realization that the federalists and the Premiers who run Canada are caught in a time warp. They are no longer able to come up with any other scheme to win Quebeckers over. The test of good governance demands that every political generation—even in the final days of its mandate—must be prepared to rise above the ordinary and establish a new balance of forces which form the country. It is the only yardstick that matters and it is the one farthest removed

from the strategizing of the Chrétien federalists.

The hard truth is that Canada's unity parties can no longer win elections in Quebec as they once did. Their electoral fortunes peaked over two decades ago. So Ottawa's power brokers increasingly need to conduct politics by other means—the Supreme Court, constitutional conferences, if necessary, such as Meech Lake, Charlottetown and now the Calgary Declaration and, recently, federalist legislation such as the *Regional Veto Act* designed to prevent any kind of fundamental constitutional change from being implemented.

Ramsay Cook, a leading historian of French-Canadian nationalism, wrote almost three decades ago that the only way to halt Quebec's natural evolution out of Canada was to build "a fruitful partnership in a single state".

Behind these initiatives is a mind-set and a vision. The Trudeau generation, still in power, continues to believe its old idea that Ottawa can deliver a definitive knockout blow to Quebec's national aspirations, at least for a generation. This is the genesis of Plan "B" even before it was called Plan "B". It stems from the idea that federalist Canada can strong-arm Quebec to accept an inferior status as one of Canada's provinces. Ottawa is attempting to do this one last time by using the Supreme Court to hear the Reference Case, but Canada's federalist leadership will fail again. Must this happen? Probably, unless the Trudeau generation loses power or reaches out for a new beginning.

ELITE DISCOURSE

Yet, there is an alternative. It is worth recalling that, long before Bouchard came on the scene with his own ideas of partnership, federalist thought had a much different view of nationalism and politics. Ramsay Cook, a leading historian of French-Canadian nationalism, wrote almost three decades ago that the only way to halt Quebec's natural evolution out of Canada was to build "a fruitful partnership in a single state". If English Canadians could bring Canada's constitutional reality closer to the goal of partnership with Quebec, they could avoid the kind of crises they have witnessed in the recent past.

Three decades on, there is still no solution to establishing a new balance of forces in the country. At the very least, no one should pretend that there is no outline for one. Relying on the Supreme Court will only hasten the inevitable of having to negotiate, in trying circumstances, with a sovereign Quebec.

Daniel Drache is Director of the Robarts Centre for Canadian Studies and Professor of Political Economy at York University.

FOREIGN AFFAIRS, NATIONAL UNITY, AND SOVEREIGNTY *from page 89*

within the international community. Canada's overseas development aid has been generous at times and the Canadian International Development Agency (CIDA) has assured Canada an outstanding reputation in the developing world.

THE BLOC AND FOREIGN AFFAIRS

This good record of Canada has never been challenged by Quebeckers, including those who have promoted and continue to promote sovereignty for Québec. On the contrary, Quebeckers have participated fully in the making of Canadian foreign policy and have played an influential role in the implementation of Canada's foreign aid policy.

The values that underlie the foreign policy of successive Canadian governments (peace, security, human rights, and solidarity) are shared values and it would thus be surprising that there be major conflicts. Hence, during the 35th Parliament, the Bloc Québécois regularly gave the government of Canada its support and participated in a constructive fashion in the debates of the House of Commons and the Standing Committee on Foreign Affairs and International Trade.

There remain areas of disagreement. The Bloc Québécois has insisted that there be a linkage between human rights, trade, and aid and has strongly criticized the Chrétien government for its inconsistent decisions in these matters. The Bloc Québécois has also opposed foreign policy initiatives dealing with education and culture, which are matters of provincial jurisdiction and which have been used by the federal government to justify its increasing involvement in these areas. The Bloc Québécois has also considered the positions of the federal government on the inclusion of social and cultural exemption clauses in international trade agreements to be contradictory.

[T]he Liberal government and Bloc Opposition might soon be on a collision course if the federal government attempts to use, and abuse, its foreign policy to thwart the democratic drive of Québec towards sovereignty.

The constructive attitude and legitimate opposition of the Bloc Québécois will continue to dictate the policy of the Bloc in these matters. But, the Liberal government and Bloc Opposition might soon be on a collision course if the federal government attempts to use, and abuse, its foreign policy to thwart the democratic drive of Québec towards sovereignty. If the means to promote national unity are seen to be illegitimate by sovereigntists, and the government's Plan B can be qualified as such, the collision might be very direct.

PLAN B AND FOREIGN AFFAIRS

Plan B relies heavily on legal argument and brings into play the Supreme Court of Canada, which is called upon to affirm that Quebeckers have no right to declare sovereignty without Canada's consent. Plan B em-

continued on page 94

FOREIGN AFFAIRS, NATIONAL UNITY, AND SOVEREIGNTY *from page 93*

phasizes the conditions of secession of Québec and calls into question the democratic rules that have governed the previous referenda on the future of Quebec. It also appears to support the partition of Quebec along ethnic and linguistic lines.

This Plan B, which I believe will prove to be a fatal strategic error on the part of the federal government and those who favour such a plan, could be echoed in international circles by the foreign service of Canada, diplomats, members of Parliament, and ministers alike. If such were the case, the Bloc Québécois will not hesitate to denounce Plan B in the same international milieu and affirm that such a plan is an unacceptable attempt to hijack the democratic process in Québec. The Bloc Québécois will point out that Québec's own plan for sovereignty has always been democratically driven and that it is inclusive in its outlook.

This Plan B, which I believe will prove to be a fatal strategic error on the part of the federal government and those who favour such a plan, could be echoed in international circles by the foreign service of Canada, diplomats, members of Parliament, and ministers alike. If such were the case, the Bloc Québécois will not hesitate to denounce Plan B in the same international milieu and affirm that such a plan is an unacceptable attempt to hijack the democratic process in Québec. The Bloc Québécois will point out that Québec's own plan for sovereignty has always been democratically driven and that it is inclusive in its outlook.

The international community will also be told that the Bloc Québécois favours an authentic partnership with Canada and that it thus continues to argue for the preservation of an economic and monetary union following the accession of Québec to statehood.

In any case, the Bloc Québécois will launch an offensive to promote sovereignty on the international scene and to obtain, at the appropriate time, international recognition. Meetings with foreign diplomats and of parliamentary associations have given the Bloc Québécois, its leader and foreign affairs critic as well as other parliamentarians, an audience and will continue to do so. Those forums shall be used extensively in the coming months and will allow the Bloc Québécois to make its case for sovereignty and partnership. The case for Québec's independ-

continued on page 107

BEARER OF THE UNITY TORCH OR ANOTHER CANDLE IN THE WIND? *from page 90*

details of the separation would be a matter of negotiation with the ROC. Even if Quebec could establish the right to unilaterally separate from the ROC, it cannot dictate to the ROC the terms of that separation. This is as true in the political world as it is in the legal one. The ROC will not be a passive observer in the breakup of Canada.

Keeping the country together should always be Plan A, but there is nothing wrong with a Plan B, aimed at an orderly and informed dissolution of the country. Canada should be a nation that operates under the rule of law in bad as well as good times.

Part of the appeal of Minister Dion's strategy is that it attempts to clarify the basic legal ground rules in advance. The heated emotions that would likely follow a vote by Quebec to separate from the ROC is hardly the climate in which to make up the rules. To use the worn metaphor of the marriage, Minister Dion is attempting to get a belated prenuptial agreement about what will happen in the event of separation. It is my hope and the hope of many Canadians that Quebec will remain as a valued member of Canada. However, I do not see establishing the legal ground rules for separation as detracting from the objectives of Canadian unity. Keeping the country together should always be Plan A, but there is nothing wrong with a Plan B, aimed at an orderly and informed dissolution of the country. Canada should be a nation that operates under the rule of law in bad as well as good times.

One of the attractive aspects of Minister Dion's unity strategy is that he does not put all of his eggs in one basket. While waging the legal battle in the Supreme Court of Canada, he continues to fight in the political arena for the hearts and minds of the Québécois. He has done this most notably in his exchange of letters with Mr. Bernard Landry. Recognizing the close link between law and politics, he uses legal arguments to advance the federalist position and to expose weaknesses in the sovereigntist position. He has also risen above the trenches of personality assassination and reclaimed an intellectual constitutional mantle that was last worn by Pierre Trudeau. Dion's appeal to the mind is a welcome supplement to Prime Minister Chrétien's "from-the-heart patriotism".

The Dion blend of law and politics is all the more appealing when contrasted with the well-intentioned but fluffy political strategy that has been called the "Calgary Accord". By eschewing the constitutional route to changing the federalist structure, the premiers have lost in substance what they have gained in flexibility. Armed with an understanding of both constitutional and international law, Stéphane Dion may emerge as a better champion for Canadian unity that nine premiers and two territorial leaders, clothed only in transparent political rhetoric. Indeed, it

shows a greater respect for the legitimate aspirations of sovereigntists within Quebec to respond to their arguments on the basis of law and logic, rather than to insult them with bland political rhetoric and expressions of love, which can only ring hollow. Whether or not we win the battle for Canadian unity, it is worth fighting on the higher ground. Quebec and the ROC must be able to respect each other the next morning—regardless of whether they decide to live together or go their separate ways.

A. Wayne MacKay is Professor of Law at Dalhousie University and Executive Director of the Nova Scotia Human Rights Commission.

THE CALGARY DECLARATION: "NATIONAL UNITY" FOR A CHANGE? *from page 91*

laration fare in Quebec as simply a "framework for discussion"?

After the 1995 referendum, no less a figure than Claude Ryan had proposed that Quebec be recognized as a "people". More recently, he has mentioned "nation" as an alternative. Just as Ryan's credentials as a federalist are indisputable, so there is nothing inherently "separatist" about either term.

In the end, the document may be tripped up by the very strategy that was designed to secure its approval in English Canada. And Reform's tacit blessings may become a curse.

After all, the term "distinct society" has become a benchmark in Quebec. The Meech Lake Accord made the term famous. English Canada's rejection of the Accord ensured that Quebeckers would look for it, or an equivalent, in any new proposal. It's one thing to surround the term with other principles, such as the seemingly contradictory notion of equality of the provinces. It's yet another to remove "distinct society" altogether.

Of course, there are other terms than "distinct society" that would resonate well in Quebec. After the 1995 referendum, no less a figure than Claude Ryan had proposed that Quebec be recognized as a "people". More recently, he has mentioned "nation" as an alternative. Just as Ryan's credentials as a federalist are indisputable, so there is nothing inherently "separatist" about either term. Indeed, as the recent referenda campaigns demonstrated, British leaders quite freely refer to Scotland and Wales as "nations".

WHAT WE HAVE LOST

For that matter, there was a time when even English-Canadian leaders applied such terms to Quebec. Back in the 1960s, Prime Minister Pearson called Quebec "a nation within a nation" and "the homeland of a people". Both the Progressive Conservatives and the New Democratic Party adopted the language of "two nations".

Of course, Pierre Trudeau's tenure as Prime Minister put an end to such talk. And the premiers' invocation of Quebec's "unique character" is itself testimony to the hold which the Trudeau vision of Canada has secured outside Quebec. The term it replaced, "distinct society", apparently had been itself adopted to avoid such words as "nation" or "people". But even it violated the Trudeau vision, and during the debate over Meech Trudeau personally made sure that all Canadians were aware of this. Now, apparently, it too has disappeared from the lexicon of Canadian politics.

Time will tell whether the Calgary Declaration provides a framework that is not only acceptable to English Canadi-

continued on page 108

COLONY, NATION, EMPIRE

BY GUY LAFOREST

In earlier times, just prior to the referendum of May 1980 on sovereignty-association, when our political lives were much simpler, the late Donald Smiley wrote that Canada almost had a unified judicial system. I shall use Smiley's comments, and his overall evaluation of the nature of the Canadian federation, as a springboard in my analysis of the political context linked to the Reference soon to be heard by the Supreme Court of Canada.

In his book, *Canada in Question: Federalism in the Eighties* [3d ed. (Toronto: McGraw-Hill Ryerson, 1980) at 22-24], Smiley argued that the Canadian political system was quasi-federal. This judgment was based on the recognition of the imperial context which presided over the birth of the Canadian federation. Westminster named the judges whose task it was to oversee the Dominion, while Ottawa named the judges whose duty it was to oversee the provinces. This included the judges of superior and appellate courts of all provinces and, from 1875 onwards, the members of the Supreme Court of Canada. In 1949, British judges disappeared from our affairs. Since 1982, Canada is no longer a colony. But the provinces remain subordinate to Ottawa in judicial matters.

Since 1982, Canada is no longer a colony. But the provinces remain subordinate to Ottawa in judicial matters.

Smiley used the expression "colonial subordination" to describe the relationship of the provinces *vis-à-vis* Ottawa produced by such powers as reservation and disallowance. The passing of provincial legislation can be deferred and, ultimately, blocked. The lieutenant-governor, whose nomination is recommended by the Prime Minister, is essentially in my understanding an imperial envoy in the provincial capitals. Smiley mentioned other matters: spending powers, emergency powers, the de-

continued on page 96

claratory power.

These quasi-federal elements, imperial remnants to call them by their real name, could have been eliminated by the drive towards institutional modernization which characterized Canadian politics after 1945 and, with a greater sense of urgency, after 1960 and the upheavals of the Quiet Revolution in Québec. The fact of the matter is that the imperial remnants were kept intact. Undeniably, we have been through some serious institutional modernization, but of a different kind. Ottawa asked a series of judges it had nominated whether they agreed with a reform, the primary effect of which would be to augment significantly the power of the judiciary in our political system. With regard to the Québec Reference on the issue of its provincial veto, Ottawa did not take any chances: the law was promulgated before the Québec Court of Appeal and the Supreme Court of Canada could have their say. In my judgment, there is but one way to see this: intimidation of the judiciary by the executive branch of government. Peter Russell summarized the matter in these terms: "I believe it was illegitimate to go ahead and make those changes without the consent of Québec, politically illegitimate, and against the traditions and practices of this country. I think the Supreme Court of Canada, when that issue was put to it after patriation, couldn't give an intellectually honest answer" [quoted in R. Bothwell, *Canada and Québec: One Country, Two Histories* (Vancouver: U.B.C. Press, 1995) at 179].

With regard to the Québec Reference on the issue of its provincial veto, Ottawa did not take any chances: the law was promulgated before the Québec Court of Appeal and the Supreme Court of Canada could have their say. [T]here is but one way to see this: intimidation of the judiciary by the executive branch of government.

We have now almost reached the end of the century, with a new rendezvous with the Supreme Court of Canada. The Judicial Committee of our own Privy Council will tell Quebeckers that they cannot remove themselves unilaterally from the confines of Canada. In a manner reminiscent of the most glorious days of indirect rule in the conduct of imperial governance, the key roles will belong to Quebeckers: Chrétien, Dion, Bertrand, Lamer.

Canada was a British colony for many decades. In attempting to remake itself into a single nation, against its history, it became an empire. This is the part of Canada's political identity that has come to the surface, with a vengeance, since the Québec referendum of October 1995. It is not pretty. There is nothing dishonourable about the federalist doctrine in political philosophy, or with the way in which federalism is practiced by many regimes in our world. I would not make the same judgment about what currently passes for federalism in this country.

Guy Laforest is Professor and Chair of the Department of Political Science at Laval University.

THE QUEBEC SECESSION REFERENCE: PITFALLS AHEAD FOR THE FEDERAL GOVERNMENT

BY JOSÉ WOEHRLING

The federal government has asked the Supreme Court for an advisory opinion on the legal rules applying to the secession of Quebec from Canada. Ottawa apparently hopes that the ruling will be helpful in opposing a new referendum on sovereignty, which has already been announced by Mr. Lucien Bouchard. However, such a strategy could well backfire and lead to political consequences harmful to Canadian unity.

The Attorney General of Canada has taken the position that neither Canadian domestic law nor international law allow Quebec to unilaterally secede from Canada. At the same time, however, he stresses that he "does not question the authority of the government of Quebec to consult Quebeckers through a consultative referendum or the right of Quebeckers to express themselves in this way".

SECESSION AND THE CONSTITUTIONAL AMENDING FORMULA

In his factum, the Attorney General of Canada rightly asserts that the secession of a Canadian province is not allowed under the unilateral amending power of the provincial legislatures set out in s. 45 of the *Constitution Act, 1982.* As a matter of fact, this provision only authorizes modifications to the internal constitution of each province. Obviously, the secession of a province from Canada would affect the whole fabric of the Canadian Constitution and not only the separating province.

On the other hand, the federal government clearly admits that the entire content of the Canadian Constitution is changeable and therefore that the secession of a province must logically be possible under one of the five amending formulas, since it is nowhere expressly prohibited. For the great majority of constitutional lawyers, secession would require the unanimity procedure (both Houses of Parliament and all ten provincial legislative assemblies). If the Court takes the same view it will, in fact, say that Quebec cannot

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

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

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

SECESSION AND INTERNATIONAL LAW

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

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

QUEBEC'S TERRITORIAL INTEGRITY UNDER UNILATERAL SECESSION

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

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

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

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

WHAT IF THE COURT PROHIBITS A NEW REFERENDUM ON SOVEREIGNTY?

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

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

continued on page 108

QUEBEC PUBLIC OPINION AND THE SUPREME COURT OF CANADA: WILL THE DECISION BE IMPARTIAL?

BY GUY LACHAPELLE

Historically, the Supreme Court of Canada has always tried to strike a balance between the power of the provinces and those of the federal government. Through its statement on 28 September 1981 that the unilateral patriation of the Canadian Constitution was legal but not "constitutional", the Supreme Court gave itself a new role as the final arbitrator in political conflicts. The Court argued that the participation and agreement of all provinces was constitutionally necessary because the new *Charter of Rights* could limit the powers of the provinces. But when the Trudeau government denied the federal principle evoked by the Court, it clearly demonstrated that the Court could also become an instrument of political power.

While it is getting ready to hear the federal government's arguments on the legality of Quebec sovereignty, the Supreme Court has been assigned a new function: to give its opinion on the very foundations of Canadian sovereignty. The inability of Canada's political class to understand the Quebec situation became evident after the October 1995 referendum when the Canadian government chose the legal route to respond to Quebec's democratic aspirations. By asking the Court to deal with this issue, the Canadian government hopes to make the conditions of the next referendum more difficult.

Moreover, since the Court has agreed to hear Guy Bertrand's arguments in favour of the partitionist cause and to appoint an *amicus curiae* to present the counter-arguments, the public is wondering about the Court's ability to reach a non-biased judgment. That is why we thought it useful to do a survey on how Quebeckers perceive the role of the highest tribunal. Can it be neutral toward the federal government's case?

Quebeckers have always been suspicious of the Supreme Court. In 1968, the Quebec government proposed a constitutional court composed of 15 judges, with 5 being appointed by Quebec, since it thought that constitutional decisions should be left

Quebec Francophone Public Opinion on the Legal Strategy of the Canadian Government

	Question 1 Impartiality of the Supreme Court				Question 2 Strategy of Quebec Government				Question 3 Importance of Judgment			
	Yes		*No*		*Agree*		*Disagree*		*A lot of importance/ some importance*		*Little importance/ no importance at all*	
	%	(N)	%	(N)	%	(N)	%	(N)	%	(N)	%	(N)
18-24	35.7	(26)	64.3	(47)	71.4	(61)	28.6	(24)	65.2	(56)	34.8	(30)
25-34	48.2	(50)	51.8	(54)	68.9	(81)	31.1	(27)	51.7	(64)	48.3	(60)
35-44	37.3	(65)	62.7	(109)	67.5	(132)	32.5	(64)	54.3	(111)	45.7	(93)
45-55	49.6	(74)	50.4	(76)	63.6	(117)	36.4	(67)	52.1	(117)	47.9	(71)
55-64	42.2	(41)	57.8	(57)	56.4	(67)	43.6	(53)	57.5	(73)	42.5	(54)
65+	55.0	(52)	45.0	(42)	50.0	(64)	50.0	(65)	64.1	(83)	35.9	(47)
Primary	52.5	(33)	47.5	(30)	60.6	(52)	39.4	(34)	53.6	(59)	46.4	(43)
Secondary	44.5	(116)	55.5	(147)	62.2	(205)	37.8	(124)	65.0	(215)	35.0	(116)
College	45.3	(84)	54.7	(102)	63.0	(139)	37.0	(82)	60.0	(138)	40.0	(92)
University	42.6	(81)	57.4	(109)	62.6	(128)	37.4	(76)	51.1	(105)	48.9	(101)
Men	39.1	(143)	60.9	(222)	66.2	(174)	33.8	(140)	51.9	(217)	49.1	(200)
Women	50.9	(172)	49.1	(166)	58.8	(153)	41.2	(177)	65.6	(295)	34.4	(155)
Total	44.8	(315)	55.2	(388)	62.5	(526)	37.5	(317)	59.0	(513)	41.0	(355)

Question 1: The federal government has asked the Supreme Court of Canada to judge the right of Quebec to separate. Do you personally think that the Supreme Court will be impartial in its judgment?
Question 2: Quebec has decided not to be represented in this case because it argues that only Quebeckers have the right to decide their future. Do you totally agree or simply agree, totally disagree or simply disagree with the decision of the Quebec government?
Question 3: Will you give the decision of the Supreme Court—which will soon become public—a lot of importance, some importance, little importance, or no importance at all?

Source: Survey SONDAGEM - Lachapelle conducted September 5-10, 1997 with 1042 informants.

to a specialized tribunal rather than the judiciary. One may also wonder whether the Supreme Court is competent to hear this cause when the Quebec government is challenging the Court's authority to render a decision on such a fundamental matter by boycotting the entire process. In other words, when the Supreme Court renders its decision, will it end up discrediting its impartiality and compromising its authority? One thing is certain: its decision will satisfy no one.

[W]hen the Supreme Court renders its decision, will it end up discrediting its impartiality and compromising its authority? One thing is certain: its decision will satisfy no one.

In our survey, Quebeckers generally remain divided when asked about the impartiality of the highest tribunal, with 51.8% believing that the Supreme Court judgment will not be impartial while 48.2% think it will be. Regarding the strategy of the Quebec government not to represent itself, 57.7% agree with this decision while 42.3% disagree. As to the importance of the Court's judgment, 71.3% of Quebeckers think it will have a lot or some importance. Clearly, Quebeckers are divided about the legitimacy of the legal approach and the political wisdom of the Quebec government in not participating.

It is also interesting to note that the francophone population has less trust for the Supreme Court than the anglophone or allophone groups in Quebec: 55.2% of francophones estimate that the Court will not be able to make an impartial decision on the three questions asked by the federal government, whereas 75.8% of the anglophone group and 58.4% of the allophone group believe that the judgement will be impartial. Francophones between the ages of 18-24 are the most suspicious, while only those francophones 65 years or older or those with primary school education believe in the impartiality of the Supreme Court.

It is also interesting to note a gap between the views of francophone men and women. Francophone women are evenly divided, whereas 60.9% of men think that the Court will not be able to be impartial. This seems to parallel the results of the referendum itself, where francophone women showed only a small preference for the "Yes" side whereas men overwhelmingly voted "Yes". Further, the older and the less educated a person is, the less likely that person will have a view on these issues.

Asked about the strategy of the Quebec government not to be represented before the Supreme Court, 62.5% of the francophone group agrees with this position while 79% of anglophones disagree. The younger a francophone is, the more likely s/he is to agree with the Quebec government's decision, with 71.4% of the 18-24 age group supporting the decision. All age groups within the francophone population support the position of the Quebec government, with the exception of the over-65 group where opinion is equally divided. The level of education does not affect one's views on the issue. Amongst francophone women, 58.8% support the decision, as compared to 66.2% of men.

Despite the fact that Quebeckers think that the decision of the Supreme Court will be important, 59% of francophones (as compared to 76.7% of anglophones) say that they will give a lot or some importance to this judgment. Young francophones under 25 and francophones 65 and over say they will regard the decision as most important, whereas the 25-54 group is very divided. People holding a university or college degree will give importance to this decision, women more than men.

[W]hatever the substance of the judgment in the end, many jurists think that it is unlikely to make any significant difference in finding a solution to the fundamental choices that Canada and Quebec will have to make. When the Court decides the reference case, many Quebeckers are of the view that it will give greater legitimacy to Quebec's right to secede.

The fact that, in contrast to the anglophones and allophones, the francophones of Quebec doubt the ability of the Supreme Court to be impartial, clearly shows the debate between law and democracy to be more of a political than a legal one. Two societies with sharply divergent views exist in Quebec: one believing in participatory democracy and the other one in legalistic federalism. If the Supreme Court chooses not to play the political game by refusing to answer certain questions, it will be more likely to maintain its credibility and legitimacy as an institution. In that event, the Court will find itself at the centre of the political rather than the legal arena. This is going to be a hard sell for Ottawa to defend before a bewildered English-Canadian public opinion, which mistakenly believed that the Court would deliver clear answers to complex issues.

Yet, whatever the substance of the judgment in the end, many jurists think that it is unlikely to make any significant difference in finding a solution to the fundamental choices that Canada and Quebec will have to make. When the Court decides the reference case, many Quebeckers are of the view that it will give greater legitimacy to Quebec's right to secede.

Guy Lachapelle is Professor of Political Science at Concordia University.

This article was translated from French by Professor Marilyn Lambert.

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 Quebeckers 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.

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.*

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 Quebeckers 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 Quebeckers.

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 that 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 Quebeckers? Most secessionist leaders in Quebec, the most notable being 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.]

[T]he secessionist government itself is impliedly accepting the legitimacy of the amending formula ... 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.*

A fundamental flaw in this argument is equating the views of elites in Quebec with legitimacy. In the daily lives of Quebeckers, 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.

If a clear majority of Quebeckers, 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 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 Quebeckers 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 Quebeckers, 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.

Legitimacy quickly departs from a democracy if the majority rides roughshod over the rights and dignity of minorities and, in the case of Canada, its special responsibilities to its First Nations.

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 Democracies: 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

continued on page 102

THE CANADIAN DILEMMA *from page 101*

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

Was not the structure of the October 30, 1995 referendum question designed to manipulate a certain response from Quebeckers? 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... the shattering of democratic legitimacy in Quebec itself?

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 vas 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 Quebeckers? 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 Quebeckers.

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

continued on page 108

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 that 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.

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.

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

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. To read Mr. Dion's letters is to realize how quickly one adopts one's master's worst inclinations (I know, I've been there). I was expecting a number of interesting remarks by M. Dion on democracy or nationalism, two subjects on which he knows a great deal. Instead, he takes it upon himself to speculate on the likely reaction of foreign powers, a subject on which he knows absolutely nothing.

Independentists pay their fair share of federal taxes and will continue to do so—until the Great Day arrives. In the meantime, I fully expect my Federal Government to work diligently (with my taxes) on preparing other countries to welcome us. After all, Tony Blair did not hesitate to take the road and spend a few pounds promoting the "Yes" side; why not Jean & Stéphane?

5. The fact that M. Dion has to include in his Reference a mention to Canada as the greatest country in the world, a sentence which summarizes Jean Chrétien's entire political thinking, is degrading for the scholar and the intellectual that M. Dion once was. That someone would go that low (intellectually speaking, that is) will always remain a puzzle.

6. Dion's letters, especially the first one, make ample references to the situation of precivil anarchy into which the Québec Government is apparently willing to push Québec. The words he uses are not innocent ones: "You are ready to push Québec into anarchy, outside of the legal framework" ("vous êtes prêts à les plonger dans une situation anarchique, en dehors du cadre juridique"). This is frightening. There are certain words and certain situations which should not be evoked under the pretext of clarifying the situation. Politics and democracy actually require that certain possibilities not be evoked. Tolerance often calls for silence.

7. At the basis of Dion's argument is the belief that Québec society is not mature enough to come to terms with its own political decision, especially if it is a close one. Unless, of course the result of the future referendum is either validated by Ottawa with a question to Ottawa's liking, or is in the 65%-70% range.

8. If M. Dion's choice of words is meant to intimidate Quebeckers and sovereigntists, he has clearly succeeded. On a number of occasions, I have written that sovereignty for Québec was not worth a single human life. By leading the charge of the partitionists and especially by giving it, in advance, an aura of legitimacy and legality, M. Dion is not only blowing on the fire, he is also making sure that people like me will simply withdraw from the entire operation.

9. The fact that his recent letters, and his entire behaviour since assuming his present job, have not been denounced by a single Anglo-Canadian intellectual and university professor is also quite revealing. Either they all agree with him and believe it's about time someone puts the (intellectual) finger to these separatists, or they actually disagree with him but are afraid that any public expression of such a disagreement would be interpreted as support for the "séparatistes". And these are the very people sovereignists want a new partnership with? Séparatistes are indeed a strange lot.

Québec needs a strong and pro-active Canada to help ease its way in the international community. This is especially so considering that, according to M. Dion and his friends, Quebeckers are a bunch of idiots who support the "Yes" side without knowing what it means. Without M. Dion and Axworthy, future Québec diplomats will never find the way to the UN bathrooms.

10. There is one point, however, on which I personally agree with M. Dion, and that is the fact that the international community would probably find it easier to welcome Québec as a new member if it had the support of the Canadian Government. In any case, I certainly hope so; otherwise, what's the point of attempting to establish a new political, economic, and social partnership with Canada, if the latter can't even show some clout on an issue so close to home. Québec needs a strong and pro-active Canada to help ease its way in the international community. This is especially so considering that, according to M. Dion and his friends, Quebeckers are a bunch of idiots who support the "Yes" side without knowing what it means. Without M. Dion and Axworthy, future Québec diplomats will never find the way to the UN bathrooms.

11. If M. Dion is right on the issue of international recognition, then it is clearly his responsibility and that of the Canadian Government to prepare for the day when they will have to come to our support. Independentists pay their fair share of federal taxes and will continue to do so—until the Great Day arrives. In the meantime, I fully expect my Federal Government to work diligently (with my taxes) on preparing other countries to welcome us. After all, Tony Blair did not hesitate to take the road and spend a few pounds promoting the "Yes" side; why not Jean & Stéphane?

12. What about the one letter which Minister Bernard Landry could find the time to write? He is right, of course, to suggest that Ottawa seem to have "deux poids, deux mesures" when it deals with Québec. In 1982, the Canadian Constitution was formally amended and fundamentally changed even though the Canadian population was not consulted. Furthermore, the opinion of the Québec National Assembly was simply put aside and no more than a handful of the five hundred or so elected parliamentarians all across Canada refused this way of proceeding. But of

continued on page 108

THE PHOENIX AND THE TURTLE

BY JOSÉE LEGAULT

Reason, in itself confounded,
Saw division grow together,
To themselves yet either neither
Simple were so well compounded.
W. SHAKESPEARE, *THE PHOENIX AND THE TURTLE*

The Reference to the Supreme Court on the right of Quebec to separate unilaterally from Canada has been postponed until February 1998, and could well be held up even further due to delays incurred by the recent nomination of a new judge of the Court. In fact, it is entirely possible that the Court's decision will not be handed down before the next provincial election. The result is that as long as there is no decision, the whole debate surrounding this Reference, at least in Quebec, will be mainly a concern for experts. For most Quebeckers, the issue will remain highly abstract and will continue to create uncertainty about the process leading to Quebec's independence. Clearly, the postponement of the Supreme Court decision is no small event.

For most Quebeckers, the issue will remain highly abstract and will continue to create uncertainty about the process leading to Quebec's independence. Clearly, the postponement of the Supreme Court decision is no small event.

FEDERALIST GAINS WITH PLAN B

In the meantime, given its own silence on most issues pertaining to the so-called "Plan B" of the federalist forces, the Quebec government is in danger of losing the battle of public opinion on the process leading to independence following a "Yes" vote. This, also, is no small event and its lack of a winning strategy has been confirmed in a series of well-publicized polls published by Quebec's print media.

For instance, in a SOM poll published on September 20 in *Le Soleil*, 55% of respondents agree that Lucien Bouchard should not hold another referendum if he were re-elected. In the light of the Calgary declaration on the "unique society", a whopping 60% say that Quebec should give yet another chance to renewed federalism.

In another SOM poll published in *L'Actualité*, 59% believe that partition is a real risk following a majority "Yes" vote; 50% do not trust the Bouchard government to maintain the integrity of Quebec's territory; 60% think partition is a right but only 46% say that Quebec has a right to separate unilaterally. Finally, only 34% would give the Bouchard government their unconditional support for sovereignty.

In a SONDAGEM poll published recently in *Le Devoir*, 54.2% of the respondents say that the approval of the federal government should be required in order for Quebec to become sovereign, regardless of the fact that 40% also say that they do not trust the Supreme Court to make an impartial decision in the Reference on a unilateral declaration of independence. In the end, an impressive 59% would accept the Supreme Court's decision partially or wholly.

One of the keys to [Plan B's] "success" is that it gives the appearance of not denying the possibility of Quebec becoming independent. What this discourse pretends is that in the event of a "Yes" vote, a unilateral declaration of independence made by Quebec's National Assembly would create "chaos", "anarchy", and possibly lead to the dismemberment of Quebec's territory along ethno-linguistic lines.

Once again, a growing number of Quebeckers appear to have been influenced by the federalist arguments regarding partition, the role of the federal government following a "Yes" vote, and the perceived importance of the Reference to the Supreme Court.

UNDERSTANDING PLAN B

One must ask what makes Ottawa's "Plan B" arguments, including the Supreme Court Reference, so effective, at least for the moment?

One of the keys to its "success" is that it gives the appearance of not denying the possibility of Quebec becoming independent. What this discourse pretends is that in the event of a "Yes" vote, a unilateral declaration of independence made by Quebec's National Assembly would create "chaos", "anarchy", and possibly lead to the dismemberment of Quebec's territory along ethno-linguistic lines.

So the alternative, according to the new federalist discourse, is that separation has to occur within what Ottawa calls the "rule of law". In effect, it consists of a complex set of legal procedures requiring the PQ to submit the democratic will of the Quebec people to the ROC for the green light to be a sovereign people. It is only if these conditions are met that Ottawa warrants that neither "chaos" or "partition" will follow.

This is why the federal government has decided to go to the Supreme Court. Here its aim is anything but "judicial"; it is purely, solely, and unequivocally political. The objective is to create the illusion that, somehow, sovereignty could be attained within a "legal", "constitutional" framework. And if the PQ government refuses Ottawa's "friendly offer"—nudge, nudge, wink, wink!—Quebec would be breaking the rules. By contrast, the federal government would be required to uphold the "peace, order and good government" of Canada. In the eyes of the international community, Ottawa knows that appearances are everything!

An astoundingly clear example of this new federalist discourse appeared in a paper presented last May at the annual conference of the Canadian Bar Association by constitutional expert Peter Hogg: "If Quebeckers do decide to separate, there are overwhelming advantages for them, as well as for the rest of Canada, to proceed in compliance with the rule of law. A secession in accordance with the rule of law

would minimize the confusion, the economic damage, and the social disorder that would inevitably accompany a unilateral declaration of independence. A secession in accordance with the rule of law would achieve speedy international recognition that is unlikely to be granted on the basis of a unilateral declaration of independence. A secession in accordance with the rule of law would be a consensual one, in which the many difficulties of disentangling communities that have lived together in harmony for so long would be solved by admittedly painful compromises reached by agreement between Quebec and Canada".

Unable to offer Quebeckers any kind of genuine renewed federalism, the federal government has come up with a strategy that aims solely at creating the impression that a "unilateral" declaration of independence would destabilize Quebec society.

Listening carefully to this discourse, one almost gets the impression that Ottawa is trying to accommodate the separation of Quebec by making it "legal", while knowing full well that no Quebec government would ever accept such a scenario.

WHY PLAN B?

Why is all of this happening? The answer, of course, is that the sovereignty option almost won the last referendum and, should the Bouchard government be re-elected, it is very likely that it could win the third one. In this context, "le nerf de la guerre" becomes what pollsters refer to as "soft" nationalist or that part of the Quebec electorate that is neither strongly sovereigntist nor strongly federalist. Unable to offer Quebeckers any kind of genuine renewed federalism, the federal government has come up with a strategy that aims solely at creating the impression that a "unilateral" declaration of independence would destabilize Quebec society.

Should Plan B arguments continue to dominate public discourse and the Supreme Court eventually lends its judicial "credibility" to the federalist cause, Ottawa knows that support for sovereignty will not be high enough for the Parti Québecois to go ahead with a third referendum. The last thing the PQ wants is to go down in history as the party that led Quebeckers through three consecutive defeats within twenty years on this fundamental issue.

Should Plan B arguments continue to dominate public discourse and the Supreme Court eventually lends its judicial "credibility" to the federalist cause, Ottawa knows that support for sovereignty will not be high enough for the Parti Québecois to go ahead with a third referendum. The last thing the PQ wants is to go down in history as the party that led Quebeckers through three consecutive defeats within twenty years on this fundamental issue.

Of course, all of this could change overnight should the Quebec government mount an efficient counter-offensive that galvanizes Quebec's public opinion. It has done this in the past and it may be helped by the Calgary declaration promising Quebec eventual constitutional change. There is a better-than-fifty-percent chance that English Canadian support for the Calgary declaration will fall apart as it did following the Charlottetown agreement. There are so many conflicting agendas that are opposed to any kind of accommodation with Quebec that this dynamic alone may destroy even this extremely modest package.

The Supreme Court Reference is part of a political strategy that looks to destabilize not only the Quebec government but the very process that the PQ considers could lead to the creation of an independent Quebec.

THE CHALLENGE FOR SOVEREIGNISTS

If Ottawa has managed to be effective with its Plan B discourse, it is because the PQ government has backed off, at least for the moment, from giving any kind of active support for the sovereignty option. This too could change and the Bouchard government could put the sovereignty discourse at the heart of political life in Quebec and in Canada. This has happened before and it most certainly can happen again. But to achieve this, one must realize that the federalists have been making a lot of headway for almost two years while the Quebec government has been concentrating solely on deficit-cutting.

With a Quebec election looming, Bouchard has to look again at his own strategy. The Supreme Court Reference is part of a political strategy that looks to destabilize not only the Quebec government but the very process that the PQ considers could lead to the creation of an independent Quebec. And that's no small event.

Josée Legault is a political scientist, author, and a political columnist at Le Devoir.

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 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.

An affirmative vote by Quebeckers 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".

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 Quebeckers 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.

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.

The 1980 referendum in Quebec implicitly acknowledged the limits of unilateralism, when a mandate was sought from Quebeckers 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 á 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.

Effective control is not a harmonious strategy on which to base Quebec's accession to independence. In essence, it would trigger a battle for exclusive authority that is likely to generate huge territorial conflicts, chaos, and very possibly violence. Faced with such an explosive situation, partition may well be the only reasonable compromise if the rights of all parties affected are to be respected.

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.

Effective control is not a harmonious strategy on which to base Quebec's accession to independence. In essence, it would trigger a battle for exclusive authority that is likely to generate huge territorial conflicts, chaos, and very possibly violence. Faced with such an explosive situation, partition may well be the only reasonable compromise if the rights of all parties affected are to be respected.

[T]he 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.

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.

Paul Joffe is a member of the Quebec and Ontario bars. He is currently part of a legal team acting on behalf of the Intervener Grand Council of the Crees in the Supreme Court of Canada Reference on Quebec secession. The views expressed in this article are his own and not necessarily those of his clients.

FOREIGN AFFAIRS, NATIONAL UNITY, AND SOVEREIGNTY *from page 94*

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 Quebeckers 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.

Daniel Turp is Member of the House of Commons for Beauharnois-Salaberry and Critic of the Bloc Québécois for Foreign Affairs.

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

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

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

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

endum, decides to postpone it indefinitely.

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

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

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

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

CONCLUSION

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

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.

THE LETTER WARS *from page 103*

course, all of this is old stuff.

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

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

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