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Communiqué

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Federal clarity bill unnecessary and possibly undemocratic, says Claude Ryan

The federal government's so-called clarity bill, Bill C-20, is an unnecessary and "undesirable intrusion...into a process that must unfold within Quebec," says leading Quebec federalist Claude Ryan in a *C.D. Howe Institute Commentary* published today. Moreover, he says, article 2 of the legislation, which would implicitly allow Parliament to rule that a clear majority is more than 50 percent plus one, "opens the door to a denial of democracy."

Ryan — who edited Montreal newspaper *Le Devoir*, served as leader of the Quebec Liberal Party during much of the first Parti Québécois government, and participated as senior minister in the provincial government between 1985 and 1994 — is also critical of Bill 99, the Quebec government's counter-legislation to the federal clarity bill. Calling it "disproportionate to the issues at hand," Ryan says "Bill 99 takes the form of a constitutional proclamation of the kind that simply cannot be concocted in a matter of a few weeks." He also says that if Quebec Premier Lucien Bouchard had wanted to create a broad consensus, he "would have been wise to restrict himself to a rebuttal of the federal law and an affirmation of the [Quebec] National Assembly's freedom of initiative with respect to the matters fettered by the federal clarity bill."

Ryan analyzes the implications of the Supreme Court's 1998 advisory opinion on Quebec secession, the so-called *Secession Reference*, and notes that, although it refers to the requirement for a clear majority decision in the event of another referendum, it fails to specify what threshold the Court intends. Ryan argues that, in the case of a referendum of the entire population, the democratic principle should prevail — that is, a simple majority of 50 percent plus one of votes cast or, at most, 50 percent plus one of registered voters. "[D]ecision rules in the public arena that depart from the norm of simple majority rule occur in bodies that make some use of delegation of the popular will," he says.

Ryan supports the *Secession Reference*'s call for a clear question in any future referendum since, he concludes, the 1995 referendum question failed any reasonable test for clarity. In the event of a third sovereignty referendum, "[t]he question should be formulated in clear and simple terms. It should...embrace the two issues highlighted by the Supreme Court: the repudiation of the existing constitutional order and the will to secede."

In Ryan's opinion, the Supreme Court reference reinforced Ottawa's position from a legal standpoint, but it "was also told something it did not seem to expect: that, if a referendum were

held on a clear question and resulted in a clear majority in favor of secession, the federal government...would have an obligation to engage the Quebec government in good-faith negotiations to put into effect the clearly expressed will of Quebecers." Ryan approves of the Supreme Court's implicit recognition of the democratic legitimacy of the sovereigntist movement: "[T]he Court treats sovereigntist aspirations with the dignity and respect that any political movement that pursues legitimate democratic objectives deserves."

Ryan argues, however, that the secessionist movement in Quebec is "a fundamentally political problem." He insists that "Byzantine discussions over what constitutes a clear question and a clear majority are far removed from the true heart of the debate." In his view, the key to understanding why a sovereigntist movement grew in Quebec and to devising the best strategy to counter it is for English-speaking Canadians to recognize that "the primacy of the French language among Quebecers has led to their forming a distinct entity with their own lifestyle, institutions, and frequently, collective goals. Quebecers want to preserve the features of their society that distinguish it from the rest of Canada."

Ryan describes the strategy of Pierre Trudeau and, since 1997, of Jean Chrétien to be "very simple: oblige Quebecers to opt clearly for one camp or the other." This strategy of confrontation, he argues, has "presented a deformed image of Quebec nationalism to the rest of the country....but it does not reflect daily reality in Quebec, where actual public opinion is far more subtle and nuanced." Ryan recalls that, according to opinion polls, renewed federalism has consistently remained the preferred option of Quebecers over both separatism and the status quo over the past ten years. Instead of confrontation, Ryan calls for a genuine interest in "Plan A" to resolve outstanding problems. "Quebec's aspirations historically have turned on the two axes of language rights and the powers of the National Assembly. A successful strategy must address both these issues," he says.

Ryan argues that Quebec has obtained very little in the formal constitutional arena, but "in terms of the concrete functioning of Canadian federalism, numerous developments have responded to [its] aspirations." He recalls that a re-examination of the distribution of powers and responsibilities remains necessary and will have to take into account Quebec's unique mission in Canada and North America. But it need not be a radical revamping of the division of powers agreed to by the Fathers of Confederation. The latter still has much to recommend it, Ryan adds. Frank discussions must also take place , according to Ryan, to find mutually acceptable solutions to the overly wide scope of the federal spending power.

"I am convinced," Ryan concludes, "that a genuine openness — a real interest in 'Plan A' — will be well received by the many Quebecers who remain committed to the future of both Quebec and Canada."

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For further information, contact: Claude Ryan, e-mail: clauderyan@videotron.ca
Shannon Spencer (media relations), C.D. Howe Institute
phone: (416) 865-1904; fax: (416) 865-1866;
e-mail: cdhowe@cdhowe.org; Internet: www.cdhowe.org

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Communiqué

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La Loi sur la clarté *du gouvernement fédéral est inutile et probablement anti-démocratique, déclare Claude Ryan*

La soi-disant *Loi sur la clarté* du gouvernement fédéral (projet de loi C-20) est inutile et « une intrusion indésirable […] dans un processus qui doit se dérouler au Québec même », déclare le fédéraliste québécois de premier rang, M. Claude Ryan, dans un *Commentaire de l'Institut C.D. Howe* publié aujourd'hui. En outre, indique-t-il, l'article 2 de la *Loi,* qui permettrait implicitement au Parlement d'établir qu'une majorité claire est plus que 50 % des voix plus une, « laisse la porte ouverte à un désaveu du procédé démocratique. »

M. Ryan — qui a été rédacteur du journal montréalais *Le Devoir,* chef du Parti libéral du Québec pendant une grande partie du premier gouvernement du Parti Québécois, et ministre de premier plan au sein du gouvernement provincial de 1985 à 1994 — trouve aussi à redire au projet de loi 99, la contre-proposition législative du gouvernement québécois à la *Loi sur la clarté* du gouvernement fédéral. La qualifiant de « disproportionnée compte tenu des enjeux dont il est question », M. Ryan affirme que « le projet de loi 99 prend la forme d'une proclamation constitutionnelle du genre qu'il est impossible de concocter en quelques semaines ». Il souligne aussi que si le premier ministre québécois, M. Lucien Bouchard, avait voulu créer un consensus général, il « aurait été plus avisé de s'en tenir à une réfutation de la loi fédérale et à une affirmation de la liberté d'initiative de l'Assemblée nationale [du Québec] à l'égard des questions auxquelles fait entrave la loi fédérale ».

M. Ryan analyse les répercussions de l'avis consultatif donné en 1998 par la Cour suprême sur la séparation du Québec, le *renvoi relatif à la sécession*, et souligne que même s'il fait allusion à l'exigence d'une décision clairement majoritaire advenant un autre référendum, il ne précise pas où la Cour en situe le seuil. M. Ryan soutient que dans le cas d'un référendum auprès de la population, le principe démocratique doit l'emporter — c'est-à-dire une majorité simple de 50 % des votes plus une voix, ou, tout au plus, une majorité de 50 % des électeurs inscrits plus une voix. « Dans l'arène publique, les règles de décision qui s'écartent de la norme d'une majorité simple se produisent dans les entités où prévaut une certaine délégation de la volonté populaire », ajoute-t-il.

M. Ryan est d'accord avec l'affirmation du *renvoi relatif à la sécession* qui réclame une question claire à l'appui de tout référendum futur puisque, indique-t-il, la question référendaire po-

sée en 1995 échouait à tout examen de clarté raisonnable. Advenant un troisième référendum sur la souveraineté, « la question doit être formulée en termes clairs et simples. Elle devrait tenir compte des deux points soulevés par la Cour suprême : la répudiation de l'ordre constitutionnel actuel et la volonté de se séparer ».

De l'avis de M. Ryan, le renvoi de la Cour suprême a renforcé la position du gouvernement fédéral d'un point de vue juridique, mais « celui-ci s'est également fait dire quelque chose qu'il ne s'attendait pas à entendre : qu'advenant la tenue d'un référendum sur une question claire qui aboutisse au vote clair d'une majorité appuyant la séparation, le gouvernement fédéral […] serait dans l'obligation d'entamer des négociations de bonne foi avec le gouvernement québécois pour donner suite à la volonté clairement exprimée de la population québécoise ». M. Ryan approuve la reconnaissance implicite de la légitimité démocratique du mouvement souverainiste : « La Cour traite les aspirations souverainistes avec la dignité et le respect que mérite tout mouvement politique qui vise des objectifs démocratiques légitimes ».

Il soutient, par contre, que le mouvement séparatiste du Québec est un « problème fondamentalement politique ». Il insiste que « les querelles byzantines sur ce qui constitue une question claire et une majorité claire sont bien éloignées du cœur réel du débat ». À son avis, pour que les anglophones puissent comprendre pourquoi est né un mouvement souverainiste au Québec et établir la meilleure stratégie pour y faire opposition, ils doivent reconnaître que la « primauté de la langue française chez les Québécois les a menés à former une entité distincte, dotée de son propre mode de vie, de ses propres institutions et souvent d'objectifs collectifs. Les Québécois veulent préserver les caractéristiques de leur société, qui la distinguent de celles du reste du Canada ».

M. Ryan décrit la stratégie de M. Pierre Trudeau et, depuis 1997, de M. Jean Chrétien, de « très simple : forcer les Québécois à choisir un camp ou l'autre ». Cette stratégie de la confrontation, selon lui, a « présenté une image déformée du nationalisme québécois au reste du pays […] mais elle n'est pas un reflet de la réalité quotidienne au Québec, où l'opinion publique est bien plus subtile et nuancée ». M. Ryan souligne que, selon les sondages d'opinion, le fédéralisme renouvelé reste, depuis 10 ans, le choix préféré par les Québécois, avant le séparatisme et le *statu quo.* Au lieu d'une confrontation, M. Ryan demande que l'on manifeste un intérêt réel pour le « Plan A » à l'égard de la résolution des problèmes existants. « Les aspirations des Québécois ont de tout temps reposé sur les deux principes des droits de la langue et des pouvoirs de l'Assemblée nationale. Toute stratégie efficace devra aborder ces deux questions », précise-t-il.

M. Ryan soutient que l'on a bien peu concédé au Québec sur le plan constitutionnel formel, mais qu'en « termes du fonctionnement concret du fédéralisme canadien, de nombreux développements ont répondu à [ses] aspirations ». Il souligne qu'un réexamen de la répartition des pouvoirs et des responsabilités s'impose encore, et que celui-ci devra tenir compte de la mission unique du Québec au Canada et en Amérique du Nord. Un remaniement radical du partage des pouvoirs, tel qu'il avait été établi par les Pères de la Fédération, ne s'impose nullement. En effet, il y a beaucoup à dire en sa faveur, ajoute M. Ryan. Mais des discussions franches s'imposent, affirme M. Ryan, pour trouver des solutions mutuellement acceptables à l'envergure trop vaste du pouvoir fédéral en matière d'application des ressources.

« Je suis convaincu, de conclure M. Ryan, qu'une ouverture d'esprit réelle — dont un intérêt véritable pour le "Plan A" — sera bien reçue par les nombreux Québécois qui restent fidèles à l'avenir du Québec et du Canada. »

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Renseignements : Claude Ryan, courriel : clauderyan@videotron.ca
Shannon Spencer (relations avec les médias), Institut C.D. Howe
téléphone : (416) 865-1904; télécopieur : (416) 865-1866;
courriel : cdhowe@cdhowe.org; site Web : www.cdhowe.org

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Consequences of the Quebec *Secession Reference*

The Clarity Bill and Beyond

Claude Ryan

In this issue...

A leading Quebec federalist argues that a genuine openness — a real interest in "Plan A" — will be well received by the many Quebecers who remain committed to the future of both Quebec and Canada.

The Study in Brief...

Where do Quebec and Canada stand in the wake of the Supreme Court's opinion in the Quebec *Secession Reference* and Ottawa's introduction of Bill C-20, the so-called clarity bill? The Court's opinion clarified the legal framework that would apply in the event of a "yes" vote in another Quebec referendum. But the clarity bill is awkward, invading provincial prerogatives should Quebec or any other province seek to hold a referendum and opening the door to decision rules other than that of simple majority rule, while limiting Ottawa's options in the event of a crisis. Meanwhile, Quebec's counter-legislation, Bill 99, falls short of a specific, well-circumscribed response to the federal bill that a federalist Quebecer could support.

The Supreme Court offers useful guidelines for the conduct of political actors on either side of future secession debates. An examination of five possible future scenarios for a Quebec sovereigntist government shows that it will be more difficult for the province to attempt secession based on a confusing referendum question or through extraconstitutional means, or to ignore the will of minorities. At the same time, it will be more difficult for political actors across the country not to negotiate seriously changes that Quebec or any other province requests on the basis of a clearly expressed popular will.

Nevertheless, Byzantine discussions around the wording of a referendum question will never come to grips with the real problem. As shown by the Supreme Court's lack of express mention of linguistic duality as one of Canada's founding principles, legal categorization cannot account for all the elements relevant to Quebec nationalism and the unity question. History suggests that, although Quebec will likely continue to seek security for its French-language majority and more jealously guard its autonomy, it also needs to proceed with realism. Despite recent failed attempts at wholesale constitutional change, cooperation among Canadian governments has often yielded concrete results. It is time for both Quebecers and Canadians in other provinces, many of whom could also benefit from future changes in the federation, to begin building new bridges along a "Plan A" approach.

The Author of This Issue

Claude Ryan now describes himself as an "independent observer free from the responsibilities and constraints of office." In earlier years, he assumed many responsibilities and the accompanying constraints. He edited *Le Devoir*, served as leader of the Quebec Liberal Party during much of the first Parti Québécois government, and participated as senior minister in the provincial government between 1985 and 1994. He has consistently concerned himself with renewing Canadian federal institutions such that both Quebecers and non-Quebecers feel politically at home. An early statement of his position was contained in the proposals set forth by the Quebec Liberals in 1980 (the so-called Beige Paper). He has since written numerous articles on Canadian unity and federal-provincial relations.

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Early in 1998, the federal government invited the Supreme Court of Canada to give an opinion[1] on the three following questions concerning Quebec's possible secession. First, under the Constitution of Canada, can the National Assembly, legislature, or government of Quebec effect the secession of Quebec from Canada unilaterally? Second, does international law give the National Assembly, 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? Third, in the event of a conflict between domestic and international law on the right of the National Assembly, legislature, or government of Quebec to effect the secession of Quebec from Canada unilaterally, which would take precedence in Canada?

The Constitution is silent on the question of secession by a province belonging to the federation. The Supreme Court could have concluded from this fact that, lawmakers having decided that this matter be left to political agents, it was not the role of judges to impose their judgment. Many factors favored such an interpretation, notably the fact that constitutional silences sometimes mean that the document's framers, while not intending to deny the existence of certain realities, thought it wiser not to touch on them explicitly at all than to do so in an unsatisfactory way (see Thomas 1997).

The passages of the Constitution most relevant to a secession project, in particular those concerning amendments to the Constitution, are of recent origin. They were adopted when the Constitution was patriated and amended as the *Constitution Act, 1982*, at which point the issue of Quebec secession had already been a major topic of public discussion for many years. Indeed, a sovereigntist government was in place at the time in Quebec City and in 1980 had already held a referendum on a mandate to negotiate a sovereignty-association formula with the rest of Canada. It is impossible to plead that lawmakers were unaware of the problems that could result from the secession project when they adopted the constitutional amending formula. If they chose not to address secession explicitly, it is likely because they had good political reasons.

Furthermore, the *Constitution Act, 1982* was adopted without Quebec's consent and despite the opposition of a strong majority of the members of its National Assembly. To this day no Quebec government has endorsed it. Many observers, including this writer, had argued that these factors should have induced the Supreme Court to react with a maximum of restraint to the questions addressed to it by the federal government. However, the Court preferred to offer new constitutional interpretations — as it had done before, in 1981. Recall that, at that time, the Court allowed Ottawa to proceed with amending the Constitution provided it enjoyed a substantial measure of provincial support. This decision led to the Constitution's patriation and the adoption of a Canadian Charter of Rights and Freedoms despite the formal objection of the Quebec government and the National Assembly.

In the case of the *Secession Reference*, the Supreme Court espouses a point of view prevalent among constitutionalists: it concludes that the questions addressed to it could

The author wishes to express his appreciation to John Richards and Daniel Schwanen for translating the original French-language version of this paper into English.

1 *Reference Re Secession of Quebec*, [1998] 2 SCR 217; hereafter referred to as the *Secession Reference*.

"clearly be interpreted as directed to legal issues" and that, accordingly, it is "in a position to answer them" (*Secession Reference*, 28).

This advisory opinion does not have the force of law. Its authors recognize, furthermore, that "the questions posed in this Reference raise difficult issues and are susceptible to varying interpretations" (ibid., 31). Nevertheless, the Supreme Court speaks at length on the issue, and with great care. It clearly indicates which principles would guide it should it be presented with a case related to the secession of Quebec, and sets forth that the governments concerned should be inspired by the same principles when deciding their own conduct. This being the case, it behooves political leaders and all those concerned about the future of both Quebec and Canada, regardless of their political preferences or views on the advisory opinion, to seek, first, to understand with the greatest possible degree of precision what the Court says and, second, to draw the appropriate implications for the main players, in particular the governments of Canada and of Quebec.

Limitations of a Strictly Legal Approach

An attempt by Quebec to undertake secession unilaterally would be first and foremost a political act. Nevertheless, the Supreme Court of Canada rejects submissions arguing that such an act would be exclusively political, concluding that it would also have important repercussions for Canada's legal and constitutional order. It was on this basis that the Court decided to answer the questions the federal government had referred to it. It repeatedly emphasizes, however, that its answers pertain to the legal and juridical aspects of those questions, that it would mainly discuss unilateral secession, and that it intends to leave to political players the responsibility for the genuinely political aspects of secession.

An exclusively juridical approach has inherent limitations.

Such an exclusively juridical approach, however, has inherent limitations. By restricting its analysis to the legal aspects of the questions put to it, the Supreme Court necessarily has to interpret reality based on legal concepts. But there is often a pronounced split between the legal dimension and the social and political dimensions of the same reality. For example, in a strictly legal sense Quebec is a province like any other in the Canadian federation, endowed with its own particularities but nothing more. In a historical and political sense, however, the reality is vastly different. Quebec is home to more than four-fifths of Canadian francophones. In the eyes of many Quebecers, it is far more than "a province like the others": it is the homeland of a founding people that possesses its own language and culture. Quebec is the seat of a society whose history, language, culture, and institutions are distinct. Yet the *Secession Reference* discusses the Quebec reality only through the prism of the existing constitutional order, a vision that falls well short of the full social and political reality.

A further weakness of the *Secession Reference* is its narrow view of recent history. Its survey of Canada's constitutional evolution quickly glosses over a number of factors that contributed to the rise of sovereigntist feeling in Quebec. An observer whose only source of information was the advisory opinion would have great difficulty understanding why the sovereigntist movement began and grew in modern Quebec.

Principles of Constitutional Evolution in Canada

The Supreme Court of Canada bases the *Secession Reference* on four fundamental principles that, it says, underlie Canada's constitutional evolution: federalism, democracy, respect for minority rights, and constitutionalism and the rule of law. From a Quebec perspective, the Court's interpretation of the first two principles gives rise to no difficulties. The same cannot be said, however, of how it interprets the latter two.

Minority Rights: Diversity versus Duality

The Supreme Court often speaks of Canada's diversity, but never of its duality.

The Supreme Court often speaks of Canada's diversity, but never of its duality. The former is perhaps a more "politically correct" term in anglophone circles, but it raises significant difficulties in Quebec, where the duality of Canada has long been considered one of the country's fundamental characteristics. For many Quebecers, the 1867 Confederation began as an alliance concluded between the two founding peoples that at the time formed the province of Canada, subsequently translated into a larger alliance of former colonies.

The government of Lester Pearson had formally recognized the concept of duality in the mandate it gave to the Royal Commission on Bilingualism and Biculturalism in 1963. Today, however, it is fashionable in English-speaking Canada to reject the notion out of hand. True, the composition of Canada's population has changed significantly and is now much more diverse than it was in 1867. Nevertheless, without prejudice to the use of other languages in private life, the two major means of integration in Canadian life remain French and English.

Public policy in Quebec has increasingly emphasized integration within the francophone milieu. In the rest of the country, integration generally occurs within the anglophone milieu, owing to the overwhelming numerical superiority of anglophones. Diversity is an inescapable Canadian reality, but it cannot properly account for the anglophone-francophone duality and should not be substituted for it.

Even from a strictly legal perspective, the Supreme Court should have distinguished clearly between two types of reality, which it instead lumps together under the rubric of respect for minority rights. Where the Constitution deals with the English and French languages, it does not treat one as a majority language and the other as a minority. On the contrary, it proclaims both to be "the official languages of Canada," with "equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada." It also proclaims — particularly for the purpose of education — that both anglophones and francophones must enjoy equal protection in the provinces in which one or the other group is a minority. One cannot help but wonder why the Court chooses, in the *Secession Reference*, not to include this concept of linguistic equality among the fundamental principles characterizing Canada's constitutional structure. How could it completely avoid the use of the word "duality" in such a long text except on purpose?

Furthermore, from a concrete historical perspective, one cannot fail to remember that, when legislators decided in 1982 to confer equal status on the English and French languages, they did so not for reasons of charity or benevolence but in recognition of political reality — that is, because the political situation in Quebec and, more specifically, the rise of sovereigntist sentiment forced them to do so. If charity and

benevolence had been their motives, they would have acted much earlier, before intolerant anglophone governments in other provinces had contributed to the assimilation of so many francophones in their midst. By acting as they did in 1982, the legislators recognized that, for all practical purposes, there exist in Canada two majority languages — French in Quebec and English in the other provinces — and that the best way to help the two coexist was to guarantee them equal status in a certain number of areas of collective life.

If both French and English are to be considered official and equal languages before the law, then their speakers have rights that cannot be limited to individual rights.

If both French and English are to be considered official and equal languages before the law, then their speakers have rights that cannot be limited to individual rights. In the case of French, especially, which is in a relatively weak position on the North American continent, the effective exercise of an individual's right to speak and use his language requires a context in which French is customarily spoken, as well as institutional support and, within Quebec, a measure of linguistic protection. Much of this is also valid for anglophones where they form a minority. In the Canadian context, this means:

- Quebec must be able to secure for itself institutions as well as legal and other instruments rooted in the culture to which the vast majority of its population belongs; and
- official-language minorities must be able to count on having access to services in their own tongue, at least in key areas such as education, health services, the courts, and broadcasting.

Constitutionalism Requires the Participation of All Parties

Respect for the constitutional order is an indispensable condition of the orderly functioning of a democratic society. But it is also necessary, especially in a federal regime, that fundamental constitutional rules be established with the participation and agreement of the main partners involved. As the Supreme Court itself stresses:

> constitutional rules are themselves amenable to amendment, but only through a process of negotiation which ensures that there is an opportunity for the constitutionally defined rights of all the parties to be respected and reconciled. (*Secession Reference*, 76.)

Thus, the Court identifies a high degree of consensus as the proper norm where constitutional change is concerned. Yet it seems inclined to minimize the effect on Quebec of the unilateral character of the changes instituted in 1982. Although the Court states "It should be noted...that the 1982 amendments did not alter the basic division of powers in [sections] 91 and 92 of the Constitution Act, 1867," it feels the need to immediately add that the 1982 amendments

> have the important effect that, despite the refusal of the government of Quebec to join in its adoption, Quebec has become bound to the terms of a Constitution that is different from that which prevailed previously, particularly as regards provisions governing its amendment, and the Canadian Charter of Rights and Freedoms. (Ibid., 47.)

The Court could have added, to complete the picture, that, having instituted a new amending formula without Quebec's agreement, its partners quickly decreed that any change to the formula would be subject to their vetoes! These facts explain why no Quebec government has given its assent to the 1982 Constitution — those that were disposed to do so demanded changes in return that were unfortunately turned down — why many Quebecers, although they remain respectful of the Constitution and the rule of law, consider the way the 1982 law was adopted to be seriously deficient in terms of constitutional fair play, and why they consequently refuse to adhere to it, even while they must accept that it applies to Quebec.

Sovereignty: A Legitimate Democratic Option

Some commentators have suggested that, given the Constitution's absence of provisions explicitly addressing secession, the Supreme Court should have peremptorily concluded that the withdrawal of any province from the federation was forbidden in the name of the principle of permanence, which ensures stability and durability in a federal regime. Abraham Lincoln, for example, invoked just such a principle to justify a fight-to-the-finish against the secessionist southern states, an interpretation later confirmed and reinforced by the US Supreme Court. Fortunately, Canada's Supreme Court has adopted no such interpretation.

Indeed, by refusing to follow that path, the Supreme Court implicitly recognizes the democratic legitimacy of any political movement, provided its proponents seek to advance it in a manner respectful of the Constitution and the rule of law. Quebec Premier Lucien Bouchard was right to conclude that the *Secession Reference* reinforces the democratic legitimacy of the sovereigntist movement. The Court also recognizes the legitimacy of the ideas conveyed by such a movement, by stating that

Premier Lucien Bouchard was right to conclude that the Secession Reference *reinforces the democratic legitimacy of the sovereigntist movement.*

> a functioning democracy requires a continuous process of discussion...No one has a monopoly on truth, and our system is predicated on the faith that in the marketplace of ideas, the best solutions to public problems will rise to the top. Inevitably, there will be dissenting voices. A democratic system of government is committed to considering those dissenting voices, and seeking to acknowledge and address those voices in the laws by which all in the community must live. (*Secession Reference*, 68.)

Much to its credit, the Supreme Court avoids identifying the sovereigntist movement with subversive objectives, making it appear destructive, or attaching to it any offensive epithet. Rather, in the language and arguments it uses in its advisory opinion, the Court treats sovereigntist aspirations with the dignity and respect that any political movement that pursues legitimate democratic objectives deserves. This approach might well serve as an object lesson for those who are wont to denigrate, or even demonize, the sovereigntist option and its supporters.

Quebecers themselves long ago discarded this poisonous perspective. As an elected member of a federalist party, I sat for 15 years in the National Assembly alongside members representing the Parti Québécois. By dint of our working together daily, we ended up not as sworn enemies but as colleagues. True, we had important disagreements — chief among them our perspectives on Canadian federalism and the

Constitution — but we held too many values in common, in particular our attachment to Quebec, to hold each other in contempt.

The best way to overcome the sovereigntist option is to fight it intelligently and vigorously at the level of ideas, while respecting those individuals who champion it in good faith.

The highest tribunal of the land has given an example that deserves to be followed. The best way to overcome the sovereigntist option is to fight it intelligently and vigorously at the level of ideas, while respecting those individuals who champion it in good faith. In Quebec, the two main parties have learned over the past 30 years to cohabit the political scene, respecting the rules of the game as they alternate their hold on power. There is in this a healthy respect for democracy of which Quebecers can be proud.

Question One Answered: Democracy and Legality

Although the Supreme Court of Canada reinforces the democratic legitimacy of the sovereigntist movement in the *Secession Reference*, it is also keen to remind us that legitimacy and legality must go hand in hand in a democratic society:

> [D]emocracy in any real sense of the word cannot exist without the rule of law. It is the law that creates the framework within which the "sovereign will" is to be ascertained and implemented. To be accorded legitimacy, democratic institutions must rest, ultimately, on a legal foundation. (*Secession Reference*, 67.)

Now the Court's answer to the first question of the reference is of the utmost importance: "The secession of a province from Canada must be considered, in legal terms, to require an amendment to the Constitution" (ibid., 84). Some representations to the Court claimed that a referendum result favorable to secession would create an extraordinary political situation, and that such an expression of popular will could not be equated with an ordinary request for a constitutional amendment. The Court rejects this view:

> The fact that those changes would be profound, or that they would purport to have a significance with respect to international law, does not negate their nature as amendments to the Constitution of Canada. (Ibid.)

Of all the conclusions the Court draws, this is the most concrete and fraught with consequences for Quebec, since it clearly affirms, for the first time, that any secession project would necessarily be subject to the consent of other partners in the federation. Some observers suggest that, in doing so, the Court simply makes explicit what was already embryonically in the Constitution. But one could equally hold that the Court engages in questionable innovation by making a constitutional text that is, after all, of recent vintage, say what legislators had judged best not to include explicitly. Not only does the Court innovate, it does so in such a way as to shift the balance of power in the federation in favor of the federal government.

On the basis of these findings, the Court draws three major conclusions. First, a referendum result favorable to sovereignty, if it emanated from a clear majority in response to a clear question, would represent a will for change endowed with a definite legitimacy. The Court comments that, although

> the results of a referendum have no direct role or legal effect in our constitutional scheme, a referendum undoubtedly may provide a democratic method of ascertaining the views of the electorate on important political questions on a particular occasion. (Ibid., 87.)

Hence it comes to this conclusion, which appears toward the end of the opinion:

> a clear majority vote in Quebec on a clear question in favour of secession would confer democratic legitimacy on the secession initiative which all of the other participants in Confederation would have to recognize. (Ibid., 150.)

Following a referendum result favorable to sovereignty, the Quebec government would be entitled to request that other participants in the federation enter into negotiations regarding the secession project.

Second, following a referendum result favorable to sovereignty, the Quebec government would be entitled to request that other participants in the federation enter into negotiations regarding the secession project, but it could not invoke an absolute right to self-determination as a means to effect secession without any other formality. Until further notice, Quebec would still belong to the federation and could only extricate itself from it by means of a constitutional amendment obtained according to the Constitution's amending rules. Only after having obtained such an amendment could Quebec legally begin the process of secession.

Third, following a referendum in favor of secession, other governments in Canada would be required to

> acknowledge and respect that expression of democratic will by entering into negotiations and conducting them in accordance with the underlying constitutional principles already discussed. (Ibid., 88.)

In other words,

> the corollary of a legitimate attempt by one participant in Confederation to seek an amendment to the Constitution is an obligation on all parties to come to the negotiating table. (Ibid.)

This obligation to negotiate is one of the *Secession Reference*'s most unexpected components.

Implications of the Court Decision

What do these conclusions mean in the context of the current political situation in Quebec and in Canada as a whole? In the following paragraphs I examine some key ramifications: the requirement of clarity enunciated by the Supreme Court, with respect to both the referendum question and the majority required to ensure the legitimacy of the result; the situation in which a Quebec government would find itself the day after a referendum in favor of sovereignty; and the implications of the obligation to negotiate enunciated by the Court.

Being Clear about "Clear"

The Supreme Court says that, following a "yes" vote, the Quebec government would be justified in requesting negotiations on a secession plan provided, however, that the referendum had been held on a clear question and that the results showed that a clear majority favored a rejection of the existing constitutional order. Yet despite this insistence on clarity — the *Secession Reference* uses the words "clear" and "clarity" about 40 times — the Court nowhere specifies what should constitute either a clear question or a clear majority. Since the Court fails to define "clear," let us try to analyze the meaning of the word.

The best place to begin is with the dictionary. In contexts comparable to the one at issue here, the *Canadian Oxford Dictionary* defines "clear" as "unambiguous, easily understood," or "manifest; not confused or doubtful." The *Nelson Canadian Dictionary* has "free from doubt or confusion; certain." And for *Webster's Tenth New Collegiate Dictionary*, the word means "free from obscurity or ambiguity: easily understood;" as a synonym, it proposes "unmistakable."

A Clear Question

These definitions suggest that, for a referendum question to be what most people would understand as clear, it should be easy to understand and free from ambiguity, its meaning comprehensible and certain. Then-premier Jacques Parizeau seemed to accept these requirements in his address, mailed to voters before the 1995, referendum, which stated: "As you can see, [the question] is simple and direct." Premier Bouchard has also maintained on a number of occasions that the 1995 question was clear. This claim is, however, disingenuous as the question gave rise to several sources of confusion. The question was formulated thus:

Premier Bouchard has maintained that the 1995 question was clear. This claim is, however, disingenuous.

> 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 Québec and of the agreement signed on June 12, 1995?

A first source of confusion was that voters were asked to say "yes" or "no" to four different things simultaneously — namely, Quebec sovereignty, the offer to Canada of a new partnership, the draft bill respecting the future of Quebec, and the June 12 agreement.

Further confusion stemmed from use of the word "sovereign," which can mean different things to different people. It can mean political independence, but it can also be used to refer to less complete forms of government autonomy. (It is generally recognized, for example, that, under the current Constitution, Quebec is sovereign in areas under its jurisdiction.) Explanations could be found in documentation sent to prospective voters by the "yes" camp, but the interpretation of "sovereign" was left wide open in the body of the question itself.

Confusion also surrounded the process suggested by the wording of the question. Reading it, one might have concluded that a vote in favor of sovereignty would be followed by the presentation of a partnership offer to the rest of Canada, and that independence would come only later. In fact, Jacques Parizeau's understanding was

quite different. His government reserved for itself a great deal of latitude: according to Parizeau, it could have proclaimed independence at any time. Those who voted "yes" but did not necessarily support independence — who simply wanted better arrangements between Quebec and the federal government — risked becoming hostages of a hasty separation in the event of a "yes" vote.

A fourth source of confusion was the absence in the question of any mention of breaking the Canadian federal link. Instead of stating clearly that this link would be broken following a "yes" vote, the question's drafters strove to paint a picture of a painless passage to a new partnership more favorable to Quebec.

The final source of confusion was the question's solemn mention of the June 12 agreement, as though this were an accord of great importance. In reality, it was an *ad hoc* deal among the three sovereigntist leaders. Any uninformed voter who had not read the accompanying documentation could easily have assumed that he was being invited to ratify an intergovernmental accord aimed at facilitating the realization of sovereignty and an association with the rest of Canada, whereas the June 12 agreement was nothing of the sort.

It is hard to deny the evidence indicating that there was confusion in the minds of many voters.

Beyond this analysis of the wording of the question, how was it actually perceived by the population at large? It is hard to deny the evidence indicating that there was confusion in the minds of many voters. Shortly after the referendum, sociologist Maurice Pinard stated:

> The polling data we have reveal very clearly that close to half of voters declared themselves confused, even at the very end of the referendum campaign. When we put to people, throughout the entire 1995 referendum campaign, the statement "The more time that elapses, the less we understand what we will vote on," 55% answered yes at the beginning of the campaign, while at the end of the campaign, this had dropped to 50%. (Pinard 1998.)

Pinard reports that 25 percent of respondents believed that, with sovereignty, Quebec would remain a province of Canada. About 20 percent of respondents were convinced that, if independence were to occur, there would necessarily be a partnership with Canada. Between 15 and 17 percent did not know what to make of the question with respect to its exact scope. The main source of confusion, according to Pinard, was the complicated nature of the question.

In a similar vein, in March 1998 a group of university researchers (Nadeau et al. 1998) published the results of three polls, one taken in 1992 and two in 1997, that attempted to measure the degree of support for sovereignty according to two different ways of asking the question. The researchers — Richard Nadeau and André Blais of Université de Montréal, Neil Neville of the University of Toronto, and Elizabeth Gidengil of McGill University — asked the individuals in their polling samples the following:

> Question 1: "Are you very favorable, somewhat favorable, somewhat opposed, or very opposed to Quebec sovereignty?"

> Question 2: "Are you very favorable, somewhat favorable, somewhat opposed, or very opposed to Quebec sovereignty — that is, Quebec is no longer part of Canada?"[2]

The experiment yielded striking results, in that answers unfavorable to sovereignty rose noticeably when sovereignty was presented as meaning a rupture with Canada. In 1992, for example, support for sovereignty fell by 9 percentage points and opposition to sovereignty rose by 17 points in the answers respondents gave to question 2 relative to those they gave question 1 (the percentage of respondents who did not know or who refused to answer dropped by 8 percentage points). In the two polls taken in 1997, the spread between the responses to the two questions was less pronounced, but respondents who were rather favorable or very favorable to sovereignty still declined by 2 and 3 percentage points, respectively, when asked question 2, and those who were opposed or very opposed to sovereignty increased by 4 and 8 points, respectively (ibid.).

The obvious conclusion is that the 1995 referendum question did not satisfy the requirement of clarity formulated by the Supreme Court. One must also conclude that the Parizeau government sought a mandate that would have enabled it to plunge Quebec into a venture of highly doubtful legal and constitutional validity.

A Clear Majority

The Supreme Court also indicates that, to be legitimate, a sovereigntist referendum victory would require a clear majority in favor of rejecting the existing constitutional order and in support of secession. But the meaning the Court gives to "clear majority" is imprecise. The *Secession Reference* notes that, although the democratic principle is fundamental, it must be applied symbiotically with other principles that underlie Canada's constitutional system. Moreover, some of those principles, notably that of constitutionalism, can give rise to decision criteria that are more stringent than a simple majority: "It would be a grave mistake to equate legitimacy with the 'sovereign will' or majority rule alone, to the exclusion of other constitutional values" (*Secession Reference*, 67).

Decision rules in the public arena that depart from the norm of simple majority rule occur in bodies that make some use of delegation of the popular will.

To my knowledge, decision rules in the public arena that depart from the norm of simple majority rule occur in bodies that make some use of delegation of the popular will as obtained through democratic means. For example, it is the people's representatives, not citizens themselves, who vote in the National Assembly. To prevent the abuse of power by elected representatives, it is understood that some decisions must be subjected — with the consent of the representatives — to a more constraining rule than that of a simple majority. For example, Quebec provincial appointments to offices that require a high degree of impartiality — such as that of the auditor-general, the director-general of elections, and members of the Human Rights Commission — must be approved by a vote of at least two-thirds of the members of the National Assembly. As another example, an ordinary amendment to the Canadian Constitution

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2 The actual French-language text of the questions was as follows:

> Question 1 : « Êtes-vous très favorable, plutôt favorable, opposé ou très opposé à la souveraineté du Québec? »
>
> Question 2 : « Êtes-vous très favorable, plutôt favorable, opposé ou très opposé à la souveraineté du Québec, c'est-à-dire que le Québec ne fait plus partie du Canada? »

can be passed with the support of a simple majority of Members of Parliament and at least seven provincial legislatures representing more than 50 percent of the country's population.[3] In the private sector, the bylaws of commercial and financial companies, and even of unions, contain many examples of requirements that decisions be approved by a majority of shareholders or members greater than 50 percent plus one. But these are private organizations, free to impose on themselves whatever operating rules they see fit provided they do not conflict with existing laws or the general welfare of society. That it should be more difficult to modify a country's constitution than to change the bylaws of a private society is a superficially appealing argument, but one that does not hold up under further examination. One freely enters or leaves a private organization, but political society is by nature monopolistic, and one has no choice but to belong to it. Political society, accordingly, must obey more rigorously the requirements flowing from the democratic principle. I believe the democratic principle implies, among other things, that the Constitution must respect the principle that viable nations within the federation can exercise political self-determination. Any exit thresholds and rules must be devised with this principle in mind. Where no agreement is possible between conflicting parties, the will of the majority must prevail over any other norm.

The Constitution must respect the principle that viable nations within the federation can exercise political self-determination.

In the actual Canadian political sphere, there are no situations in which either the Constitution or ordinary laws impose a decision rule more stringent than that of a simple — that, is, an absolute — majority when voters are consulted directly. Elections at all levels are generally decided by a simple majority (although there are many exception to the principle of voter equality as a result of electoral boundaries that rarely lead to a rigorously equal number of voters per electoral district). But municipal referendums are held under the rule that the majority of registered voters who cast a ballot decide. Likewise, a simple majority of votes cast was the rule that determined the outcomes of the Quebec referendums held in 1980, 1992, and 1995.

By requiring a "clear majority," does the Supreme Court mean to insist on a majority exceeding what has so far been the norm in public elections? Nowhere in its opinion is there wording that points to such an interpretation. And it is better that way.

One passage, however, creates uncertainty as to what the Court means:

> In this context, we refer to a "clear majority" as a qualitative evaluation. The referendum result, if it is to be taken as an expression of the democratic will, must be free of ambiguity both in terms of the question asked and in terms of the support it achieves. (*Secession Reference*, 87.)

What does the word "qualitative" mean here? Dictionaries and the opinions of commentators are of no use in this case. One plausible interpretation is that, to be considered qualitative, a clear majority should exceed the 50 percent plus one threshold. But it is also plausible that a simple majority of 50 percent plus one of the votes cast would be sufficiently qualitative. According to some interpretations, the Court intended to signal that a majority should be qualitatively sufficient with respect not only to the overall result, but also to different regions and groups in the population.

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3 This requirement applies even in provinces that have adopted laws requiring that the public be consulted before their legislatures vote on any constitutional modification requiring their consent. Those provinces could, however, undo such legislative impositions.

If this interpretation of the Court's intentions is correct, however, then with all due respect I would feel compelled to hold my breath since, applied to a referendum, it could directly contradict the principle of the equality of voters.

The theoretical possibility that an election could be decided by one vote is an understandable concern of Prime Minister Jean Chrétien and other observers of the political scene. As an established democracy, however, Canada long ago learned to live with this possibility, and Canadian society does not seem the worse for it. One way to relieve this concern might be to introduce a provision stipulating that, in secession referendums, the required majority should be 50 percent plus one of voters validly registered on the electoral list. This attenuating provision could be considered a reasonable constraint on the principle of one person one vote, given the importance of what would be at stake and the possibly irreversible character of the electors' choice.

After a "Yes" Vote

Before the 1995 referendum, the Parizeau government appeared to take it for granted that, in the event of a "yes" victory, it would be entirely free to proclaim independence at a time of its own choosing and to effect the realignment of government functions, responsibilities, and powers that would ensue. It would, in such a case, effectively have made a unilateral declaration of independence. The Supreme Court concludes, however, that such an initiative would have violated Canada's constitutional rules. The Court also concludes that, while international law does not explicitly prohibit unilateral secession, there is no explicit right to it in cases such as Quebec's, since Quebec is not a colony and the fundamental rights and liberties of Quebecers are not under attack.

Another source of confusion sovereigntist leaders have fostered regarding potential post-"yes" scenarios is the issue of negotiations. Both Lucien Bouchard and Jacques Parizeau maintained, following the release of the *Secession Reference*, that the obligation to negotiate with the rest of Canada outlined by the Supreme Court posed no difficulty since the Parti Québécois had always anticipated that such negotiations would take place following a "yes" vote. However, although there is agreement on the obligation to negotiate, there seems to be a serious misunderstanding about the legal framework within which negotiations would occur. Sovereigntist leaders obviously contemplate a negotiation in which two sovereign governments discuss, on an equal footing, the practicalities of putting into effect a separation that had already been decided upon. From a legal perspective, however, this is certainly not the Court's conception of the negotiating framework.

The Supreme Court maintains that, following a "yes" vote,.... the Quebec government would have to accept that everything — including "the substantive goal of secession"... would be on the table.

The Supreme Court maintains that, following a "yes" vote, Quebec would remain a member of the Canadian federation. A sovereigntist government would certainly be justified in demanding that Canada come to the negotiating table, but it could neither claim an absolute right to secession (*Secession Reference*, 91, 97) nor "purport to invoke a right of self-determination such as to dictate the terms of a proposed secession to the other parties" (ibid., 91). The Quebec government would have to accept that everything — including "the substantive goal of secession"(ibid.) — would be on the table, not just the "logistical details" (ibid., 90). Ultimately, the Constitution would have to be amended for secession to become legally possible (ibid., 84).

The Negotiation Process

The Supreme Court's finding of an obligation to negotiate in the aftermath of a "yes" vote opens the door to many questions:

- Which players would be involved?
- What matters would be subject to negotiation?
- How would decisions be reached?
- What role would the judiciary play?
- What would happen in the event of an insurmountable deadlock in the negotiations?

Let us examine each of these questions in turn.

The Players

The main participants in the negotiation process would be the federal government, the Quebec government, and the governments of the other provinces.

The main participants in the negotiation process would be the federal government, the Quebec government, and the governments of the other provinces. The Supreme Court notes, however, that the interests of "other participants, as well as the rights of all Canadians both within and outside Quebec" (*Secession Reference*, 92) could be taken into consideration. In drafting this statement, the Court no doubt had aboriginal peoples in mind (ibid., 139), but it does not exclude the possibility that "other groups within Quebec and/or Canada" could legitimately demand that their interests also be taken into account.

A negotiating table around which all the governments mentioned above were seated would be difficult enough to manage; the difficulty would only increase if other groups were also represented. Such a prospect is doubtless the reason the Court thinks it necessary to recall that the object of negotiations would be

> the reconciliation of various rights and obligations by the representatives of two legitimate majorities, namely, the clear majority of the population of Quebec, and the clear majority of Canada as a whole, whatever that may be. (Ibid., 93.)

The Court has not gone so far as to suggest that there should be only two sides — namely, the government of Quebec and the rest of Canada — at the table, but it aptly summarizes whose interests would, in the final analysis, essentially be at stake in this operation.

The Issues

As to the topics the negotiations should cover, the Supreme Court is categorical. First, the goal of secession itself should be subject to negotiation. The Court explicitly rejects the view that other governments would be obliged to assent to secession and that the negotiations should cover only the practical details of secession. It also categorically rejects the idea that other governments would not be obliged to take into account the Quebec population's clearly expressed will to secede (*Secession Reference*, 91, 92). On first reading, this passage seems to open the door to a conflict between legality and

legitimacy — indeed, it may well have done so. If one interprets the passage more broadly, however, the Court could be showing the way to negotiations that, while not necessarily leading to formal independence, could lead to an improved constitutional status for Quebec within Canada.

Dissolving the historical, multilinked alliance between Quebec and the rest of Canada would require the negotiation of many issues. Among these, the Court mentions the division of assets and liabilities, the regional interests that must be taken into account, the rights of aboriginal peoples, the slicing up of national ventures, the rights of linguistic and cultural minorities, and the demarcation of the borders of a sovereign Quebec. Although many of these topics were alluded to in the legislation that the Parizeau government intended to adopt following a "yes" vote, that bill implied that many matters, including the borders of a sovereign Quebec, would be resolved solely by a vote in the National Assembly. Indeed, the borders issue is among the thorniest of the topics the Supreme Court enumerates. Sovereigntists have always postulated that, in the event of secession, Quebec would retain in its entirety the territory it currently occupies. They have also maintained that, once independence was achieved, this territory would not be subject to division or partition. From a legal standpoint, however, the *Secession Reference* clearly indicates that borders, as with all other issues, should be subject to negotiation, the outcome of which no one could unilaterally determine.

The Secession Reference *clearly indicates that borders, as with all other issues, should be subject to negotiation.*

The Process

Negotiations, of course, are not held for the pleasure of negotiating. They must lead to decisions. What would be the rule for making decisions in any post-"yes" negotiating process?

The Supreme Court is not as clear as it could be on this matter. In stressing that secession cannot be achieved legally unless a constitutional amendment makes it possible, the Court seems to suggest that the decision rule should follow the relevant provisions of Part V of the *Constitution Act, 1982*. But nowhere does it state so explicitly nor, of course, does it specify which of the formulas described in the 1982 law should apply.

Some commentators have concluded that the Court — mindful of the difficulties that would arise under either formula — by omitting any detail on this issue, wished to indicate that the parties should be more concerned with the fundamental obligations flowing from the principles underlying the Constitution than with the letter of the law (Woehrling 1999; Greschner 1999). In making concrete decisions, however, political players have to consider not just principles but interests, too. The players in this scenario may well be tempted to stick to a narrow interpretation of these sibylline passages in the *Secession Reference* instead of following the wider and more flexible political approach. Those wishing to take a harder line might invoke the most stringent provisions of the *Constitution Act, 1982* — namely, those requiring unanimity for very important changes.

The Role of the Supreme Court

Customarily, a law obliging parties to negotiate is generally accompanied by mechanisms to ensure an equitable result. In the event that a party does not fulfill its obligation to negotiate in good faith, or if the parties are unable to agree, lawmakers ordinarily impose either appropriate sanctions or some form of compulsory arbitration. No such avenues are available, however, in the Quebec sovereignty case. Indeed, the Supreme Court emphasizes that the obligatory negotiations would be a strictly political exercise and that the Court would have "no supervisory role over the political aspects of constitutional negotiations" (*Secession Reference*, 100). In the Court's view:

> Only the political actors would have the information and expertise to make the appropriate judgment as to the point at which, and the circumstances in which, those ambiguities are resolved one way or the other. (Ibid.)

Must this mean that, in the event of a refusal by other governments to negotiate in good faith, Quebec would have no legal recourse within the Canadian constitutional framework, even in the event of a clear referendum verdict in favor of sovereignty? If this interpretation is to be retained, one must conclude that, when it comes to the exercise of its right to self-determination under Canada's constitutional rules, the letter of the Supreme Court's advisory opinion leaves Quebec at the mercy of the other partners' goodwill.

In the Event of Impasse

If negotiations failed, Quebec would have no other choice but to shelve its secession project or pursue it in some other way, of which the most plausible would be a unilateral declaration of independence.

If negotiations conducted within the existing constitutional framework failed, Quebec would thus have no other choice but to shelve its secession project or pursue it in some other way, of which the most plausible would be a unilateral declaration of independence. The Supreme Court does not exclude this possibility — on the contrary, it notes that some peoples have acceded to independence in just this way and that, having succeeded in establishing effective control of their territories, these secessionist states were able, on that basis, to secure the recognition of the international community. The Court thus recognizes that "international law may well, depending on the circumstances, adapt to recognize a political and/or factual reality, regardless of the steps leading to its creation" (ibid., 141).

The Court warns, however, that, in situations such as Quebec's, international law favors *a priori* the maintenance of the territorial integrity of existing countries. The right to pursue independence unilaterally is, according to international law, reserved for peoples who are colonized or are victims of oppression or systematic violations of their fundamental rights in the countries of which they form a part. It is generally admitted that neither situation applies to Quebec. Notwithstanding these considerations, the Court recognizes that "[i]t may be that a unilateral secession by Quebec would eventually be accorded legal status by Canada and other states, and thus give rise to legal consequences" (ibid., 144). But other states also may want to listen to Canada's version of events and, when forming their judgments, take into account not only the legitimacy but also the legality of the steps Quebec took on the road to independence. The Court comments:

> [A]n emergent state that has disregarded legitimate obligations arising out of its previous situation can potentially expect to be hindered by that disregard in achieving international recognition....On the other hand, compliance by the seceding province with such legitimate obligations would weigh in favour of international recognition. (Ibid., 143.)

Negotiating Constitutional Change

The Supreme Court affirms that, at any time, a participant of the federation can request a constitutional amendment and legitimately expect that other participants will enter into negotiations to that effect:

> The Constitution Act, 1982 gives expression to this principle, by conferring a right to initiate constitutional change on each participant in Confederation. In our view, the existence of this right imposes a corresponding duty on the participants in Confederation to engage in constitutional discussions in order to acknowledge and address democratic expressions of a desire for change in other provinces. This duty is inherent in the democratic principle which is a fundamental predicate of our system of governance. (Ibid., 69.)

Later, the Court further emphasizes that "[t]he corollary of a legitimate attempt by one participant in Confederation to seek an amendment to the Constitution is an obligation on all parties to come to the negotiating table" (ibid.). To this, a federalist with only a minimum of experience in such matters could answer that there has been no lack of initiatives on the part of Quebec over the past 30 years. But the obligation for participants in the federation to negotiate in good faith is now more clearly established. There is no reason a Quebec government could not, after having elaborated a serious plan for the renewal of Canadian federalism, submit this project to Quebecers' approval by way of a referendum. In the quite plausible event that the results of such a referendum were favorable, Quebec could then approach the negotiating table with a very strong political case.

There is no reason a Quebec government could not, after having elaborated a serious plan for the renewal of Canadian federalism, submit this project to Quebecers' approval by way of a referendum.

Five Possible Secession Scenarios

The Supreme Court gave itself the goal of defining the legal framework within which political decisions concerning a secession project must be taken. However controversial the notion of the federal government's asking for it, and of the Court's decision to respond, the *Secession Reference* is now a major document in the Quebec sovereignty file. At the political level, the debate will no doubt continue to turn on broader considerations than the merely legal ones. At the juridical level, however, discussion of this issue no longer wallows in ambivalence. In particular, the Quebec government will be forced to outline its intent more clearly in the future than it has in the past.

Unless Quebecers had given it an explicit mandate to do otherwise by means of a referendum, I take for granted that a sovereigntist government will continue to govern Quebec as it has in the past: in conformity with the Canadian Constitution, under the

authority of the Charter of Rights and Freedoms and the oversight of the courts. Nevertheless, the current Quebec premier has declared on a number of occasions that he intends to proceed as quickly as possible with a new referendum. In the aftermath of the publication of the Supreme Court's advisory opinion, he announced:

> An increasing number of men and women will conclude that the time will soon come when we must decide, once and for all, to put an end to our quarrels with Canada, and to negotiate with our neighbors a mutually beneficial relation among equals. (Bouchard 1998.)

In this light, it is worthwhile anticipating five scenarios:

- a referendum according to constitutional principles;
- a unilateral declaration of independence;
- an ambivalent strategy similar to that of 1995;
- a multi-step process whereby successive referendums are held that seek a strengthening of Quebec's constitutional powers; or
- the indefinite postponement of a new referendum on sovereignty as long as Premier Bouchard's "winning conditions" are not in place.

The Constitutional Route

If the Quebec government intends, as is its generally recognized right, to call another referendum, prudence requires that, without excluding in principle a possible recourse to extraconstitutional means, it should first pursue a line of conduct in conformity with the Constitution. Such an approach would call for two stages.

In the first stage, a referendum would be held on a question that clearly stipulated that the government was asking for a mandate to effect the independence of Quebec subject to Canadian constitutional rules. The question should be formulated in clear and simple terms. It should, in one way or another, embrace the two issues highlighted by the Supreme Court: the repudiation of the existing constitutional order and the will to secede. So as to clearly dissipate any possible confusion regarding its intentions, it would be advisable, although not strictly indispensable, for the Quebec government to include in the question a clear expression of its commitment to proceed in conformity with constitutional rules. According to whether or not it included the latter component, the referendum question might read as follows:

A referendum question should be formulated in clear and simple terms. It should embrace the two issues highlighted by the Supreme Court: the repudiation of the existing constitutional order and the will to secede.

> (a) Do you give the Quebec government the mandate to effect the independence of Quebec, and its separation from Canada, in conformity with the Canadian Constitution?

or

> (b) Do you give the Quebec government the mandate to effect the independence of Quebec and its separation from Canada?

The first formulation (a) would no doubt be clearer, but one could not fault (b) for lack of clarity, since it would include the two components underlined by the Supreme

Court. As well, the second formulation could give the Quebec government more room for maneuver in any negotiation that followed a "yes" vote.

Sovereigntists will correctly remark that neither of these formulations incorporates the second part of their platform, which concerns economic and political association. In order to satisfy the Supreme Court's clarity requirement, voters should not be called on to answer several questions simultaneously. Logically, the question of sovereignty must come first, since by its very nature the association the Parti Québécois desires can exist only between sovereign states. Since a Quebec government armed with a referendum result favoring independence would have a clear mandate to negotiate a reasonable agreement on sovereignty, including the means of implementing it, and since any actual deal would need to be approved by Quebecers in a second referendum, nothing would prevent proposals for association being placed on the table during the sovereignty negotiations. First, however, Quebecers would have to have given their clear and unequivocal support for independence in a referendum. And since the future of a duly constituted country would depend on their answer, the referendum question would have to be posed frankly and without ambiguity.

Logically, the question of sovereignty must come first, since by its very nature the association the Parti Québécois desires can exist only between sovereign states.

Could association, alternatively, be the topic of a second question included in the same referendum ballot? Such a possibility may seem desirable from the point of view of a sovereigntist who sincerely wished to effect Quebec's independence without burning all bridges with Canada. In practice, however, a second question on the ballot could be a source of confusion for voters. To be sure that the principle of clarity was respected, any future popular consultation that could result in sovereignty for Quebec and the breaking of the Canadian federal link should bear only on that issue. In any event, the text of Quebec's referendum law appears to cover only a referendum with a single question.

Some commentators would like any proposed referendum question to be subject to the approval of at least two-thirds of the members of the National Assembly (Monahan 2000). From a democratic standpoint, however, the Quebec government would, quite reasonably, not wish to be beholden to a minority of opposition members on such an important issue. Furthermore, such a requirement would offer no effective constraint against a government that held more than two-thirds of the seats in the National Assembly. I therefore do not support this idea.

It does make sense, however, to guard against possible arbitrary action on the part of the Quebec government. During debates in the National Assembly on the 1980 and 1995 questions, the government intransigently rejected every amendment brought forward by the Opposition. As an example of a workable constraint, could not the Conseil du référendum be entrusted to assess complaints coming from the "no" committee or from groups of individuals? The Conseil is composed of three judges of the Quebec Court and, according to the *Loi sur la consultation populaire*, any juridical issue related to the holding of a referendum must be submitted to it. Another option might consist of entrusting the responsibility for advising on the question's clarity to the chief electoral officer, whose nomination requires the approval of two-thirds of the members of the National Assembly.

In the event of a "yes" victory on a clear question, which would express the clear will of Quebecers to achieve independence, the Quebec government would have the necessary mandate to call on other participants in the federation to negotiate subsequent decisions within a mutually acceptable time frame. This would lead to the

second stage, whereby Quebecers would be invited to decide, again by a referendum: (a) in the event of successful negotiations, if they accept the result; or (b) in the event the negotiations fail, if they authorize the Quebec government to effect independence through other appropriate means.

A Unilateral Declaration of Independence

One may also conceive of a scenario in which a sovereigntist government, rather than taking the constitutional route, chose a unilateral declaration of independence.

One may also conceive of a scenario in which a sovereigntist government, rather than taking the constitutional route, chose a unilateral declaration of independence. If the secession option had been approved in a referendum, a sovereigntist government would no doubt argue that independence was not negotiable, since Quebecers had given it their approval. The government would likely argue that, under the circumstances, it was prepared to discuss with other parties only the practicalities of effecting secession, not secession itself. On the other hand, since the Supreme Court has rendered the opinion that all parties have an obligation to negotiate not only the means of secession, but also secession itself, other partners in Confederation might consider themselves freed from any obligation to negotiate if Quebec were to adopt such a position. Moreover, a Quebec government that chose such a route would open the door to legal challenges on the part of Quebecers, either as individuals or as groups, anxious to uphold their rights as Canadian citizens.

A sovereigntist government resolved to take this route would, in any event, be obliged to formulate the referendum question in such a way as to leave no confusion about its intentions. It would also have to have informed citizens precisely of the implications of the choice they were about to make and of the line of conduct it intended to follow in the aftermath of a "yes" vote. In addition, the government should be reasonably assured, before calling a referendum, that it would obtain a substantial majority in its favor, so that there would be no doubt about the real will of Quebecers. Finally, it should be in a position to demonstrate to the Quebec and Canadian publics, to other states, and to the international community at large that it had serious reasons to try to realize its sovereignty project without first taking the constitutional route.

A Strategy of Ambiguity

In a third possible scenario, a sovereigntist government could be tempted to play simultaneously in two registers — that of sovereignty and that of economic and/or political association. This approach almost brought victory to the "yes" camp in the 1995 referendum. But if Bill C-20, the federal clarity bill, became law, such an approach would be riskier to adopt again. In the event of a "yes" victory obtained by means of an unclear question, Quebec could find it difficult to invoke on the part of its partners in the federation an obligation to negotiate.

In any event, a sovereigntist government that pursued ambivalent strategies would lessen its chances of a successful negotiation resulting in Quebec's legally becoming an independent country. Ambivalence would open the door to conflict with other governments and could give rise to retaliatory measures on their part — in particular, a federal intervention that effectively diminished the scope and decisionmaking powers of the National Assembly, which the *Constitution Act, 1982* showed was possible.

A Step-by-Step Approach

The possibility of a fourth scenario, that of an *étapiste*, or step-by-step, approach, was recently put back on the agenda thanks to a book by Jean-François Lisée, a former advisor to Lucien Bouchard (Lisée 2000). Under this approach, a sovereigntist government, realizing that the sovereignty option was headed for defeat in the short run, would instead hold one or more referendums dealing with the transfer of constitutional powers to Quebec — or with the strengthening of existing powers — premised on Quebec's remaining within the existing federal order. According to its proponents, this strategy inevitably would advance Quebec's interests. Any gain stemming from it would be of benefit to Quebec; on the other hand, any refusal by Ottawa to cede powers requested by Quebecers in a referendum would advance the sovereigntist cause.

This strategy still attracts some sovereigntists, but there is little chance that a Parti Québécois government could adopt it without engendering a split among party activists. Nonetheless, if adopted, this *étapiste* strategy might, in the short term, help create the "winning conditions" that Lucien Bouchard is hoping for. But even if the Parti Québécois won a "federalist referendum," it would still be forced to revert to one or other of the scenarios already discussed in order to realize independence.

The Indefinite Postponement of Another Referendum

One must not rule out the possibility of a fifth scenario, under which a new referendum on sovereignty would be postponed indefinitely until the "winning conditions" that Premier Bouchard has called for are in place.

Finally, one must not rule out the possibility of a fifth scenario, under which a new referendum on sovereignty would be postponed indefinitely until the "winning conditions" that Premier Bouchard has called for are in place. Currently, based on the results of the 1995 referendum and recent opinion polls, four major obstacles must be eliminated, or at least attenuated, before a satisfactory consensus can be realized.

First, although 49.5 percent of the votes went to the "yes" side in the 1995 referendum, a significant proportion of those votes were obtained thanks to a question that invited Quebecers to say "yes" with a single stroke of the pen to four different objectives — namely, sovereignty for Quebec, a new partnership with Canada, an elaborate piece of legislation tabled in the National Assembly before the referendum, and a tactical agreement among the leaders of three parties supporting the "yes" side.

Second, although 60.0 percent of francophones voted "yes" in 1995, a substantial majority of anglophone and allophone voters answered "no." Such a cleavage of opinion must not be treated lightly. It is the expression of a significant malaise. If a close result in favor of sovereignty were to be obtained in a future referendum, the situation would not be much better — indeed, it could well be aggravated by the confusion that might ensue.

Third, the results of the 1995 referendum also highlighted the significant cleavage of opinion that exists between the Montreal area, the Eastern Townships, and southwestern Quebec, which gave a majority to the "no" side, and the rest of the province, where the "yes" side carried the day. Unless it is given attention, this situation would not augur well for a harmonious transition in the event of a close vote in favor of sovereignty.

Finally, the First Nations living on Quebec territory have repeatedly expressed their nearly unanimous opposition to sovereignty and their firm will to maintain their links with Canada. There is nothing to indicate that their position has changed.

As long as these difficulties remain, a sovereigntist government can hardly persuade itself that Lucien Bouchard's winning conditions have been satisfied. As well-known philosopher James Tully notes:

> Those who seek a new form of recognition must first persuade their own members that the existing recognition is unacceptable. Among such members one must count in Quebec the First Nations, minorities (including linguistic minorities), and individual citizens having certain rights and powers under the existing Constitution. Consequently, discussions around a claim for recognition must imply public negotiations between the members. It is through such negotiations that a clear definition of what is to be meant by a "Quebec nation" should be worked out, a definition which must make room for the concerns and anxieties of minorities and dissenting citizens. (Tully 1999, 21; my translation.)

A Quebec government desirous of achieving independence in the best possible conditions should not overlook this opinion. It would act wisely by resolving to enlarge its current base of support so as to ensure that another vote on sovereignty, should it occur, is the expression of a broader consensus.

In light of the above considerations, the fifth scenario now appears to be the most likely. It is also the most desirable. Given the current state of public opinion in Quebec, the best that a sovereigntist government could achieve in a new referendum would be a close result in favor of sovereignty. In view of the obstacles that would remain, such a result could well be inconclusive. Absent a major change in public opinion, which appears unlikely, it would be highly preferable — and in the best interests of both Quebec and Canada — that the Bouchard government call no new referendum on sovereignty during its current mandate and that an unambiguous decision to this effect be made public.

The federal government obtained from the Supreme Court almost all the answers it wished concerning the democratic and constitutional validity of a secession referendum process. It was also told something it did not seem to expect.

After the *Secession Reference*: More Recent Developments

On the legal front, the federal government obtained from the Supreme Court almost all the answers it wished concerning the democratic and constitutional validity of a secession referendum process. It was also told something it did not seem to expect: that, if a referendum were held on a clear question and resulted in a clear majority in favor of secession, the federal government and other participants in the Canadian federation would have an obligation to engage the Quebec government in good-faith negotiations to put into effect the clearly expressed will of Quebecers.

The Clarity Bill

In the short term, the federal government has emerged from its Supreme Court initiative with its position reinforced. The legal prospects are now clear enough, and the

Secession Reference gives it an important tool that it can use at any time if an unforeseen situation emerges. Since it seems that no referendum will be held in the foreseeable future, the federal government should behave with reserve and moderation. Unless it has truly useful, relevant, and timely points to add to the debate, Ottawa should use the current period of respite not to provoke new quarrels with Quebec but to devote time and energy to improving the political aspects of the relationship between Quebec and the Canadian federation.

Although Bill C-20, the federal clarity bill, pursues defensible goals, the means by which the federal government expects to realize them are highly questionable in light of the principles of both federalism and democracy. Had the bill been limited to giving assurances that, in the event of a "yes" vote, Parliament would be convened to examine and assess the situation thus created and to provide guidance as to the appropriate line of conduct, there would have been nothing to say against such an initiative. Such a bill would simply have assured the Canadian population that its representatives in the federal Parliament would be immediately involved in any "yes"-vote situation.

The clarity bill contains elements that are plainly unacceptable, not only to sovereigntists but also to many federalist Quebecers.

But the clarity bill goes much further. It contains elements that are plainly unacceptable, not only to sovereigntists but also to many federalist Quebecers.

The main problem stems from section 1 of the bill, which states that the federal Parliament would be required to pronounce itself on the clarity of the referendum question as soon as it was made public and that, if the verdict was that the question was unclear, the federal government would be released from its obligation to negotiate in the event of a sovereigntist referendum victory. The bill also stipulates that a question would be considered unacceptable if the Quebec government sought a mandate to negotiate without "soliciting a direct expression of the will of the population of that province on whether that province should cease to be part of Canada," as would any question offering "other possibilities in addition to the secession of the province from Canada, such as economic and political arrangements with Canada."

Federal Intrusion into a Provincial Matter

These provisions of the clarity bill constitute an undesirable intrusion of the federal Parliament into a process that must unfold within Quebec. Indeed, under Canada's federal system, each level of government is deemed sovereign within its jurisdiction. This means that neither one, when acting within that jurisdiction, should have to be subjected to the other's interference. In conformity with this principle, the federal government recognizes in Bill C-20 that "the government of any province of Canada is entitled to consult its population by referendum on any issue and is entitled to formulate the wording of its referendum question." But it contradicts this recognition by a provision in the clarity bill that confers on the federal Parliament direct power of intervention in the referendum process at a stage when, by its own admission, this process lies within the jurisdiction of the Quebec National Assembly.

If the National Assembly has the right to consult Quebecers on secession, it also has the right to do so without being subjected to constraints or meddling from another legislature. According Parliament the power to judge the clarity of the question at the early stage indicated in the bill represents an obvious intrusion in a referendum campaign. Such an intervention would be all the more intrusive if, even before the vote

was held, Parliament enjoined the federal government not to negotiate, regardless of the referendum result.

Furthermore, the clarity bill indicates certain criteria that should guide Parliament in formulating its judgment on the clarity of the question. By including these criteria in a law, Parliament would interfere, at least indirectly, in the very process of drafting the question. Such practices, while acceptable in a unitary state wherein regional governments are subject to central tutelage, have no place in a federal system.

The clarity bill's practices, while acceptable in a unitary state wherein regional governments are subject to central tutelage, have no place in a federal system.

From the point of view of democratic principles, article 1 of the clarity bill presents another major difficulty. It is possible that a majority of federal MPs from outside Quebec would adopt a resolution declaring a referendum question unacceptable as a trigger for negotiations, while a majority of Quebec MPs took a different view. In such a situation, even before Quebecers had a chance to speak, the federal government would be forbidden by a majority of MPs outside Quebec to begin any negotiation whatsoever with the Quebec government following a referendum in favor of sovereignty. Such a situation would be not just indefensible in terms of the democratic principle but politically untenable; it could even steer Quebec public opinion in the opposite direction to that intended.

Still at the political level, it would be unrealistic and dangerous for the federal government to be bound in advance by a parliamentary resolution as to what its conduct should be following a referendum in favor of sovereignty. Nobody can predict the kind of events that would then emerge. Instead of being bound by constraints established in a prior context, the federal government should have plenty of room to maneuver when deciding its conduct under the circumstances of a "yes" vote.

Article 2 of the clarity bill also opens the door to a denial of democracy, since it gives Parliament the power to pronounce on the validity of a vote in favor of sovereignty. There would be nothing illegitimate about that if the bill did not also make it possible for Parliament to make this judgment by using, *a posteriori*, norms other than those generally accepted. The legislation specifies that the majority obtained could be assessed using three criteria: the majority of votes cast, the percentage of eligible voters voting in the referendum, and "any other matter or circumstances it considers to be relevant." This last, open-ended criterion could lead to a damaging denial of democracy.

Without saying so explicitly in Bill C-20, the federal government implies that a majority of 50 percent plus one of votes cast would not in its view be sufficient for the results of a referendum on sovereignty to be acceptable. This position is not inherently unreasonable: the rule of equality of voters already suffers from important exceptions. It is these exceptions that allow Canadians to be governed, as much in Ottawa as in Quebec City, by parties that have obtained less than 50 percent of the popular vote. Premier Bouchard himself heads a government that has a comfortable majority of seats in the National Assembly even though it obtained fewer votes in the last election than Jean Charest's Liberal Party. If these distortions, produced by the divisions of the electoral map and the first-past-the-post voting system, are not considered scandalous in the eyes of the majority of the population, it is because there is at least a tacit consensus that the current system of representation possesses advantages that exceed the contradictions that can result from it. It is not unreasonable, therefore, to question the notion that a simple majority is the best decision rule.

The current case, however, concerns a referendum, not an election. To my knowledge, the simple majority rule has always been in effect when interpreting the

results of a referendum held across an entire territory. One could plausibly argue that this rule be modified in the case of a referendum on the irreversible breakup of the country. But Parliament would be ill-advised to impose its views unilaterally on this topic even before a referendum is called and, what is more, to impose them on a referendum that would be held under the authority of the Quebec government. As long as it acted within its jurisdiction, the determination of the decision rule should be up to the National Assembly.

If the decision rule is to be changed, therefore, it is the National Assembly that must change it. The federal government can seek to modify the decision rule, either by negotiating with the Quebec government or by influencing public opinion. Clearly, what is inadmissible prior to the holding of a referendum would be even more inadmissible after the event. Yet that is what Bill C-20 contemplates. The federal government is using highly contestable means to promote ends that are not altogether unreasonable, and the manner in which things are done is fundamental in constitutional affairs.

The Reaction in Quebec

These contentious elements of the clarity bill have prompted numerous criticisms not only among sovereigntists but among federalists as well. If the principles advanced by Quebec federalist opponents of the bill are right — and I am convinced they are — Quebec federalists should not find themselves isolated. They should be able to count on effective support from federalists living elsewhere in the country who also accept these principles. But the national unity debate has been so poisoned by propaganda against "evil separatists" that to raise questions about the wisdom of Ottawa's referendum legislation is to risk suspicion of complicity with separatists at best, or of mental aberration at worst.

For Quebec federalists, Bill 99, the Quebec government's proposed counter-legislation, leaves much to be desired. The response is disproportionate to the issue at hand.

Premier Bouchard legitimately wants to unite all those with serious objections to the federal bill and to defend the powers of the National Assembly. However, for Quebec federalists — who are as committed to Quebec's interests as are the sovereigntists — Bill 99,[4] the Quebec government's proposed counter-legislation, leaves much to be desired. First, the response is disproportionate to the issue at hand. Bill 99 takes the form of a constitutional proclamation of the kind that simply cannot be concocted in a matter of a few weeks. Had he wanted to create a broad consensus, Premier Bouchard would have been wise to restrict himself to a rebuttal of the federal law and an affirmation of the National Assembly's freedom of initiative with respect to the matters fettered by the federal clarity bill.

Furthermore, Bill 99 makes no mention of Quebec's being part of the Canadian federal system, apart from a brief mention (in section 6) that the province "is sovereign in the areas assigned to its jurisdiction," by virtue of the "laws and constitutional conventions" of Canada. On the other hand, the bill contains articles that are of dubious constitutional validity in the eyes of many observers. The remaining text would be more applicable to a Quebec that had voted "yes" in the 1995 referendum or one that had given a plurality of its votes in the 1998 provincial election to the Parti

4 The full title is *An Act respecting the exercise of the fundamental rights and prerogatives of the Quebec people and the Quebec state*.

Québécois. However slight the margins, a majority voted "no" in 1995 and a plurality preferred Jean Charest's Liberals in 1998. Several clauses of Bill 99 would require significant modification to be acceptable to Quebecers of a federalist persuasion.

A Fundamentally Political Problem

Since the publication of the Supreme Court's *Secession Reference*, public debate has turned primarily on two matters: the clarity of the question to be submitted to Quebecers in any future referendum and the threshold that a "yes" majority must achieve to trigger the obligation on the part of other senior Canadian governments to negotiate. Given that the Court discussed these matters extensively, it was inevitable that commentary be fixed on them. But Byzantine discussions over what constitutes a clear question and a clear majority are far removed from the true heart of the debate.

Byzantine discussions over what constitutes a clear question and a clear majority are far removed from the true heart of the debate.

In effect, the Supreme Court gave its opinion on the question of how a sovereignty project could be conducted in a manner consistent with the Canadian Constitution. There are, however, more important questions to pose — questions of a fundamentally political, rather than legal, nature: Why does a sovereigntist movement exist in Quebec? Why has this movement been so significant over the past quarter-century? What is the best strategy to counter the idea of Quebec sovereignty?

In answering the first question, one must avoid the error of casting the advocates of sovereignty as outdated or deviant, or of portraying them as ignorant of contemporary reality and lacking in political tolerance. The essence of any answer lies in the fact that the primacy of the French language among Quebecers has led to their forming a distinct entity with their own lifestyle, institutions, and frequently, collective goals. Quebecers want to preserve the features of their society that distinguish it from the rest of Canada. In the eyes of many Quebecers, the rest of Canada has inadequately accepted the legitimacy of such a goal.

For historical reasons — Britain's acquisition of New France in 1760, the *Quebec Act* of 1774, the *Constitution Act* of 1791, the *Act of Union* of 1840, the *British North America Act* of 1867 — this people never acquired the full powers of a sovereign country. Nonetheless, thanks to political compromises that accorded Quebec an important measure of autonomy, Quebecers succeeded in preserving their identity and in creating a society that in many ways is distinct from that of the other provinces.

Roots of the Problem

Until the end of the 1950s, Quebec's loyalty to the Canadian federation was generally accepted as a *fait accompli*. Certainly, serious conflicts had arisen that pitted anglophones against francophones. As examples, I mention the hanging of Louis Riel in 1885, and passionate disagreements over French-language education outside Quebec in the years before World War I, over Canadian participation in foreign wars, over the extent of bilingualism in the federal civil service, and over the extent of provincial autonomy. During Canada's first century, however, all concerned implicitly understood that the appropriate theater in which to play out these conflicts was the Canadian federal system. Quebecers, more than most Canadians, dreamed of a Canada in which the

English and French languages would enjoy equal status and in which Quebec could freely develop those aspects of its society that were unique to it.

The Quiet Revolution and After

The Quiet Revolution of the 1960s marked a major turning point in the minds of many Quebecers. Some, disappointed at not being able to work in their language or having been relegated to minor positions, angrily left the federal public service; others, well trained in economics and other modern disciplines, congregated in Quebec City to build a modern society. In general, this generation of Quebecers concluded that the Quebec government should be the *fer de lance* of a modernization exercise and that, in order to do so effectively, it should exercise wider powers.

In the spirit of the times, the attention of Quebecers turned inward, focusing less on the Canadian scene and more on Quebec events. Starting in the 1960s, francophones in Quebec came to define themselves as *Québécois* and no longer as *Canadiens français*. The career of René Lévesque illustrates this process well. When he entered politics in 1960, he was a federalist opposed to separatism. As minister of social affairs in the Liberal government of Jean Lesage, he became aware of the many incoherent and overlapping policies being pursued by Ottawa and the Quebec government. Late in the 1960s he became a sovereigntist.

There was truth in Lévesque's critique of program duplication. Premier Lesage and Prime Minister Lester Pearson maintained excellent personal relations, which helped the Quebec government obtain numerous adjustments that responded to the spirit of the Quiet Revolution. Among the most important of these was federal legislation for Established Programs Financing, which allowed Quebec to opt out of several joint programs in the areas of health, social services, and postsecondary education in exchange for fiscal or financial compensation. Another reform was the flexibility Ottawa showed in creating an occupational pension program that allowed for two parallel systems: the Quebec Pension Plan and the Canada Pension Plan for the other nine provinces.

Within Quebec, some saw these reforms as proof that federalism in Canada was capable of adapting to the new expectations of Quebecers; others, however, judged the reforms to be insufficient. In the rest of Canada, many perceived them as a dangerous weakening of Ottawa's political power and as steps down the road toward special status for Quebec. Whatever the effect of the innovations Lesage and Pearson undertook, the cooperative approach they established came to an end when Pierre Trudeau became prime minister. Trudeau had firm ideas on these matters: equality between anglophones and francophones should be brought about by creating equal individual rights for speakers of the two languages and by assuring equal access for both to senior positions in the federal civil service. He put a stop to any further evolution toward special status for Quebec and undertook to confront the sovereigntist idea directly.

Whatever the effect of the innovations Lesage and Pearson undertook, the cooperative approach they established came to an end when Pierre Trudeau became prime minister.

Instead of weakening during the Trudeau era, the sovereigntist movement became an extremely important political force. Although its progress has been intermittent, in every election held since 1976 the Parti Québécois has received more than 35 percent of the popular vote, and has won office four times. In the three referendums (of 1980, 1992, and 1995), the position endorsed by the Parti Québécois obtained 40 percent,

56 percent, and 49 percent of the vote, respectively. In the mid-1960s, Trudeau predicted that the sovereigntist notion would have a short life. Events have proved him wrong.

Growth of the Sovereigntist Movement

The history of the past four decades offers insights into why a sovereigntist movement exists in Quebec. The movement finds its roots in the feeling among a large majority of Quebecers that they form a distinct people and in the conviction among many that they should possess full control of their political destiny.

Two questions thus need to be addressed. First, if Quebecers have always felt themselves to be a distinct people, how can one explain that this identity gave birth to a sovereigntist movement only relatively recently? Second, how can one explain the subsequent rapid growth of sovereigntist sentiment?

Before the Quiet Revolution, vague desires for sovereignty were expressed in some milieus, but Quebec public opinion was largely indifferent or hostile to such ideas. Nationalist movements enjoyed some success, but the idea of separating from Canada was not part of the dialogue. Starting in 1960, all this changed.

In an evolutionary sense, the Quiet Revolution was a time of dramatic mutations. Quebecers in all domains of life experienced a desire for liberation. Quebec wanted to free itself from the constraints of *Duplessisme*, from control by the clergy over education, hospitals, and social services, and from anglophone domination of business. It was inevitable in this climate that Quebecers should also question the prevailing political framework, one in which the effectiveness of the Quebec government was significantly constrained. The consciousness of being a distinct people, together with the desire of this people to flourish in a political framework over which it had "normal" control — therein lies the principal cause of the rise of sovereigntist ambitions.

To this first cause must be added a second. The failure of attempts since 1960 to renew Canadian federalism have, in effect, contributed to the sovereigntist message.

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During the Trudeau era of 1968–84, many constitutional projects were put forward, but those adopted were designed to neutralize or minimize Quebec's aspirations rather than to integrate Quebec positively into the federal structure. The culmination of this period of constitutional wrangling was the adoption in 1981 of major changes to the Constitution over the formal objections of the National Assembly.

In 1987, Prime Minister Brian Mulroney and the provincial premiers attempted to bring Quebec into the constitutional fold via the Meech Lake Accord, an agreement that met the conditions put forward by the government of Quebec Premier Robert Bourassa if Quebec was to endorse the *Constitution Act, 1982*. Despite its ratification by the federal Parliament, the National Assembly, and the legislatures of eight provinces, the accord died after Newfoundland rescinded its earlier ratification and Manitoba failed to pass it through its legislature.

Afterwards came the 1992 Charlottetown Accord, a lengthy, complex, and indigestible document that was rejected in a nationwide referendum by Nova Scotia, by all provinces west of Ontario and, for different reasons, by Quebec as well.

Supporters of sovereignty profited from this series of failures, which they saw as proof that the rest of Canada had never wanted and never would want to accommodate Quebec's legitimate aspirations.

How to Gauge Public Opinion in Quebec

Faced with a growing sovereigntist movement, the strategy of Pierre Trudeau and, since 1997, of Jean Chrétien has been very simple: oblige Quebecers to opt clearly for one camp or the other, to declare themselves unambiguously as sovereigntist or federalist, and force the choice as rapidly as possible in order to crush the infamous separatist demon while there is still time. This strategy has been used repeatedly — notably in 1970 at the time of the *War Measures Act*, in 1981 when negotiating constitutional patriation with the provinces, and, most recently, with the introduction of the clarity bill. It is a strategy that invariably enjoys unconditional support in the other provinces, but has yet to succeed in Quebec.

A more constructive strategy would need to meet two major requirements: a better appreciation on the part of each side of the other's reality, and a genuine desire to seek solutions whereby both Quebecers and other Canadians can accept a federal arrangement.

The advocates of confrontation have presented a deformed image of Quebec nationalism to the rest of the country.

The advocates of confrontation have presented a deformed image of Quebec nationalism to the rest of the country. They have given the impression that a battle is being waged in Quebec between, on the one hand, *les méchants séparatistes* and, on the other, the virtuous defenders of federalism. This Manichean presentation of reality, which is promoted by Bill C-20, often seduces opinion in English-speaking Canada, but it does not reflect daily reality in Quebec, where actual public opinion is far more subtle and nuanced. Failing to realize this, those of the Manichean persuasion have frequently mired the country in strategies doomed to fail.

Maurice Pinard, a senior sociologist with impeccable federalist convictions, has presented an appropriately nuanced glimpse of Quebec opinion based on a 1998 survey by CROP, a leading polling firm (Pinard 1998). Behind the stated "yes" or "no" to a question about sovereignty-partnership, Pinard has found hesitations and qualifications that should not to be ignored. Among those who answered "yes," more than 50 percent thought it important to renew Canadian federalism; only 25 percent were in favor of sovereignty without some form of partnership with Canada. Of those who said "no," 35 percent conditioned their response on the renewal of the federal arrangement.

Realizing that for many Quebecers the choice between federalism and sovereignty remains conditional, Pinard comes to the following conclusion. The condition that many "no" sovereigntists — that is, those whose response to the sovereignty question is a qualified "no" — attach to their preference for a Quebec within Canada is that federalism be renewed. This condition must be taken as a serious warning to the advocates of federalism. The "no" federalists" — that is, those unambiguously in favor of federalism — and, in particular, their leaders, ignore these qualifications at their peril. The solid convictions of the latter must not lead them to ignore the ambiguous "no"s of the former. Ultimately, these conditional voters may play a crucial role, one way or the other.

Elements of a New Strategy

Viewed from a historical perspective, debates about the wording of a referendum question are of marginal importance. In following the current debate surrounding the federal clarity bill and Quebec's proposed legislative response to it, one must not lose

sight of the essential challenge: to offer Quebecers choices that address their real expectations, expectations that are more complex than those with Manichean views are willing to admit. If I am correct in my analysis, what is required is a strategy markedly different from that Ottawa has pursued so far.

A successful strategy must rely on negotiation to resolve outstanding problems with Quebec. Quebec's aspirations historically have turned on the two axes of language rights and the powers of the National Assembly. A successful strategy must address both these issues.

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Language Rights

There can never be total equality of language rights across Canada. English will always predominate in nine provinces, and French in Quebec.

I happily acknowledge that the policies pursued by prime ministers Pearson, Trudeau, Mulroney, and Chrétien have moved us toward greater equality in certain domains. Furthermore, court interpretations of official language minorities' education rights contained in section 23 of the Charter of Rights and Freedoms have been of great utility to the francophone minority outside Quebec. In Quebec, the anglophone minority has always enjoyed more complete access to education, health, and other provincial services in its own language than have the francophone minorities of the remaining provinces. The provisions of the *Charte de la langue française* (Bill 101) banning the use of English on commercial signs have been amended; since the enactment of Bill 86, the use of both official languages on commercial signs has been allowed in most instances in Quebec, provided that French predominates.

No doubt much remains to be done to establish effective equality for the two languages in all sectors, whether they fall under federal or provincial competence. Nonetheless, the major elements of a linguistic compromise have been established. They deserve to be maintained and further refined.

It behooves Quebec federalists to tell their fellow citizens about the progress that has been made in recent decades elsewhere in Canada toward respecting minority language rights. It also behooves Quebec federalists to make other Canadians appreciate the necessarily complex challenge that defining language rights poses in Quebec. When other Canadians voice, in good faith, constructive criticisms of Quebec's language laws, Quebec federalists should be receptive. Finally, in Quebec as in the other provinces, learning English or French as a second language deserves to be a national objective of prime importance. Pursuing this objective offers an occasion for active collaboration between Quebec and the other provinces.

Quebec's Status

Outside Quebec, some argue that too many concessions have already been made to Quebec and that further concessions are out of the question. By contrast, Quebec sovereigntists insist that Quebec has obtained virtually nothing via constitutional negotiations over the past three decades, and that it is time to put an end to these sterile discussions. Only by going beyond these adamant assertions on both sides can the nuanced truth be discovered.

In terms of formal constitutional change, the gains Quebec has made fall well below the reasonable expectations entertained by the champions of renewed federalism in the 1960s. And these gains — such as the modification of section 93 of the Constitution to allow language-based school boards to replace those based on religion — cannot suffice to efface the rebuff Quebec experienced in 1981 and again in 1990. It is utterly false to claim that Quebec has enjoyed too many constitutional concessions; the opposite is closer to the truth.

On the other hand, in terms of the concrete functioning of Canadian federalism, numerous developments have responded to Quebec's aspirations. As examples, I list the following:

- Quebec's frequently exercised ability to withdraw from federal shared-cost programs and mount its own equivalents;
- the increase in the relative share of public revenues accruing to the provinces and municipalities;
- the elimination of many conditions formerly attached to intergovernmental transfers for postsecondary education and social services;
- successful negotiations to harmonize fiscal transfers by the two orders of government for families with children;
- Ottawa's delegation, via administrative agreements, of labor market training to the provinces;
- the modernization of infrastructure; and
- aid for scientific innovation.

Nevertheless, although specific Canadian institutions have been improved, much frustration has been generated for Quebecers in recent decades. Hence, a re-examination of the distribution of powers and responsibilities within the federation remains important and must, of course, take into consideration new economic realities arising from changing technology. But it must also take into account Quebec's unique mission in Canada — indeed, in North America — which is to ensure the health of francophone culture for generations to come.

The division of powers set out by the Fathers of Confederation in 1867 had much to recommend it. It was imbued with realism.

Quebecers, I admit, too often propose global changes to the distribution of powers between Ottawa and the province. The division of powers set out by the Fathers of Confederation in 1867 had much to recommend it. It was imbued with realism, and there is no need to start again with a *tabula rasa*. Quebec should proceed instead in a more constructive manner.

There is more at issue than the letter of the Constitution. There is also the manner in which the two orders of government exercise their respective powers. While I do not want to challenge the necessity of the federal spending power, it is true that Ottawa frequently relies on it to launch programs in areas that, according to the Constitution, lie under provincial jurisdiction. Federal use of the spending power has been important in education, health, social services, subsidies to business, and regional development. While recognizing that other provinces are justified to conclude otherwise, Quebec has always insisted on exercising primacy in these areas. This insistence will not change, and there is a need for frank discussions to find mutually acceptable solutions to the overly wide scope of the federal spending power.

A spirit of openness to the changes Quebec desires is of primary importance in Ottawa, first of all, but also in the capitals of the other nine provinces, if for no other

reason than that they, too, are likely to want changes in the federation at some turn down the road. The history of recent decades has shown that Ottawa is *maître du jeu* over constitutional change. At the legal level, no change can succeed without Ottawa's consent. At the political level, Ottawa is the only actor that can initiate change with some chance of success. To renew Canada's federal arrangements, Ottawa needs to reach a better understanding of the country's diverse political realities.

In thinking about desirable changes to the Canadian federation, in no way do I want to ignore the importance of the other provinces. Even if their demands are usually put forward with less insistence than those of Quebec, they have important regional interests that must be respected if Canada is to remain a viable federation. Decentralization is not a panacea, but in general a greater decentralization of responsibilities from Ottawa to the provinces would not only improve the quality of many programs, it would also facilitate collaboration between Quebec and the other provinces.

In closing, I take note of a recent poll (Mackie 2000) in which Quebecers were asked "which of the following options is closest to your opinion?" The three options given were "sovereignty association," "maintaining the status quo," and "renewal of the federation with more powers [to the province]," and the responses were 30 percent, 18 percent, and 41 percent, respectively. Understandably, a negligible percentage of anglophones opted for sovereignty; more significant is that, overall, the status quo was the least preferred option. Furthermore, "renewal of the federation" was the preferred option among both francophone and anglophone Quebecers.

A genuine openness will be well received by the many Quebecers who remain committed to the future of both Quebec and Canada.

Reconciling the aspirations of Quebecers and— no less but no more legitimate — those of Canadians living elsewhere is a necessary task requiring much work. Undue delay inevitably will be damaging to the country's future. I am convinced that a genuine openness — a real interest in "Plan A" — will be well received by the many Quebecers who remain committed to the future of both Quebec and Canada.

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