A CONSTITUTIONAL DUTY TO NEGOTIATE AMENDMENTS: *REFERENCE RE SECESSION OF QUEBEC*

IN the aftermath of the 1995 referendum on Quebec unilateral secession,[1] the then Minister of Justice, Allan Rock, proposed that the legality of a province's attempting to secede unilaterally be referred to the Supreme Court of Canada for a judicial opinion, pursuant to that Court's special advisory jurisdiction.[2] Accordingly, on 30 September 1996, the Governor General in Council submitted three questions of law, discussed in detail below, concerning the legal authority of Quebec, under both Canadian and international law, to secede from the Canadian federation. In addition to the government of Canada, two provinces, the two territories, and a number of special interest groups and individuals (all given leave to intervene) submitted written arguments and rejoinders over the course of 1997.[3] The government of Quebec did not participate in the hearing and submitted no argument. Accordingly, the Court appointed an *amicus curiae* (from Quebec) to represent the secessionist interest. The Court heard argument from 16 to 19 February 1998. On 20 August 1998 the Court released its unanimous opinion, rather earlier than expected.[4] The Court rejected the legal right of Quebec to separate unilaterally under Canadian constitutional law, and the right to do so under international law as recognised in Canada. Given the latter holding, the Court did not consider further the third question relating to reconciling a possible conflict between the two legal orders. The following extended case comment proposes to outline and discuss briefly the reasoning of the Court, in

1. The 30 October 1995 referendum, beset with some controversy over appropriateness of the referendum questions and campaigning, saw a mere 50.58% reject a proposed declaration of Québec sovereignty under a draft Bill respecting Québec independence and a "new economic and political partnership" with Canada. Québec lawyer Guy Bertrand had obtained a declaration in a challenge to the earlier 1994 draft of the Bill, as a "serious threat" to his constitutional rights: *Bertrand* v. *Québec (Attorney General)* (1995) 127 D.L.R. (4th) 408 (Que.Sup.Ct.). An injunction preventing the referendum was refused as doing more harm than good. The Québec government attempted but failed to strike the action as non-justiciable. It withdrew thereafter from the proceedings. Following the referendum, Bertrand amended his action, this time for a declaration that unilateral secession was unconstitutional and contravened his rights under the Charter. The federal government intervened. The Québec government moved to strike the action as non-justiciable, and lost (unreported, 30 August 1996, Que.Sup.Ct. Pidgeon J). Thereafter, it also withdrew again from these proceedings, maintaining that the secession issue was purely political. In the course of his Lordship's reasons, he identified certain constitutional and international law questions requiring consideration. The Federal Government used this as an invitation to remit those issues, in its own formulation, to the Supreme Court of Canada.

2. Supreme Court of Canada Act, s.53 (R.S.C. 1985 c.S–26).

3. Manitoba, Saskatchewan, the Northwest Territories, Yukon Territory, four separate representatives of aboriginal interests, the Minority Advocacy and Rights Council, the Ad Hoc Committee of Canadian Women on the Constitution, Guy Bertrand, Vincent Pouliot, Yves Michaud and lastly Dr Singh and six others.

4. *Reference re Secession of Quebec*, [1998] 25 S.C.R. 217 and available via the Internet at [www.scc-csc.gc.ca] (the "*Quebec Secession Reference*"). The judgment is by the "Court" and is not ascribed to any one of their Ladyships or Lordships.

what is a significant exercise of judicial power in the service of constitutional affairs. The structure of this comment will follow that of the Court's reasoning, dealing first with a preliminary objection, then turning to Question 1 (introduction and discussion) and then to Questions 2 and 3.[5]

A. The Preliminary Objection

Before addressing the reference questions proper, the Court disposed of a preliminary objection raised by the *amicus curiae* as to the Court's jurisdiction to hear the reference. The grounds of the objection challenged the validity of the Court's reference jurisdiction and the justiciability of the questions. As to the first leg, the Court considered itself duly constituted as a general court of appeal, and as such it could properly exercise an original jurisdiction and undertake other legal functions such as advisory opinions. The phrase "general court of appeal", used in the Court's constitutional and statutory foundation,[6] was not to be understood in a restrictive fashion limiting the Court's functions. There was nothing inherently self-contradictory in a general court of appeal exercising an original jurisdiction on an exceptional basis. In support, the Court referred to the examples of the English Court of Appeal, the US Supreme Court and certain Canadian provincial appeal courts.[7] Further, nothing inherently precluded a general court of appeal from undertaking other legal functions in tandem with its judicial duties, particularly where Parliament had duly conferred such additional powers. The US jurisdiction doctrine of "case or controversy", which excluded abstract or objective questions from the purview of the US Supreme Court, had no application in Canada. The doctrine depended upon the wording of the US Constitution and the strict separation of powers approach in the United States.[8] In contradistinction, the Canadian Constitution did not insist on such a strict separation of powers.

As to justiciability, in the first place the questions did not require the Court to usurp the function of an international tribunal but, rather, to consider the application of international law in the Canadian legal order. In the second place, the advisory nature of a reference did not require "ripeness", or issues that were formally adversarial or dispositive of cognisable rights. The Court's concern was its proper functioning within the constitutional structure, in particular that the

5. R. Howse and A. Malkin, "Canadians Are a Sovereign People: How the Supreme Court Should Decide the Reference on Quebec Secession" (1997) 76 C.B.R. 186 and H. W. MacLauchlin, "Accounting for Democracy and the Rule of Law in the Quebec Secession Reference" (1997) 76 C.B.R. 155, two articles commissioned by the Canadian Bar Association prior to the court hearing, provide a helpful summary and discussion of the background and issues. The former is remarkably close to the Court's own approach on the points of federalism, democracy, the rule of law and the protection of minorities.

6. Constitution Act 1982, s.101, providing that Parliament may establish a "General Court of Appeal for Canada"; and Supreme Court of Canada Act, s.3.

7. Referring to *De Demko* v. *Home Secretary* [1959] A.C. 654 (HL); US Constitution, Art.III(2), and *Re Forrest and Registrar of the Court of Appeal of Manitoba* (1977) D.L.R. (3d) 445 (Man.CA).

8. Specifically, Art.III(2), and see e.g. *Baker* v. *Carr* 369 U.S. 186 (1961) and W. McCormack, "The Justiciability Myth and The Concept of Law" (1986–7) 14 Hastings Con.L.Q. 595 and R. W. Galloway, "Basic Justiciability Analysis" (1990) 30 Santa Clara L.R. 911.

questions did not pull the Court out of its own self-assessed proper role in the Canadian constitutional framework, by involving the Court in an appraisal of issues not having a legal component.[9] That component in the instant case was satisfied: the reference questions were strictly limited to the legal framework in which democratic decisions were to be made. Nor were there other, pragmatic, grounds such as ambiguity, imprecision or insufficient information to support argument and answer, that would cause the Court to decline to hear the matters at hand, or otherwise interpret or qualify question, answer, or both.[10] With these preliminary matters out of the way, the Court began its consideration of the reference questions themselves.

B. Question 1

> Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally?

Briefly, the Court's answer is "no". But first things first. A lengthy preface concerning certain fundamental, unwritten constitutional principles precedes the direct consideration of, and answer to, Question 1. The primary purpose of this discussion is to outline the theoretical basis or framework for the Court's ultimate determination. In particular, as will be seen, the Court introduces certain propositions in this section of its opinion which later become key premises to its decision on Question 1.

In order to introduce (and to justify) constitutional principles in a legal context, the Court begins, as might be expected, with the proposition that the Canadian Constitution is an amalgam of written and unwritten rules—a "global system of rules and principles".[11] This combination was necessary and critical, in the opinion of the Court, for the endurance of a constitution over time, so as to provide a comprehensive set of rules and principles capable of providing an exhaustive legal framework for a system of government. The text of the Constitution is primary, but relies upon the other principles and conventions to fill out the gaps in its express terms.[12] All the elements, written and unwritten, work together in an interdependent whole. No one principle excludes or trumps another. The

9. Canadian courts have approached and dealt with issues involving "political questions" with less hesitation, diffidence and restriction than their US counterparts. Accordingly, the doctrine is less an issue for Canadian courts than US ones. This arises in part because the separation of powers doctrine in Canada is not as constrictive or restrictive as applied in the US. See e.g. *Operation Dismantle Inc.* v. *The Queen* [1985] 1 S.C.R. 441 and *Reference re Canada Assistance Plan (BC)* [1991] 2 S.C.R. 525, and in contrast, see generally, L. Tribe, *American Constitutional Law* (1978), pp. 52–60, 71–78.

10. As it had considered in e.g. *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island* [1997] 3 S.C.R. 3 (the "*Provincial Judges Reference*"), *Reference re Resolution to Amend the Constitution* [1981] 1 S.C.R. 753 (the "*Patriation Reference*"), *Reference re Goods and Services Tax* [1992] 2 S.C.R. 445, and *Reference re Authority of Parliament in Relation to the Upper House* [1980] 1 S.C.R. 54.

11. Developed in the earlier cases of *New Brunswick Broadcasting* v. *Nova Scotia* [1993] 1 S.C.R. 319, *Harvey* v. *N.B. (Attorney General)* [1996] 2 S.C.R. 876, and *Provincial Judges Reference.*

12. Citing *Provincial Judges Reference*, and *Fraser* v. *Public Service Staff Relations Board* [1985] 2 S.C.R. 455.

principles, as the "vital unstated assumptions upon which the text is based", wield a significant normative force and may establish obligations and duties binding on governments and courts alike, of varying degrees of particularity.[13]

Four unwritten, but fundamental, constitutional principles were germane to the reference issue: federalism, democracy, the rule of law/constitutionalism and protection of minorities. The Court makes clear that other, unnamed principles also exist.[14] These unwritten principles arise from the written text, the historical context and from previous judicial decisions. The Court narrates briefly an outline of Canadian constitutional history from the initial steps towards Confederation in 1867, to the 1982 "patriation" of the Constitution ending the formal *de jure* control of the Imperial Parliament over Canadian constitutional affairs. The Court proffers this historical excursus to support the existence of and content to its four relevant constitutional principles. The Court also highlights the "national" spirit and co-operation of the then colonies to form a federal union accommodating political and cultural realities.

This "historical" support is at best weak and inconsequential: it does not underline the principles at issue. A review of the basic facts of Confederation and patriation illuminates no part of federalism, democracy, the rule of law or minorities protection to any greater degree than merely stating that the Canadian political tradition relies on such values. A patina of historical foundation hardly constitutes hard fact or serious reason why such values exist now and why they apply now. Excluding the section would not have diminished the Court's reasoning, or its reliance on the four concepts. This is not to deny that the historical practice and tradition, if treated and examined seriously, may offer substantial support to the identification of constitutional values. But it must keep to its place, and not obscure or presumptively legitimate what judges are doing when they dip outside the text of a constitution for legal and binding rules.[15] It calls for careful judicial appreciation of just where the dividing line between the legal and the political (or more generally, the non-legal) actually is, more than a perfunctory recital of the rules of justiciability.

In its assessment of Canadian federalism, the Court is keen to highlight the theme of unity accommodating diversity in a democratic way.[16] After quickly reaffirming Canada's status as a federal State, the Court launches into its theme for the section, which is that Canadian unity via federalism was a political and legal response to, and reconciliation of, the underlying social and political realities

13. *Quebec Secession Reference, supra* n.4, para. 54.

14. See e.g. *Provincial Judges Reference, ibid* (judicial independence) and *Hunt* v. *T&N plc* [1993] 4 S.C.R. 289 (full faith and credit).

15. This point has received most attention in the US, under the hands of R. Dworkin (*Taking Rights Seriously*, 1997, and *Law's Empire*, 1990), J. Choper (*Judicial Review in the National Political Process: A Functional Reconsideration of the Role of the Supreme Court*, 1980), J. H. Ely (*Democracy and Distrust*, 1980), and C. Wolfe (*The Rise of Modern Judicial Review*, 1985), among others. It is sometimes cast as the debate between "interpretivism" (being closely, if not exclusively bound to the four corners of the constitutional text), "non-interpretivism" (ranging somewhat more freely over policy grounds), and the search for "neutral principles" of constitutional interpretation.

16. As it had done so in the earlier case of *Morguard Inv.* v. *De Savoye* [1990] 3 S.C.R. 1077 (interprovincial recognition and enforcement of judgments).

in late nineteenth-century Canada. The distribution of powers between the larger federal and smaller provincial elements facilitated democratic participation in levels of government most suited to achieving the relevant social objectives. The provinces, maintaining an independent and autonomous existence under the Crown, were able to develop themselves in their respective spheres of jurisdiction, pursuing collective goals by transforming cultural and linguistic minorities into provincial majorities.[17] Thus, remarks the Court, is Quebec an example; but so too with the other provinces, to protect their respective individual cultures and autonomy over local matters.

The second principle is democracy. The Court takes "democracy" to mean a political system of majority rule involving, in the Canadian context, parliamentary supremacy, representative and responsible government, universal suffrage and effective representation. But the Court emphasises that democracy is not simply a process of government of majority rule, of the effective expression of the sovereign will of the majority. The expression of the majority will, notes the Court, must occur within the bounds of other institutional values and principles. The Court ties democratic rule to substantive goals and values, such as self-government and the accommodation of cultural and group diversity. No one majority, at a federal or provincial level, may necessarily trump the other. Further, the consent and will of the governed must be limited and guided by the rule of law.

> To be accorded legitimacy, democratic institutions must rest, ultimately, on a legal foundation. That is, they must allow for the participation of, and accountability to, the people, through public institutions created under the Constitution. Equally, however, a system of government cannot survive through adherence to the law alone. A political system must also possess legitimacy, and in our political culture, that requires an interaction between the rule and law and the democratic principle.[18]

Moreover, a functioning democracy involves a continued process of discussion, negotiation and compromise, in order to build the necessary majorities, whilst acknowledging and addressing the "dissenting voices" in the laws of the community. Since each participant in the Constitution (viz. the provinces) may initiate constitutional amendment processes, that right (so the Court holds) imposes a corresponding duty to engage in constitutional discussions to acknowledge and address the democratic expression of a desire to change.[19]

This co-ordinate right and obligation will play a central role in the Court's approach to secession. But the Court gives no authority for this proposition.[20] Nor is it clear how the Court comes to this concept. It may follow loosely from the

17. See *Liquidators of the Maritime Bank of Canada* v. *Receiver General of Canada* [1892] A.C. 437 (PC Can), stating that the object of Confederation was neither to weld the provinces into one nor subordinate them to the federal government.

18. *Quebec Secession Reference, supra* n.4, para. 67.

19. *Quebec Secession Reference, supra* n.4, paras 68–69.

20. The federal government and several other interveners had submitted in their respective *facta* that any secession must be accompanied by negotiations led by the federal government (with the provinces arguing for a right of direct participation). But no one required that such negotiations be a duty; instead, negotiations were understood merely to rationalise the territorial, fiscal and financial split in some ordered fashion, following naturally from the amending formulae which specified certain levels of federal and provincial consent.

juridification of "democracy" and "the interaction of the rule of law and the democratic principle"; but this is mere implication. At best, it may be an unexpressed implication from the constitutional amending formulae requiring certain levels of provincial and federal consent: without negotiation, there can never be consent. But this obscurity recalls the earlier comment about a prudent judicial appreciation of the dividing line between the political and the legal.

The third principle is that of the rule of law and constitutionalism. The Court relies on the rule of law for the concept that the law is supreme over acts of governments and individuals. The exercise of all public power must have, as its ultimate source, a legal rule. The result of this highly textured concept is a sense of orderliness and accountability—"it vouchsafes a stable, predictable, ordered society in which to conduct affairs".[21] Constitutionalism refers to the Constitution Act 1982 being the supreme law, as established in section 52 thereof. All government power emanates from the Constitution. No government has any authority or power outside it, thereby limiting the sovereignty of Parliament. The Constitution is entrenched beyond the reach of simple majority rule as an added safeguard to fundamental human rights, individual freedoms and minority interests. For this reason a majority vote in a province-wide referendum is neither a sufficient nor a legitimate basis for secession. Where political representatives of a province duly commit the people to constitutional rules, these rules bind the people by defining the majority to be consulted in order to effect fundamental change; and not frustrating the will of the majority of that province. Constitutional amendment often requires some form of substantial consensus, which in turn warrants that minority interests be addressed before enacting proposed changes that affect them.

The fourth, and last, constitutional principle is the protection of minorities. This has developed together with Canada, being a product of historical and political compromise, and negotiation.[22] The other three principles fill out the scope and operation of it. And with this introduction thus concluded, the Court begins at last to address the first reference question.

As noted above, the Court answers that (an attempt at) unilateral secession by Quebec is not a lawful act under the Canadian Constitution and would violate the Canadian legal order. No province may secede unilaterally from the Canadian federation as a legitimate legal and constitutional act. The Court's argument for this appears rather straightforward. Secession, regardless of the extent and profundity of change it would entail to the current constitutional structure, is to be treated as an amendment to the Constitution.[23] Governments, duly elected and recognised thereunder, acting on behalf of their constituents may initiate the amending process. It is the sovereign prerogative of the people to choose how they wish to be governed. The Court reiterates that it is a corollary of a legitimate attempt to seek an amendment to the Constitution that there is an obligation to come to the negotiating table as an acknowledgement of the expression of democratic will by the federal government and the other provinces. Unilateral secession is to effect a severing without prior negotiations with the other

21. *Quebec Secession Reference, supra* n.4, paras. 70–71.
22. *Quebec Secession Reference, supra* n.4, para. 79.
23. That is, the Constitution governs the process of separation.

provinces or the federal government. Secession would put at risk the established ties of interdependence among the provinces, and unilateral secession would undermine the stability and order vouchsafed by the Constitution, without the principled negotiation mandated by the current constitutional framework. Non-negotiated secession is thus unconstitutional.

A referendum itself has no direct legal or constitutional effect. By the principle of democracy, a provincial referendum supporting secession would be entitled to considerable weight as the clear expression of a clear majority of people and would thus give legitimacy to their government's efforts to initiate constitutional amendments effecting secession. The principles of federalism and democracy dictate "that the clear repudiation of the existing constitutional order and the clear expression of the desire to pursue secession by the population of a province would give rise to reciprocal obligations on all parties to Confederation to negotiate constitutional changes to respond to that desire".[24] But a referendum could not itself bring about (unilateral) secession.

Having thus imposed an obligation to negotiate in the amending procedure, the Court attempts next to give some content to the new concept. The Court emphasises that the negotiation process must not necessarily lead to secession. Where a government duly initiates the amending procedure to effect secession, with a clear majority clearly expressed in an appropriate referendum result, the negotiation process which follows does not entail that the negotiations are directed at working out the details of separating the province from the rest of the nation. There is no legal obligation to accede to secession. There is no absolute legal entitlement to secession based on the obligation to negotiate and to acknowledge in the circumstances a supporting referendum result. Having said that, the Court then qualifies the obligations of the other participants to the negotiations. They have no right to ignore or remain indifferent to the demands of the people and their desire to secede. The negotiation process aims at a reconciliation of the rights and obligations of two legitimate authorities,[25] with the negotiating process itself conducted in accordance with fundamental constitutional principles, on pain of risking its legitimacy. The negotiations themselves may not lead to any agreement whatsoever, or to secession, or to some other accord.

The duty to negotiate would seem to slip easily into what that duty entails and how it is to be exercised. But here the Court stops. It takes pains to remove itself from discussing the substance and course of the negotiating, treating it as a political issue. The Court states that it has no supervisory role over the political aspects of the negotiation—even though the Court had noted earlier that in Canada "legality and legitimacy are linked". What constitutes a "clear" majority is subject only to political evaluation. So too are the negotiating positions of the various parties: "... the distinction between a strong defence of legitimate interests and the taking of positions which in fact ignore the legitimate interests of others is one that also defies legal analysis."[26] Justiciability and judicial restraint

24. *Quebec Secession Reference, supra* n.4, para. 88.

25. In this case, identified by the Court as "a clear majority of the population of Quebec, and the clear majority of Canada as a whole, whatever that may be": para. 93.

26. *Quebec Secession Reference, supra* n.4, para. 101.

make their return. For the Court, these aspects presuppose a politician's access to information, types of information, relevant expertise, and resolving ambiguities which are all beyond the jurisdiction, functioning and capacity of a court. The Court recalls, however, that constitutional rules are still in play during a negotiation. A breach of those obligations and rules is not without legal consequences (whether or not a legal, as opposed to a political, remedy is better suited), or without international repercussions.

Finally, if Quebec proceeds in any event to declare itself independent, the possibility of the subsequent recognition and acceptance of the act and Quebec's new status does not justify its initial, unconstitutional act. The alleged "principle of effectivity" has no legal or constitutional status and is contrary to the rule of law. It cannot legitimate *ex ante* an unconstitutional and illegitimate *de facto* secession in defiance of Canadian or international law. At best it suggests only that, as a matter of fact, but not law, an illegal and unconstitutional act may ultimately come to be recognised and accepted after the fact.

C. Question 2

> Does international law give the National Assembly, the legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?

The Court's answer here too is "no". In so far as such an external right of self-determination could be said to exist in international law (and so be recognised by Canadian law), it is restricted to peoples who are oppressed by, and whose right of internal self-determination is restricted by, foreign powers. Whether or not Quebec could constitute a "people" having such rights, neither its population nor its representative institutions are in the present political situation subject to such extraordinary circumstances. Accordingly, none of them possesses such a right to secede under international law.

The Court's argument here also is straightforward. It keeps to safe and generally accepted grounds. The Court relies throughout on the principle of territorial integrity as a fundamental premise. First, a component part of a sovereign State does not have the right at international law to secede from its parent State. The domestic law of the parent State controls the formation (by secession or otherwise) of new States. Second, whilst international law recognises the right of peoples to self-determination,[27] it does not expressly permit nor deny the right of unilateral secession. Self-determination is normally fulfilled through internal self-determination—the people's pursuit of their social, economic,

27. Citing Arts.1 and 55, Charter of the United Nations, Can.T.S. 1945 No.7, Art.1, International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, Art.1, International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3, UN Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A.R.2625 (XXV), 24 Oct. 1970, UN Adoption of the Vienna Declaration and Programme of Action, A/Conf.157/24, 25 June 1993, the General Assembly's Declaration on the Occasion of the 50th Anniversary of the UN, G.A.R.50/6, 9 Nov. 1995 and the CSCE Helsinki Final Act (1975) 14 I.L.M. 1292.

political and cultural development within the framework of an existing State. "A state whose government represents the whole population resident within its territory on the basis of equality and without discrimination and respects the principles of self-determination in its own internal arrangements is entitled to protection under international law of its territorial integrity."[28] The Court accepts that external self-determination arises at best only under three extreme but carefully defined circumstances.[29] The first two instances, each clearly recognised in international law, did not apply to Quebec because it was under neither colonial rule nor foreign subjugation. A third basis, where the internal right of self-determination was blocked from meaningful exercise, itself of uncertain status in international law, also did not apply to Quebec. There was no supportable factual basis to suggest that Quebec's internal right of self-determination, at a federal or provincial level, was in any way blocked in Canada.

Finally, the Court rejects the "effectivity principle" in the context of international law, as legitimating *ex ante* Quebec's unlawful separation as a political reality. The Court notes that recognition in international law relies in part on the legitimacy of the process by which the emergent State is pursuing or did pursue separation. Such States which disregard legitimate obligations binding in their previous situation may put at risk their international recognition. The Court reiterates the argument of its first dismissal of the principle of effectivity, that an *ex post facto* acceptance of the political fact, not itself a rule of law, cannot and does not in any way confer a colour of right or legality upon the initial illegal act.

D. Question 3

> In the event of a conflict between domestic and international law on the right of the National Assembly, the legislature or government of Quebec to effect the secession of Quebec from Canada unilaterally, which would take precedence in Canada?

Given the Court's answers to the previous two questions, there was no conflict between the two to be addressed in the *Reference* opinion.

E. Commentary

The answers to the reference questions are not in themselves that surprising. Rather, the most interesting feature of the *Reference* opinion is its introduction of

28. *Quebec Secession Reference, supra* n.4, para. 130.

29. The Court, whilst expressly relying in this second branch of its reasoning on A. Cassese, *Self-Determination of Peoples: A Legal Appraisal* (1995), also had the benefit of a report by the federal government's expert, Prof. James Crawford (and endorsed by Prof. Luzius Wildhaber) and a combined report, on behalf of the *amicus curiae*, of Profs. Abi-Saab, Franck, le Bouthillier, Pellet and Shaw. The reports were in general agreement as to the first two bases for external self-determination, but disagreed as to how firmly developed and recognised was the third. The latter reports also pushed for a much wider application of that third basis. See also N. Finkelstein, G. Vegh and C. Joly, "Does Quebec Have a Right to Secede at International Law?" (1995) 74 C.B.R. 223 (in line with Prof. Crawford's view); J. Woehhrling, "Les Aspects Juridiques d'une Éventuelle Sécession du Québec" (1995) 74 C.B.R. 293 (examining the aspects of a *fait accompli* and international recognition). Arguing for the much wider application of that third ground for external self-determination are D. Turp, "Le Droit à la sécession: l'expression du principe démocratique", in A.-G. Gagnon and F. Rocher (Eds), *Répliques aux détracteurs de la*

an obligation binding constitutional participants to negotiate when one or more wish to initiate constitutional change. As seen above, the concept springs forth with little indication of its origin or pedigree.[30] At best, the obligation could arise on the premises that democracy and federalism require constant discussion and compromise, and that a constitution based on those principles requires negotiation for stable and constant evolution.[31] But this is hardly a legal proposition. Negotiation is a political concept; it is a feature of all political processes unless absolute power or exclusive jurisdiction renders compromise unnecessary. But it is certainly not an inherent feature of federalism, which refers to a division of political powers and to ascribing competencies to various public institutions, at least any more than it is to, say, unitary democracy or (constitutional) monarchy. Admittedly, the divisions of political competence render federalism more amenable to negotiation policy particularly where the proposed constitutional amendments may cut across those divisions or where equalisations may be required. This would not necessarily be the case in a unitary system, such as the United Kingdom, although minority and special interest groups could just as easily be taken as negotiating constituencies in the place of provinces. But this does not render negotiation a principle of constitutional law.

Apart from the theoretical foundation difficulty, there is the additional immediate problem of substantive content to the duty. It is one thing to recognise the practical necessity of negotiations in democracy as a means of building by discussion and compromise the appropriate majorities to conduct political and legislative business. But it is something entirely different to invest such negotiations with legal significance by rendering them a duty or obligation in a federal democracy. Expecting people to discuss their differences is never a bad thing, but forcing them to do so involves the courts to a degree, at least in the constitutional context, that may make the participants, the courts and the people rather uncomfortable.

Making constitutional negotiations obligatory means that the process has become juridified. Courts may not be able to escape the inevitable cases calling upon them to consider and censure or exonerate particular participants for either failing to negotiate, or negotiating in bad faith or in a manner inconsistent with "fundamental constitutional principles". The courts may not wish to pronounce upon negotiating positions, but those positions manifestly at odds with the juridified constitutional values would appear in fact amenable to judicial review. The Court did indicate that it expected negotiations to proceed in accordance with

souveraineté (1992) and J. Brossard, *L'accession à la souveraineté et le cas du Québec: Conditions et modalités politico-juridiques* (2nd edn, 1995).

30. See e.g. P. Hogg, *Constitutional Law of Canada* (4th edn, 1997), K. C. Wheare, *Federal Government* (4th edn, 1963) and *Modern Constitutions* (2nd edn, 1980), pp.83 *et seq.*, D. J. Elazar, *Exploring Federalism* (1983) and C. J. Friedrich, *Constitutional Government and Democracy* (4th edn, 1968), none of which refers to such a mandatory (or even conventional) duty to negotiate.

31. Such a concept does exist in German and Belgian constitutional law, known as *Bundestreue* or *federal loyalty*, but addresses conflicts of jurisdiction between federal and local levels of government-that is, within a constitutional structure, not at its boundary or outside it. See H. Bauer, *Die Bundestreue* (1992) and H.A. Schwarz-Liebermann von Wahlendorf, "Une notion capitale: la Bundestreue (fedélité fédérale)" [1979] Rev. Droit Pub. 769. It is less a legal concept and more a convention of political co-operation.

those values. Moreover, the set of such values is not closed. Others may apply to negotiation positions and propositions. We should recall that the four "constitutional principles" discussed in the *Reference* were only the four understood by the court as relevant to the issues. Implicated as the courts now are in the constitutional amendment process, identifying the precise dividing line between judicial and political questions becomes all the more pressing.[32] When we recall that the Court considered legitimacy linked to legality, the task hardly becomes any easier, at least in the Canadian context.

Nevertheless, the *Reference* opinion does represent some beginning to the development of a Canadian constitutional amending process. Whilst the Constitution did prescribe the necessary majorities in Parliament and the provincial legislatures to approve amendments to the Constitution,[33] no formal amending process exists. That is, there exists no procedure for initiating or conducting discussions to amend the Constitution. Some constitutional conventions do exist, such as the federal government consulting the provinces regarding proposed amendments which may affect them. This has recently been translated into federal statute, An Act Respecting Constitutional Amendments, whereby federal resolutions to amend the Constitution must have the antecedent support of a majority of the provinces.[34] But even this establishes no procedure: it merely sets another limiting feature as already found in the Constitution. Indeed, the previous two attempts to amend the Constitution, in part to assuage Quebec, demonstrate rather pointedly the "seat of the pants" approach to proposed wholesale amendment.[35] Now the *Reference* opinion provides at least a starting point by crystallising "principled negotiations" into a constitutional obligation. Where that takes Canada and its political representatives, as well as the courts, remains to be seen.

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32. See *supra* n.15 and see also, from a Canadian perspective, M. Mandel, *The Charter of Rights and the Legalisation of Politics in Canada* (1989).

33. Constitution Act 1982, ss.38, 41, 42, 43, 44 and 45.

34. An Act Respecting Constitutional Amendments, S.C. 1996, c.1. By s.1, the requirement for a majority of provincial support does not apply to those amendments for which the provinces already have a constitutional veto or right of dissent (Constitution Act 1982, ss.41 and 43 respectively). The majority of provinces must include Ontario, Quebec, B.C., at least two of the Atlantic provinces having at least 50% of the population of all those provinces (Nova Scotia, New Brunswick, P.E.I. and Newfoundland), and at least two of the Prairie provinces having at least 50% of the population of those three provinces (Alberta, Saskatchewan and Manitoba).

35. The ill-fated 1987 Meech Lake Accord was concluded during a meeting of the provincial premiers and then Prime Minister Mulroney, without prior public consultation, and collapsed after failing to obtain the required approval in the Manitoba and Newfoundland legislatures. The similarly fated 1992 Charlottetown Accord, preceded by public consultation under then Constitutional Affairs Minister Joe Clark, collapsed after rejection by a 1992 Canada-wide referendum.

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