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Communiqué

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Federal Clarity Act reasonable and necessary but needs amending, says C.D. Howe Institute study

The federal *Clarity Act*, introduced in the House of Commons last December, is a necessary and logical follow-on from the Supreme Court of Canada's advisory opinion on the possibility of unilateral secession by Quebec, says a *C.D. Howe Institute Commentary* released today. But the legislation needs amending, the study says, since it would regard as "unclear" any future referendum question that referred to post-secession economic or political arrangements with Canada and since it fails to specify what "yes" result would constitute a "clear" majority in favor of secession.

The study, "Doing the Rules: An Assessment of the Federal *Clarity Act* in Light of the Quebec Secession Reference," was written by Patrick J. Monahan, Professor of Law at Osgoode Hall Law School, York University, and an Affiliated Scholar at Davies, Ward & Beck, Barristers and Solicitors, Toronto.

Monahan argues that, while the Supreme Court clarified certain aspects of the legal framework applicable to secession, it also created new uncertainties. The Court said that, in the wake of a clear mandate on a clear question, Ottawa would have a duty to negotiate secession, and it called on political actors to "give concrete forms" to concepts it identified in its advisory opinion. These uncertainties, Monahan says, now make it essential for Ottawa to proceed with the *Clarity Act*, well ahead of another referendum on Quebec sovereignty. By invoking the principle of democracy to justify its establishing a duty to negotiate secession, the Supreme Court added something to the Constitution that its framers had preferred to leave to the realm of ordinary politics, Monahan argues. He fears that the possible consequences of extending this approach to a host of other subjects the Constitution does not specifically cover could be significant.

Monahan argues that, although a Court-imposed "duty to negotiate" would narrow Ottawa's options in responding to a "yes" vote in a future referendum on secession, the Supreme Court also provided federalists with a number of significant political tools in its opinion that:

- fifty percent plus one of votes cast would not be a majority sufficient to trigger the duty to negotiate secession;

- the 1995 referendum question would have fallen short of the Court's requirement of a "clear question" before the constitutional duty to negotiate could be invoked;
- secession negotiations would involve not only the federal and Quebec governments, but all provincial governments and perhaps other parties, such as aboriginal peoples; and
- secession negotiations would have to include the borders of an independent Quebec.

Monahan says there are no persuasive grounds for objecting to legislation that would put these principles into effect. In any event, legislation is better than other options, such as a white paper that set out Ottawa's policy toward secession referendums, because of its higher value as an advance signal and the better likelihood that it would be respected in the crunch.

Monahan proposes that, for Ottawa to accept a duty to negotiate after a "yes" vote, the referendum question must have been approved by a two-thirds majority of members of the Quebec National Assembly, and the majority vote for secession would have to be at least 50 percent plus one of eligible voters, as opposed to 50 percent plus one of valid ballots cast. Monahan also says that circumstances might justify Ottawa's requiring other clarity conditions as long as they were consistent with the Supreme Court's advisory opinion.

The *Clarity Act* could be improved in two particular areas, Monahan says. First, the legislation goes beyond the principles mandated by the Supreme Court in that it would deem "unclear" any referendum question that included a reference to post-secession economic or political arrangements (such as a free trade area) with Canada. He suggests that the legislation be amended to require the House of Commons to take such wording into account, rather than rejecting the question out of hand. Second, the bill fails to provide enough guidance on the level of popular support that would constitute a "clear" majority. Accountability and transparency would be better served, Monahan argues, if Ottawa were to state in advance the threshold that would have to be achieved, rather than effectively leaving it to the discretion of the prime minister until after the ballots had been counted.

Monahan concludes that, with the Court's "having imposed on the government of Canada the obligation to negotiate secession if certain conditions are met, it is clearly appropriate and necessary for Ottawa to set out the criteria on which that judgment is to be based." The *Clarity Act*, he says, is an attempt in good faith to do so, and one consistent with the interests and values of all Canadians.

The Institute also intends to publish in the near future an analysis of the Supreme Court's opinion by former Quebec Liberal Party leader Claude Ryan.

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Communiqué

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Selon une étude de l'Institut C.D. Howe, la Loi sur la clarté du gouvernement fédéral est raisonnable et nécessaire, mais certaines modifications s'imposent

Déposée à la Chambre des communes en décembre dernier, la *Loi sur la clarté* représente une suite nécessaire et logique de l'avis consultatif rendu par la Cour suprême du Canada sur la possibilité d'une séparation unilatérale du Québec, affirme un *Commentaire de l'Institut C.D. Howe* publié aujourd'hui. Selon l'étude du C.D. Howe, la *Loi* a cependant besoin d'être modifiée, car elle prévoit que toute question référendaire touchant aux ententes politiques et économiques avec le Canada après la séparation serait considérée comme « manquant de clarté », et parce qu'elle ne précise pas dans quelle mesure un « oui » représenterait une majorité « claire » en faveur de la sécession.

Intitulé « Doing the Rules: An Assessment of the Federal *Clarity Act* in Light of the Quebec *Secession Reference* » (« Établir les règles : une évaluation de la *Loi sur la clarté* du gouvernement fédéral à la lumière de la référence à la sécession du Québec »), l'ouvrage est rédigé par M. Patrick J. Monahan, professeur de droit à l'Osgoode Hall Law School de l'Université York et chercheur affilié du cabinet juridique de Ward & Beck à Toronto.

M. Monahan soutient que même si la Cour suprême a clarifié certains aspects du cadre légal de la sécession, elle a également créé de nouvelles incertitudes. La Cour a indiqué qu'à la suite d'un mandat clair sur une question claire, le gouvernement fédéral serait obligé de négocier la sécession; elle a aussi demandé aux politiciens de « concrétiser » les concepts dégagés dans son avis consultatif. L'auteur affirme qu'en raison de ces incertitudes, il est maintenant essentiel qu'Ottawa donne suite à la *Loi sur la clarté*, bien avant la tenue d'un autre référendum sur la souveraineté du Québec. En invoquant le principe démocratique pour appuyer le devoir de négocier la sécession, la Cour suprême a ajouté à la Constitution quelque chose que ses législateurs auraient préféré laisser au domaine de la politique ordinaire, soutient M. Monahan. Il craint que les conséquences éventuelles d'une approche qui engloberait une foule d'autres sujets qui ne sont pas abordés de manière spécifique dans la Constitution pourraient être retentissantes.

L'auteur est d'avis que même si une « obligation de négocier » limiterait les options d'Ottawa face à un « oui » lors d'un référendum sur la sécession, la Cour suprême a muni les

fédéralistes de plusieurs outils politiques importants, en ce que son avis consultatif aurait les conséquences suivantes :

- un vote de 50 % plus une voix ne représenterait pas une majorité suffisante pour créer l'obligation de négocier la sécession;
- la question référendaire de 1995 n'aurait pas rempli l'exigence d'une « question claire » comme condition préalable au devoir constitutionnel de négocier;
- les négociations sur la sécession feraient appel non seulement à la participation des gouvernements fédéral et québécois, mais à celle de tous les autres gouvernements provinciaux et peut-être même à celle d'autres groupes concernés, comme les peuples autochtones;
- les négociations sur la sécession devraient porter, entre autres, sur les frontières d'un Québec indépendant.

L'auteur affirme qu'il n'existe pas de motif convaincant pour s'opposer à une loi qui donnerait effet à ces principes. De toute manière, une loi est préférable aux autres options, telles qu'un livre blanc établissant la politique fédérale vis-à-vis tout référendum sur la séparation, car elle donne une indication plus ferme de ce qui surviendra et parce que la probabilité que l'on s'y plie est meilleure, même en cas de crise.

M. Monahan propose que, pour qu'Ottawa accepte l'obligation de négocier à la suite d'un vote aboutissant à un « oui », la question référendaire devrait être approuvée par une majorité des deux-tiers des membres de l'Assemblée nationale du Québec. De plus, la majorité nécessaire se traduirait par la moitié des électeurs admissibles plus une voix, plutôt que par la moitié des bulletins valides plus un. L'auteur ajoute que certaines circonstances pourraient justifier qu'Ottawa ajoute d'autres conditions de clarté, tant que celles-ci sont conformes à l'avis consultatif rendu par la Cour suprême.

On gagnerait à améliorer la *Loi sur la clarté* sur deux plans, soutient l'auteur. En premier lieu, la *Loi* dépasse les principes dictés par la Cour suprême parce qu'elle considère que toute question référendaire comprenant une référence aux ententes économiques ou politiques conclues après la sécession (telle qu'une zone de libre-échange) avec le Canada comme « manquant de clarté ». Il suggère que l'on modifie la *Loi* pour forcer la Chambre des communes à tenir compte de la formulation d'une telle question, plutôt que de la rejeter d'emblée. En second lieu, elle ne fournit pas suffisamment d'indications sur le niveau d'appui populaire qui constituerait une majorité « claire ». Selon l'auteur, on améliorerait la responsabilisation et la transparence si Ottawa déterminait d'avance le seuil qui doit être atteint, plutôt que d'en laisser le soin au premier ministre, une fois que les résultats du scrutin auront été dépouillés.

En conclusion, M. Monahan estime que maintenant que la Cour a imposé au gouvernement canadien l'obligation de négocier la sécession si certaines conditions sont remplies, il est manifestement approprié et nécessaire qu'Ottawa établisse les critères sur lesquels il fondera son jugement. Selon lui, la *Loi sur la clarté* représente une tentative de négocier de bonne foi, tentative qui est conforme aux intérêts et aux valeurs de toute la population.

L'Institut prévoit par ailleurs publier, dans un avenir proche, une analyse de l'opinion rendue par la Cour suprême, par l'ancien chef du Parti libéral du Québec, M. Claude Ryan.

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Doing the Rules

An Assessment of the Federal Clarity Act *in Light of the* Quebec Secession Reference

Patrick J. Monahan

In this issue...

An examination of the justification for and wisdom of the federal government's Clarity Act *on potential Quebec secession negotiations.*

The Study in Brief...

Following the extremely close result in Quebec's 1995 sovereignty referendum, the federal government initiated a strategy designed to clarify the legal framework that would apply to any such referendum in the future. The first element was a reference to the Supreme Court of Canada, asking its advice on whether Quebec had the legal right to secede unilaterally. The Court's opinion, handed down in August 1998, was that Quebec has no such right. But the Court also declared that, if Quebecers clearly expressed a desire to secede, the federal government and the other provinces would be obliged to negotiate in good faith with the Quebec government.

The Court refused to clarify the circumstances that would trigger the duty to negotiate secession, declaring that matters such as the majority required and the assessment of the clarity of the question are the responsibility of the political branches of government.

Little more than a year later, the federal government introduced the *Clarity Act* into the House of Commons, legislation designed to further clarify the consequences of a majority "yes" vote in a secession referendum. The bill defines the circumstances under which the government of Canada would enter secession negotiations following a sovereignty referendum.

This *Commentary* examines the justification for and wisdom of the federal initiative. It considers whether the legislation is appropriate, given the Court's pronouncements on the matter, and the question of its timing. In general, the bill seems a good faith attempt to give concrete legal form to the key principles identified by the Supreme Court. The only exceptions identified in the *Commentary* are the provision that deems unclear any question dealing with matters such as economic or political arrangements with Canada and the lack of specification of the vote that must be obtained to constitute a clear majority — elements that could be dealt with by amendments in the House.

Overall, the government was right to introduce the *Clarity Act* when it did, and it should now press ahead to enact the bill into law as soon as possible.

The Author of This Issue

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In a *C.D. Howe Institute Commentary* published more than three years ago (Monahan and Bryant 1996), I argued that the federal government should undertake a two-stage strategy for clarifying the ground rules that would apply to any future secession process. The first stage involved referring to the Supreme Court of Canada a series of questions about the legal framework applicable to secession. This reference would be followed by the enactment of "contingency legislation,"[1] in which Parliament would build on the advisory opinion provided by the Court and define in a more detailed way, through federal statute, the requirements that would need to be satisfied before a province could secede from Canada.

Since that *Commentary* was published, the federal government referred a series of legal questions on unilateral secession to the Supreme Court, which provided its response in an historic opinion handed down on August 20, 1998.[2] Although the Court agreed that unilateral secession would be unlawful, it surprised many observers by stating that, in the event a "clear majority" of the population of Quebec expressed a desire to secede from Canada on a "clear question," there would be a constitutional obligation to negotiate the terms of secession with Quebec.

More recently, on December 13, 1999, Intergovernmental Affairs Minister Stéphane Dion introduced the *Clarity Act*[3] into the House of Commons, legislation designed to clarify the meaning of the terms *clear question* and *clear majority*. The introduction of this legislation has provoked a vigorous debate as to the appropriateness and timing of any attempt to further clarify the ground rules applicable to unilateral secession. In fact, the Quebec government immediately responded with Bill 99, legislation of its own designed to affirm the right of the Quebec people "alone" to determine the political regime and legal status of Quebec.[4]

It thus seems an opportune moment to revisit the question of whether federal contingency legislation remains the logical next step to an advisory opinion from the Supreme Court in the *Secession Reference* and to assess the *Clarity Act* in light of the requirements established by the Supreme Court.

While political circumstances in January 2000 differ somewhat from those of early 1996 (primarily because sovereigntist fortunes today appear to be on the decline compared with the period immediately following the

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Without implication, I am indebted to Finn Poschmann, John Richards, William Robson, and Daniel Schwanen for helpful comments on an earlier draft of this paper.

1 The term *contingency legislation* to describe a federal statute designed to establish the ground rules governing secession was first used by former Privy Council Clerk Gordon Robertson in early 1996.

2 *Reference Re Secession of Quebec*, [1998] 2 SCR 217 (hereinafter "*Secession Reference*").

3 Bill C-20, *An Act to give effect to the requirement for clarity as set out in the opinion of the Supreme Court of Canada in the Quebec Secession Reference*, (36th Parliament, Second Session) First Reading December 13, 1999 (hereinafter the "*Clarity Act*").

4 Section 2 of Bill 99, *An Act respecting the exercise of the fundamental rights and prerogatives of the Quebec people and the Quebec state* (36th Legislature, First Session) First Reading December 15, 1999 (hereinafter "Bill 99").

1995 referendum[5]), little has changed in the debate over the merits of contingency legislation. Throughout the late fall of 1999, as in 1996, leading Quebec federalists urged the prime minister to let sleeping dogs lie for fear of provoking a backlash among Quebec nationalists that would lead to an upsurge in sovereigntist sentiment in the province (see, for example, Bryden 1999; Aubry 1999). On the other hand, today acceptance seems widespread that the federal government was right to refer questions on unilateral secession to the Supreme Court of Canada, even though the initiative was widely condemned by Quebec federalists (as well as by sovereigntists) when it was undertaken in September 1996.[6] And even though early poll results following the introduction of the *Clarity Act* indicate that a majority of Quebecers disapprove of the legislation, they do not show an increase in support for sovereignty.[7]

"[T]he federal government was right to refer questions on unilateral secession to the Supreme Court of Canada."

In my earlier *Commentary*, I argued that the federal government was under a moral obligation to clarify the ground rules governing secession even if such an initiative could potentially provoke an upswing in sovereigntist sentiment. The 1995 referendum had been characterized by profound confusion as to the meaning and consequences of voting "yes," confusion that persists even to the present day.[8] Basic democratic principles demand that voters have a clear understanding of the choices they are asked to make. The need for clarity is particularly acute in a sovereignty referendum because, unlike an election, where the voters' choice is

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5 Polling data indicate that support for sovereignty has declined since the Supreme Court's *Secession Reference* decision in August 1998. For example, a poll of approximately 5,000 Quebec residents commissioned by the Privy Council Office between June and August 1999 indicates that only 38 percent of respondents would vote "yes" to the question on sovereignty-partnership that was asked in 1995, while 50 percent would vote "no." See Centre de recherche sur l'opinion publique (1999) (hereinafter referred to as the "August 1999 CROP Poll").

6 The separatist Parti Québécois government denounced the *Secession Reference* when it was announced in September 1996. The initiative was also criticized by then federal Progressive Conservative leader Jean Charest and Quebec Liberal leader Daniel Johnson. In contrast, the August 1999 CROP Poll finds that almost three-quarters of Quebecers (72 versus 15 percent) say it is a "good thing" the Supreme Court decided that "a clear majority voting Yes on a clear question is necessary before engaging in negotiations on the independence of Quebec."

7 A Groupe Leger & Leger poll of 806 Quebecers conducted between December 16 and 19, 1999, found that 59.6 percent of respondents indicated that they disapproved of the federal government's *Clarity Act*, with only 28.6 percent approving (Mackie 1999, hereinafter the "Groupe Leger & Leger December 1999 Poll"). Note, however, the poll by Ekos Research Associates (1999) reporting on a survey of 823 Quebecers conducted between December 1 and 12, 1999; it finds that support for sovereignty declined in the days following the announcement of the federal government's intention to table clarity legislation. Similar poll results were released by the Angus Reid Group (1999, hereinafter "Angus Reid December 1999 Poll").

8 Polling conducted during the 1995 referendum revealed that substantial numbers of Quebecers believed that Quebec would remain a province of Canada following sovereignty. The August 1999 CROP Poll finds that, although this confusion has been reduced somewhat, 10 percent of respondents indicated that they supported sovereignty-partnership but also favored Quebec's remaining a province of Canada. Within this group, 71 percent agreed with the statement that, "if sovereignty-partnership is achieved, Quebec will still be part of Canada."

reversible in four or five years' time, a referendum may well have a permanent outcome.

Nor is it in the interest of anyone, sovereigntist or federalist, to conduct a referendum in circumstances where the popular meaning and understanding of the vote is unclear. For example, if sovereigntists wish to effect a fundamental change in Quebec's status, political reality demands that they first obtain a clear mandate from the voters. Any attempt to proceed on the basis of an ambiguous question or without a clear majority could not hope to succeed, as international experience with failed secessions and the advice of the Supreme Court of Canada confirm.[9]

"[T]he case for clarifying the ground rules governing secession is based on fundamental principles of democracy and fairness."

In effect, then, the case for clarifying the ground rules governing secession is based on fundamental principles of democracy and fairness, as opposed to short-term calculations of the likely impact on sovereigntist sentiment within Quebec. For this reason, I maintained in the earlier *Commentary* that the federal government had an obligation to refer questions on unilateral secession to the Supreme Court as well as to introduce contingency legislation, regardless of the short-term impact on public opinion in Quebec. In essence, public policy on the territorial integrity of the Canadian state is too fundamental to be held hostage to the vicissitudes of public opinion polls.

At the same time, there is good reason to be skeptical of the claim that a further attempt to bring clarity and reason to bear on this debate will provoke a long-term backlash among Quebec voters. In 1996, we had no baseline of experience against which to measure such predictions, since the federal government had never openly discussed how it might respond to a majority "yes" vote in a sovereignty referendum. There was thus no reason to doubt the accuracy of the claims alleging negative political consequences certain to follow an attempt by the federal government to lay down basic rules governing the secession process.

With the benefit of hindsight — particularly the fact that the predicted backlash against Canadian federalism has repeatedly failed to materialize — it is unclear why any objective observer of the situation would counsel abandonment of what is proving to be a winning political strategy. In fact, an overwhelming majority of Quebecers agree with the Supreme Court's determination that the results of a Quebec sovereignty vote should be recognized only if the question is clearly formulated and a clear majority of Quebecers vote in favor of sovereignty.[10] Thus, we have little reason to

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9 Although the Supreme Court made no reference to comparative experience on this particular point, no secession since 1945 has proved successful without a clear mandate on a clear question. See the discussion of the international experience with secession in Crawford (1997).

10 For example, the Angus Reid December 1999 Poll reports that 96 percent of Quebec respondents agreed with the statement that an eventual decision on sovereignty must be based on a clear question, while 80 percent agreed that the results should be recognized only if a clear majority vote "yes". Moreover, 60 percent of the respondents in the same poll believe that 50 percent plus one of those voting does not constitute a clear majority.

believe that, once the predictable nationalist rhetoric and cries of outrage have died down, ordinary Quebecers will reject as unreasonable legislation designed to implement the principles set out by the Supreme Court.

The Plan of the Paper

In this *Commentary*, I revisit the arguments in favor of the enactment of contingency legislation in light of events that have transpired over the past three and a half years and assess the *Clarity Act* introduced by Ottawa in December 1999. I also briefly consider the Quebec government's Bill 99.

I begin by reviewing the Supreme Court's opinion in the *Secession Reference* in order to ascertain whether the Court has so clarified the applicable legal framework that contingency legislation has now become superfluous. I argue that, although the Court's opinion clarified certain aspects of that legal framework, it created new uncertainties.

The major one surrounds the duty to negotiate secession, which the Court held would fall on the federal government in the face of a clear mandate in favor of secession on a clear referendum question. The Court refused to clarify the circumstances that would trigger this duty, declaring that determining matters such as the majority required and the assessment of the clarity of the question is the responsibility of the political branches of government, rather than the judiciary.

Thus, while the Court's declaration that there must be a "clear majority of the population of Quebec on a clear question" (para. 93) makes an important contribution to the debate, it also imposes an obligation on the country's political leadership to define the meaning of these terms. I argue, therefore, that the Court's opinion has made it more, rather than less, essential that the federal government undertake a political initiative designed to further clarify the consequences of a majority "yes" vote.

"[T]he Court's opinion has made it... essential that the federal government undertake a political initiative ...to...clarify the consequences of a majority 'yes' vote."

The second section of my paper considers the nature and scope of such an initiative. Although I believe that such an action is so important that it should be undertaken even if it provokes negative political consequences in the short term, I also suggest that federalists should not be blind to these potential consequences. I therefore argue that any attempt to clarify the ground rules for secession can and should be crafted in such as way as to minimize any potential backlash it might provoke.

Thus, the initiative should be framed narrowly, focusing only on elements that can be traced back directly to the principles established by the Supreme Court of Canada:

- the requirement of a clear question on whether Quebecers wish to remain within Canada;
- the requirement that a clear majority of the population favor secession;

- the fact that a constitutional amendment would be required, which means that the provinces as well as the federal government would be necessary parties to secession negotiations; and
- the fact that issues such as border adjustments and the territorial claims of aboriginal peoples would have to be addressed in any secession negotiations.

Any federal initiative to clarify secession rules should concentrate on these four elements and take the form of legislation, rather than a House of Commons resolution or a white paper.

Turning to an assessment of the *Clarity Act* in light of this framework, I find that, in general terms, the bill is a reasonable attempt to express the principles identified by the Supreme Court of Canada.

I also consider the argument that the legislation is an illegitimate attempt to interfere with the right of the Quebec government to draft a referendum question of its own choosing. I find this criticism unpersuasive. With the Supreme Court's having imposed on the government of Canada an obligation to negotiate secession if certain conditions are met, it is clearly appropriate and necessary for the government to set out the criteria on which that judgment is to be based. Assuming that those criteria are a good faith attempt to give concrete form to the principles identified by the Court, there can be no convincing objection to the legislation.

Finally, I revisit the issue of timing. Some arguments in favor of adopting a wait-and-see approach are plausible. But the Quebec government continues to maintain that it will hold a third referendum on sovereignty. Thus, sooner or later, the federal government will have to deal with the issue. While taking an initiative will always present risks, they will never be lower than they are at present. With the issue of national unity largely dormant, there is a window of opportunity to proceed with federal clarity legislation, an opportunity that may not be present if the federal government waits until the eve of another referendum. The risks of enacting the *Clarity Act* are far outweighed by the potential benefits of permanently altering the terms on which this issue is debated. Thus, this initiative is demonstrably in the public interest of all Canadians, federalists and sovereigntists alike.

"[The Clarity Act*] is demonstrably in the public interest of all Canadians, federalists and sovereigntists alike."*

The Political Implications of the *Secession Reference*

Elsewhere, I have analyzed the Supreme Court of Canada's reasoning in the *Secession Reference* in considerable detail (Monahan 1999). Here I repeat some of that analysis, emphasizing the opinion's political implications for a future referendum on Quebec sovereignty.

The Duty to Negotiate

As is well known, the key element in the Supreme Court's opinion is the recognition that the federal government would have a constitutional duty to negotiate secession following a clear majority vote on a clear question. In my view, the establishment of this duty was based on a somewhat shaky legal foundation.

In creating this duty, the Court relied on the existence of a "gap" in the constitutional text (para. 53) in terms of the legal consequences that would flow from a majority "yes" vote in a sovereignty referendum. The Court concluded that it was appropriate to fill the gap by resorting to four unwritten but implicit constitutional principles. Of particular importance in this regard was the principle of democracy.[11]

In considering the legal effect of a majority "yes" vote in a referendum, the Court rejected what it termed two "absolutist propositions" (para. 90). One of them was that "there would be a legal obligation on the other provinces and the federal government to accede to the secession of a province" (ibid.) following a clear referendum mandate in favor of secession. The Court rejected this proposition as involving the use of the democracy principle in order to "trump" principles such as federalism, the rule of law, and the rights of individuals and minorities.

On the same reasoning, however, a clear mandate in favor of secession could not be entirely dismissed by the federal government and the other provinces since "this would amount to the assertion that other constitutionally recognized principles necessarily trump the clearly expressed democratic will of the people of Quebec" (para. 92). Rather, the clear expression of a right to secede would require the federal government and the other provinces to enter into sovereignty negotiations.

"[T]he clear expression of a right to secede would require the federal government and the other provinces to enter into sovereignty negotiations."

Some Legal Difficulties

As I have suggested elsewhere (Monahan 1999), if the methodology of the *Secession Reference* opinion were followed in other cases, the Supreme Court would have free rein to create wholly new constitutional obligations. The reason is that the Constitution provides only a general framework within which the political process is intended to operate. As such, the Constitution makes express provision for only a limited number of fundamental issues, leaving the vast majority of matters free of constitutional constraint so that they may be worked out in the give and take of the ordinary political process.

If the courts are free to add to the Constitution through the use of unwritten norms whenever they discover a matter not provided for in the text, they have, in effect, an open-ended license to rewrite the document at

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11 The other unwritten constitutional principles recognized by the Court were federalism, constitutionalism and the rule of law, and respect for minorities.

will. They can incorporate wholly new norms or obligations, even where the political authorities have determined that such matters should not be constitutionalized and should, instead, be left to the realm of ordinary politics.

This process is essentially what occurred in the *Secession Reference.*[12] The Constitution has a gap in terms of the legal effect of a sovereignty referendum only in the sense that the matter is not provided for in express terms. Yet if mere constitutional silence opens the door to the creation of constitutional duties through reliance on unwritten principles, the Court is free to invent constitutional requirements on a host of other subjects that are also not provided for in the written Constitution.

For example, the Constitution is also silent on the legal effect of referendums on subjects other than secession. A gap exists in that sense. If a referendum on sovereignty can create constitutional duties on the basis that it would ascertain "the views of the electorate on important political questions" (para. 87), the same can surely be said of referendums on other subjects, such as the election of senators, the creation of a unified megacity in the Toronto area, or the abolition of the monarchy. One level of government is thus exposed to the possibility of being subjected to constitutional duties based on referendums that are organized and conducted by another level of government, duties that cannot even be overridden by statute.

"[T]he legal foundation for the duty to negotiate and its implications for future cases give rise to significant difficulties."

Consider, too, the vast array of other subjects on which the courts have held that the Constitution is silent — matters such as the duty of governments not to reduce social assistance payments,[13] the duty of politicians to fulfill their election promises,[14] or a guarantee for property rights,[15] to name just a few. On the basis of the reasoning in the *Secession Reference,* many of these silences can be said to constitute a gap in the text that could be filled by judicial intervention, regardless of whether a referendum is held on the issue (see Box 1).

Thus the legal foundation for the duty to negotiate and its implications for future cases give rise to significant difficulties.

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12 It should be noted that the Supreme Court does point to one source in the constitutional text for the duty to negotiate — namely, section 46 of the *Constitution Act, 1982*, which permits any province to initiate a constitutional amendment through passage of a constitutional resolution. The Court suggests that "the existence of this right [to initiate change] 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" (para. 69). For a discussion of the linkage between the democratic principle and section 46 of the *Constitution Act, 1982*, see Newman (1999, 46, 51).

13 See *Masse v. Ontario (Ministry of Community and Social Services)* (1996), 134 DLR (4th) 20, holding that the Constitution makes no provision for an obligation not to reduce social assistance payments.

14 See *Reference re Canada Assistance Plan*, [1991] 2 SCR 525, holding that there is no constitutional obligation to perform election promises.

15 Despite various proposals to add the protection of property to the list of interests protected by section 7 of the Charter of Rights and Freedoms, none has been adopted.

Box 1: ***Unwritten Constitutional Principles: A Slippery Slope***

Unwritten constitutional principles are sometimes convenient for the judiciary, but they may provide a shaky legal basis for decisions.

Consider, for example, the manner in which the Ontario Divisional Court used unwritten constitutional principles in the recent *Montfort Hospital* case.*

The plaintiff objected to the reduction of services at the Montfort, the only French-language hospital in eastern Ontario and the only such teaching hospital in the province. Among the arguments made was the novel claim that the reduction of services at the Montfort violated the unwritten constitutional principle of protection of minority rights.

The Constitution contains a variety of provisions guaranteeing certain rights and services to the two official language groups. But the Constitution does not guarantee access to health or social services in any particular language, leaving decisions about the provision of these services in the minority language to the discretion of provincial legislatures.

In the *Montfort Hospital* case, the Ontario Divisional Court agreed that the unwritten text of the Constitution does not guarantee official language minorities access to medical services in their language. However, the court accepted the plaintiff's submission that the decision to reduce French-language hospital services in eastern Ontario violated the unwritten constitutional principle of the protection of minority rights. Because the court made this finding on the basis of an unwritten principle, rather than the text of the Constitution, the "reasonable limits" clause (sec. 1) of the Charter of Rights and Freedoms (which permits governments to justify limits on guaranteed rights where the need for such limits can be demonstrably justified) had no application. The matter was referred back to the minister for reconsideration in light of the court's findings.

The court's reasoning gives little guidance as to the precise nature of the constitutional entitlements to French-language hospital services that flow from the principle of protection of minority rights.

I am not suggesting that the Ontario government's decision to reduce services at the Montfort Hospital was the right one in public policy terms. Indeed, the court's judgment sets out a compelling political case for the importance of the institution in terms of maintaining the vitality of the francophone community in the Ottawa area. My point is simply that there does not appear to be any principled basis for judicial restructuring of hospital services on the basis of vague and amorphous unwritten constitutional principles such as democracy, federalism, or the protection of minorities.

* *Lalonde v. Ontario (Health Services Restructuring Commission)*, [1999] OJ 4488, November 29, 1999 (Ontario Superior Court of Justice, Divisional Court).

Political Implications

My primary concern in this *Commentary*, however, is the political implications of this duty to negotiate in the context of a future sovereignty referendum. On this scorecard, the clear verdict of commentators so far is that the Supreme Court's theory is a winning political formula. The Court

has confirmed that unilateral secession is unlawful under the Constitution, but it has also conferred legitimacy on the sovereignty project by stating that a clear mandate for secession would give rise to a constitutional duty to negotiate the terms of secession. The main virtue of this formula is that it gives something to both sides, thereby avoiding a scenario in which either party feels humiliated.

One important point made by federalist supporters of the decision is that recognizing the existence of a duty to negotiate secession is harmless since such a duty was already a political reality. In the oral argument before the Supreme Court, the lawyers for the federal government repeatedly emphasized that it would make no attempt to keep Quebec in Canada against its will. Consider the assessment of Osgoode Hall Dean Peter Hogg, the country's most respected constitutional lawyer, of the Court's decision to give constitutional effect to political realities:

> Even without the court's ruling, the political reality is that the federal government would have to negotiate with Quebec after a majority of Quebec voters had clearly voted in favour of secession. It is safe to say that there would be little political support for a policy of attempted resistance to the wish of Quebec voters. The court's decision simply converts political reality into a legal rule. Indeed, it is not clear why it is a *legal* rule, since it appears to have no legal sanctions. (1999, 34–35.)

"It may be somewhat premature...to conclude that the Court's recognition of a constitutional duty to negotiate secession would not have any material impacts during a future referendum campaign."

It may be somewhat premature, however, to conclude that the Court's recognition of a constitutional duty to negotiate secession would not have any material impacts during a future referendum campaign or in any political negotiations following a majority "yes" vote. Federalists in Ottawa and the other provinces have never stated clearly how they would react to such a vote.

Even if political reality would have forced the federal government to respond in some fashion to such a referendum outcome, the commencement of secession negotiations had been only one of a number of options. Other possibilities included holding a second referendum (in Quebec or nation-wide) and establishing some form of independent national commission or other body with a mandate to develop proposals for a renewed federation. Now the Supreme Court's recognition of a constitutional duty to commence secession negotiations following a clear referendum mandate has materially reduced the federal government's flexibility in this regard.

This reduced flexibility has increased the difficulty the federal government would have extracting concessions in return for its agreement to commence secession negotiations. Even if the ultimate result of any positive mandate for secession would have been negotiations, the advance recognition of a constitutional duty to negotiate has likely altered the scope, nature, and timing of those discussions.

The recognition of a constitutional duty to negotiate will not merely affect the conduct of any secession negotiations. It will also color any

referendum campaign itself. A key element of the federalist strategy in the referendum campaigns of 1980 and 1995 was to emphasize the uncertainties associated with voting "yes." The existence of a constitutional duty to negotiate reduces this element of uncertainty significantly, thereby changing the dynamic of any referendum campaign. The Supreme Court opinion in hand, Quebec Premier Lucien Bouchard and other sovereigntist leaders can rebut conclusively any claims that a majority "yes" vote would plunge Quebec into a legal black hole. Instead, voting "yes" can be portrayed as a way to force the federal government to commence negotiations over Quebec's legitimate demands.

Thus, one can mount a superficially plausible argument that Quebec would have everything to gain and nothing to lose from such negotiations. If they were successful, Quebec would have gained new powers, either as part of an agreement whereby it became sovereign or through a profound decentralization of the federation along the lines of the Allaire Report (Quebec Liberal Party 1991). If the negotiations failed, however, the sovereigntists could claim that this was proof positive that Canadian federalism itself is a failure and that the time was at hand for Quebec to strike out on its own.

Some Important Requirements

Although converting political reality into a constitutional duty has, in certain respects, significantly strengthened the hand of sovereigntist leaders, particularly in the context of a future referendum campaign, at the same time the Supreme Court has provided federalist leaders some significant new political tools. In particular, the Court has contradicted at least four key claims that sovereigntist leaders have traditionally advanced.

"[T]he Court has contradicted at least four key claims that sovereigntist leaders have traditionally advanced."

A Clear Majority

The first of these claims is that sovereignty negotiations would be triggered by a simple majority of 50 percent plus one of the votes cast in a referendum. Whenever the Supreme Court spoke of the duty to negotiate, it linked the existence of that duty to a clear majority in favor of secession. While the Court did not identify what would constitute a clear majority, it strongly suggested that a bare majority of votes cast in a referendum would fall well short of this standard.

In its discussion of the principles that underlie the Constitution, the Court noted the "superficial" appeal of the argument that "the Constitution may be legitimately circumvented by resort to a majority vote in a province-wide referendum" (para. 75). It went on to note, however, that this argument is "unsound, because it misunderstands the meaning of popular sovereignty and the essence of a constitutional democracy." The Canadian system of government is premised on the assumption that simple majority

rule is not an acceptable decision rule when making fundamental and permanent alterations to the political ground rules of society:

> In this way, our belief in democracy may be harmonized with our belief in constitutionalism. Constitutional amendment often requires some form of substantial consensus precisely because the content of the underlying principles of our Constitution demand it. By requiring broad support in the form of an "enhanced majority" to achieve constitutional change, the Constitution ensures that minority interests must be addressed before proposed changes which would affect them may be enacted. (Para. 77.)

The Court did not define what level of support would satisfy the need for a "substantial consensus" sufficient to justify the fundamental decision of a province to secede from Canada. That matter was left to the political authorities, rather than the courts. But there can be little doubt that a bare majority of 50 percent plus one of ballots cast in a referendum would not be enough.

"[T]here can be little doubt that a bare majority of 50 percent plus one of ballots cast in a referendum would not be enough."

Nor does the requirement of a substantial consensus in favor of such a change contradict the principle of democracy:

> Canadians have never accepted that ours is a system of simple majority rule. Our principle of democracy, taken in conjunction with the other constitutional principles discussed here, is richer....[C]onstitutional rules are themselves amendable to amendment, but only through a process of negotiation which ensures that there is an opportunity for the constitutionally defined rights of all of the parties to be respected and reconciled. (Para. 76.)

Henri Brun, in a recent, carefully reasoned legal opinion (1999), argues that the Supreme Court's reference to a "clear majority" is consistent with a bare majority of valid votes cast in a referendum. He reaches this conclusion on the basis of accepted denotations of the term *majority*, which he finds is generally defined as "the greatest number of votes cast" or 50 percent plus one.

The difficulty with this analysis is that the Supreme Court did not refer simply to a "majority" in favor of secession; it was careful always to qualify the word *majority* with the requirement that it be *clear* (see, in particular, paras. 73, 74, 76, 77, 87, and 88 of the Court's opinion). In my view, the most plausible reading of this insistence on a "clear majority" is that the Court had in mind something other than a bare majority of 50 percent plus one of valid votes cast. Otherwise the word *clear* would add nothing to the word *majority*, since anything less than 50 percent plus one of votes cast would not represent a majority. Thus, if the Court was attempting to suggest that 50 percent plus one of votes cast was sufficient, it would have used the term *majority of votes cast*. This view is reinforced by the Court's statement that the identification of a *clear majority* requires a "qualitative evaluation" and that 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 receives" (para. 87).

Brun seeks to explain the use of the adjective *clear* in relation to the word *majority* as perhaps reflecting a concern over possible fraud or irregularities in the conduct of a referendum campaign (1999, n.26). He says that Canada is obliged to enter into secession negotiations only if the majority is "real, true and not doubtful," and it is in this sense that the adjective *clear* was used (ibid., 5; my translation).

Yet, in my respectful view, this attempt to explain the meaning of the Court's reference to a *clear majority* is unconvincing. Suppose that a referendum result was vitiated by fraud or some other voting irregularity so that a majority of voters had, in fact, cast ballots against sovereignty but the results were tabulated or reported wrongly. In such a case, we would surely conclude not that there was a majority in favor of sovereignty although one that was not "clear" (as Brun seems to suggest). Rather, we would conclude that the sovereignty option had failed to achieve even a simple majority of votes.

Moreover, in order to reach this conclusion, there would be no need to undertake a "qualitative assessment" of the result, as the Supreme Court stated in its discussion of the requirement of a clear majority. In contrast, such an assessment would be required to ascertain whether there was a "substantial consensus" in favor of secession, which, by analogy at least, is the standard identified by the Court in its earlier discussion of the requirements that must be satisfied in order to undertake significant constitutional change.

On balance, therefore, the Supreme Court's discussion of this issue indicates that a bare majority of 50 percent plus one of votes cast would not be a sufficient basis to commence secession negotiations. However, the precise level of support that should be required in order to meet the standard of a clear majority was left to the political actors to specify.

"Until the Court handed down its opinion, the premise within Quebec circles was that the wording of the referendum question was the sole and exclusive prerogative of the Quebec premier."

A Clear Question

The second important contribution that the Supreme Court made to the sovereignty debate was its declaration that the wording of any referendum question must be clear. Until the Court handed down its opinion, the premise within Quebec circles was that the wording of the referendum question was the sole and exclusive prerogative of the Quebec premier, in accordance with the terms of Quebec's *Referendum Act*. Essentially, the operating assumption in both 1980 and 1995 seems to have been that, as long as the referendum question mentioned the word *sovereignty*, the Quebec government could interpret a majority "yes" vote as providing a mandate to pursue independent statehood. But the Court introduced a new element into the debate by explaining that the duty to negotiate secession would be triggered only by a mandate that was "free of ambiguity both in terms of the question asked and in terms of the support it achieves" (para. 30).

Although the Court did not comment directly on the 1995 referendum question, the fact that it found it necessary to underline the requirement of clarity throughout its discussion of the duty to negotiate[16] strongly suggests that that question could not be said to be "free of ambiguity."

The basic problem was that the 1995 question was misleading. It linked sovereignty with a new political partnership with Canada, although close examination of the June 12, 1995, agreement between Action Démocratique, the Bloc Québécois, and the Parti Québécois referred to within the question reveals no requirement to negotiate a new partnership arrangement in order for the Quebec government to declare sovereignty. In effect, the referendum question asked voters for an endorsement of sovereignty-partnership but proposed to use that endorsement to justify a unilateral declaration of independence. A "yes" vote to such a question could hardly be described as a "clear repudiation of the existing constitutional order and the clear expression of a desire to pursue secession," which is what the Court concluded would be required in order to trigger the duty to negotiate secession.[17]

"[T]he Court's requirement that any referendum question be 'clear' ...finds wide favor among Quebecers at large."

Although the Court's requirement that any referendum question be "clear" may be somewhat unorthodox in terms of the elite opinion in Quebec, this view finds wide favor among Quebecers at large. Moreover, more than 60 percent of them believe that the 1995 referendum question was not clear.[18]

A Multilateral Negotiation Model

A third important contribution made by the Supreme Court relates to the question of the parties in any future sovereignty negotiations. Sovereigntist leaders have traditionally maintained that the negotiations would be conducted bilaterally — between Ottawa and Quebec City alone — rather than multilaterally, involving the other provinces, the territories, aboriginal peoples, and constitutionally protected minorities.

The Supreme Court in the *Secession Reference* clearly rejected the bilateral model. The Court referred at a number of points in its analysis to the fact that both the federal government and the other provinces would be directly involved in any secession negotiations:

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16 For example, the decision referred to the fact that only the "clear repudiation of the existing constitutional order and the clear expression of the desire to pursue secession by the population of a province would give rise to a reciprocal obligation on all parties to Confederation to negotiate constitutional changes to respond to that desire" (para. 88).

17 A recent legal opinion by Andrée Lajoie (1999) argues that the Supreme Court refused to specify the meaning of a "clear question" because there is no objective means of assessing clarity in a legal text; its meaning can be discerned only from an understanding of the broader social context. While this analysis is doubtless correct as far as it goes, it fails to consider that *clarity* and *ambiguity* are relative terms, with certain questions giving rise to greater confusion than others. Lajoie fails to address the considerable empirical evidence indicating the existence of widespread confusion among Quebec voters as to the meaning and implications of the 1995 referendum question.

18 The August 1999 CROP Poll reports that 93 percent of respondents agree with the statement that the referendum question must be clear, while only 4 percent disagree. And 61 percent believe that the 1995 question was not clear, while 36 percent believe that it was clear.

> The corollary of a legitimate attempt by one participant in Confederation to seek an amendment to the Constitution of Canada is a obligation on all parties to come to the negotiating table. The clear repudiation by the people of Quebec of the existing constitutional order would confer legitimacy on demands for secession, *and place an obligation on the other provinces and the federal government 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.* (Para. 88; emphasis added.)

"[T]he Court specifically mentioned that [the obligation to negotiate] would fall on the provinces as well as the federal government."

In discussing the obligation to negotiate, the Court specifically mentioned that this obligation would fall on the provinces as well as the federal government:

> However, we are equally unable to accept the reverse proposition, that a clear expression of self-determination by the people of Quebec would impose *no* obligations [emphasis in original] upon *the other provinces or the federal government....The rights of the other provinces and the federal government cannot deny the right of the government of Quebec to pursue secession, should a clear majority of the people of Quebec choose that goal....Negotiations would be necessary to address the interests of the federal government, of Quebec and the other provinces, and other participants, as well as the rights of all Canadians both within and outside Quebec.* (Para. 92; emphasis added except as indicated.)[19]

Some observers argue that the Court mandated only bilateral negotiations between the federal government and the government of Quebec, excluding a direct role for the provinces in the negotiations.[20] The basis for this interpretation seems to be the reference to negotiations between "representatives of two legitimate majorities" in the following passage of the Court's judgment:

> This observation suggests that other parties cannot exercise their rights in such a way as to amount to an absolute denial of Quebec's rights, and similarly, that so long as Quebec exercises its rights while respecting the rights of others, it may propose secession and seek to achieve it through negotiation. The negotiation process precipitated by a decision of a clear majority of the population of Quebec on a clear question to pursue secession would require the reconciliation of various rights and obligations

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19 The same point is reinforced in the Court's discussion of the possible breach of the duty to negotiate. It referred to "violations of those principles by the federal *or other provincial governments responding to the request for secession*" and to the possibility of "unreasonable intransigence on the part of the other participants at the federal *or provincial level*" as being relevant to international recognition of an independent Quebec. The Court also spoke of the "legality of the acts of *the parties to the negotiation process under Canadian law*" (para. 103; emphasis added). The suggestion is that the parties to the negotiation process are determined in accordance with Canadian law, under which the provinces have a legally mandated role to play in the enactment of a constitutional amendment.

20 Wells (1999, A1) reports a statement by Joseph Facal, Quebec's intergovernmental affairs minister, to the effect that Quebec would negotiate secession with the federal government alone, and that "there would be no room at the table for the other provinces."

> by the representatives of two legitimate majorities, namely, the clear majority of the population of Quebec, and the clear majority of Canada a whole, whatever that may be. There can be no suggestion that either of these majorities "trumps" the other. (Para. 93.)

In fact, this passage does not address who would participate in secession negotiations but merely speaks to the fact that Quebec's "legitimate majority" cannot be overridden by a majority of Canadian citizens as a whole. There is no discussion of the separate question of who would have a right to act as the "representatives of...the clear majority of Canada as a whole."

Note, however, that even this paragraph seems to assume that the negotiation process would be multiparty. The first sentence of the quotation refers to the exercise of rights by "other parties"; the use of the plural, rather than the singular, reflects and reinforces the Court's statements in earlier paragraphs to the effect that the obligation to negotiate is one that is imposed on the other provinces as well as the federal government. If the Court meant that the negotiations were to be conducted bilaterally, rather than multilaterally, the appropriate reference in paragraph 93 would have been to the "other party" to the negotiation, rather than to the "other parties."

The multilateral character of any secession negotiations does not depend merely on a parsing of the Court's pronouncements in the *Secession Reference*. It flows from and is dictated by the terms of the Constitution itself. Canada is a federal state, not a unitary one. Thus, the legitimate representatives of "Canada as a whole" in constitutional matters must include the provinces as well as the federal government. This principle is reflected in Canadian law, which provides for a constitutionally mandated role for the provinces in the enactment of most constitutional amendments. It is also reflected in the jurisprudence of the Supreme Court of Canada and the Judicial Committee of the Privy Council, which have continually emphasized the important and legitimate role of the provinces in significant constitutional change. In my view, there can be little doubt that all provinces would have a direct role in secession negotiations, and that this reading is the only plausible interpretation of the Court's reasoning in the *Secession Reference*.

"[T]here can be little doubt that all provinces would have a direct role in secession negotiations."

The Court was less clear as to whether the negotiations would be limited to governments or whether other constitutionally recognized groups would have a right to direct participation. It stated that, in Canada, "the initiative for constitutional amendment is the responsibility of democratically elected representatives of the participants in Confederation" and that, "in legal terms, constitution-making in Canada, as in many countries, is undertaken by the democratically elected representatives of the people" (para. 88). While one might argue that this statement was intended to refer to governments only, the phrase *participants in Confederation* is not clearly defined. Could the aboriginal peoples of Canada not be regarded as "participants" in Confederation, and, on this reasoning, could their

democratically elected representatives claim a seat at the negotiating table? Later in its judgment, the Court emphasized that the interests of aboriginal peoples must be "taken into account" in any secession negotiations, without specifying whether that mandate requires direct participation by their representatives or merely that the federal government indirectly advocate on their behalf.

Clearly, the question of who has a right to participate in the negotiations, apart from the federal government and the provinces, is a matter that has not been finally resolved. One can, therefore, assume that, in the event secession negotiations are contemplated and certain participants are, in fact, excluded, there would be a high likelihood that litigation would be commenced to clarify who has a right to a seat at the negotiating table.[21]

The Borders Issue

"[O]ne of the issues that would need to be resolved would be the borders of an independent Quebec."

Finally, in the *Secession Reference*, the Supreme Court set out some broad parameters for the sovereignty negotiations themselves. In this regard, the Court made the important statement that one of the issues that would need to be resolved would be the borders of an independent Quebec. In discussing the range of issues that would have to be addressed in sovereignty negotiations, the Court noted that "arguments were raised before us regarding boundary issues," and it commented that "nobody seriously suggests that our national existence, seamless in so many aspects, could be effortlessly separated along what are now the provincial boundaries of Quebec" (para. 96). Later, the Court returned to the borders issue in the context of the rights of aboriginal peoples:

> We would not wish to leave this aspect of our answer...without acknowledging the importance of the submissions made to us respecting the rights and concerns of aboriginal peoples in the event of a unilateral secession, as well as the appropriate means of defining the boundaries of a seceding Quebec with particular regard to the northern lands occupied largely by aboriginal peoples. (Para. 139.)

But having identified the issue as one appropriate for negotiation, the Court did not find it necessary to spell out the nature of any border adjustments that might be appropriate:

> [T]he concern of aboriginal peoples is precipitated by the asserted right of Quebec to unilateral secession. In light of our finding that there is no such

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21 In this regard, see *Gitanyow First Nation v. Canada*, [1999] BCJ No. 659 (BCSC, March 23, 1999), in which Mr. Justice Williamson granted a declaration stating that the Crown in Right of Canada and the Crown in Right of British Columbia were under a duty to negotiate in good faith with a First Nation, although he declined to further declare that the Crown representatives were under an obligation to make reasonable efforts to conclude and sign a treaty.

> right applicable to the population of Quebec, either under the Constitution of Canada or at international law, but that on the contrary a clear democratic expression of support for secession would lead under the Constitution to negotiations in which aboriginal interests would be taken into account, it becomes unnecessary to explore further the concerns of the aboriginal peoples in this Reference. (Ibid.)

The Court's reference to "the appropriate means of defining the boundaries of a seceding Quebec" is a specific statement that secession negotiations would have to address the issue of borders, at least in terms of the rights of aboriginal peoples.

In my view, the same border issues would arise with respect to regions within Quebec that had voted by a clear majority not to secede from Canada. Although the Court does not address this aspect of the matter directly, nothing in its analysis of unwritten principles would give the Quebec government a legal or political mandate to compel citizens in these regions to secede from Canada against their will and in violation of their rights under Canadian law. This conclusion is particularly the case given the Court's statement earlier in the judgment that no single political majority has the right to trump any other. In this sense, the fact that a majority of Quebec residents as a whole might have voted for secession would not justify overriding or disregarding a clearly expressed preference of a defined region of the province to remain within Canada.

What is significant about the Court's specific reference to the borders issue is that the Parti Québécois government has traditionally maintained that the question of borders would not be a subject in any sovereignty negotiations. The official PQ position has been that, although Canada is divisible, Quebec is not.

"The official PQ position has been that, although Canada is divisible, Quebec is not."

In 1992, a committee of the Quebec National Assembly commissioned a legal opinion from five international law experts (Franck et al., hereinafter "Five Experts' Opinion"). They concluded that, following Quebec's successful accession to sovereignty, the international law principle of the territorial integrity of states would apply. Therefore, minorities within Quebec would have no right, after sovereignty had been achieved, to challenge the borders of an independent Quebec.

PQ politicians have regularly relied on this Five Experts' Opinion in an effort to rebut claims that the borders issue would need to be negotiated with the rest of Canada.[22] The obvious anomaly in this position has been that, even as the Quebec government invoked principles of international law in order to preclude Canada from raising the issue of borders, it was maintaining that the issue of whether it had a right of unilateral secession in

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22 For example, a brochure published in November 1997 by the Quebec government (Brassard 1997) states categorically that Quebec is indivisible, relying heavily on the Five Experts' Opinion.

the first place was an entirely political question, rather than a legal one, and thus unfit for legal analysis.[23]

The Quebec government's insistence that international law would prevent Canada from effectively raising the borders issue has already been subject to extensive criticism by legal scholars.[24] With the Supreme Court having now stated that under the Constitution there would need to be "some appropriate means of defining the boundaries of a seceding Quebec," it is clear that Quebec could not refuse to negotiate the issue. In fact, a refusal to negotiate and adjust borders would mean that the Quebec government was not conducting itself in accordance with the mandated negotiation framework, which, according to the Court, would "put at risk the legitimacy of that party's assertion of its rights, and perhaps the negotiation process as a whole" (para. 95).

Significantly, in his comments on the Supreme Court's opinion, Prime Minister Jean Chrétien focuses on the fact that it stated that the borders of an independent Quebec would need to be negotiated and could be subject to change.[25]

The New Elements in Summary

"[T]he Supreme Court's opinion has introduced a number of important new elements into the sovereignty debate."

In summary, it is clear that the Supreme Court's opinion has introduced a number of important new elements into the sovereignty debate, and that these new elements would be prominent in any future sovereignty referendum. The Court has created a constitutional duty to negotiate secession with the Quebec government if it obtains a clear referendum mandate for that option. In any future referendum campaign, the "yes" side would rely on the existence of this constitutional duty as proof that the province would not be plunged into a legal black hole by voting in favor of sovereignty.

At the same time, the Court has tied the duty to negotiate to a requirement that the mandate in favor of secession be clear, with clarity applying both to the wording of the question and to the majority obtained.

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23 In fact, the principal author of the Five Experts' Opinion, Alain Pellet of the University of Paris X-Nanterre, now claims that the opinion merely concludes that international law does not *require* negotiations on border issues in the context of secession. Pellet agrees that the Supreme Court's decision in the *Secession Reference* makes it clear that border issues would be a legitimate subject for negotiations in the context of Quebec secession, and he now suggests that this judgment is consistent with the Five Experts' Opinion on this point. (See Pellet 1999, 6–8.)

24 The most comprehensive and careful consideration of international law principles in relation to the territorial question is Grand Council of the Crees (1995). See also Monahan (1995).

25 See, for example, the year-end interview by the prime minister with Radio-Canada, broadcast on December 23, 1998, in which he noted that the Supreme Court had stated that "no one can guarantee to a province that, at the end of negotiations, its borders will remain the same." (Author's translation of a transcript of the interview prepared by Bowdens Media Monitoring Limited, Ottawa.)

It has also indicated that sovereignty negotiations would need to be conducted multilaterally, rather than bilaterally, and that the issue of border changes would be a legitimate subject for negotiation.

The Respective Roles of Courts and Legislatures

Although the Supreme Court's opinion introduced these important new elements into the sovereignty debate, it also made plain that political leaders have the responsibility to define and make them operational. For example, after having declared that a duty to negotiate secession would exist only after a clear mandate had been obtained, it noted that determining whether there was a clear majority on a clear question would be "subject only to political evaluation, and properly so" (para. 100). Explaining that it had no supervisory role over what it termed the "political aspects of constitutional negotiations," the Court said:

> A right and a corresponding duty to negotiate secession cannot be built on an alleged expression of democratic will if the expression of democratic will is itself fraught with ambiguities. *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.; emphasis added.)

The Court went on to reiterate this point in even stronger terms, noting that the elected representatives, not the courts, have an "obligation...to give concrete form to the discharge of their constitutional obligations which only they and their electors can ultimately assess." The reconciliation of the various constitutional interests it has identified is "necessarily committed to the political rather than the judicial realm" (para. 101).

"[T]he task of defining the ground rules for the next referendum remains seriously incomplete."

In short, despite the Supreme Court's important contribution, the task of defining the ground rules for the next referendum remains seriously incomplete. The Court has done little more than lay a constitutional foundation, leaving the political branches to build on it by giving content and definition to the terms the judgment introduced into the debate. Indeed, the Court has expressly called on the political branches to "give concrete form" to the concepts it has identified.

In the absence of such elaboration, the entire attempt to define secession ground rules, beginning with the federal intervention in the *Bertrand* litigation in May 1996[26] and continuing through the two-year Supreme

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26 See *Bertrand v. Québec (Procureur général)*, [1996] RJQ 2393. Guy Bertrand, a private citizen from Quebec, commenced litigation seeking to prohibit the Quebec government from holding any future referendums similar to that of 1995. The federal government initially refused to intervene in the case. However, when the Quebec government took the position that the courts had no jurisdiction to pronounce on the legality of a sovereignty referendum, the federal government intervened in support of Bertrand.

Court Reference process,[27] will have been left hanging in mid-air. To be sure, we now have a declaration that a "clear majority" on a "clear question" would trigger secession negotiations. But we have no definition of what those terms mean and thus no way of bringing them to bear in the context of a future referendum process. They remain simply words on a page until political leaders give them specific content.

The Case for Federal Contingency Legislation

"The question... is not whether the government of Canada must supplement the decision of the Supreme Court..., but how and when."

The question, in short, is not whether the government of Canada must supplement the decision of the Supreme Court of Canada, but how and when it should take such supplementary action. At least two distinct but related considerations must be kept in mind when identifying the options available to the federal government for further clarification of the ground rules governing secession. The first consideration is the scope or range of matters that are to be addressed by the initiative. The second is the form that such an initiative might take. I now examine each of these issues in turn.

The Scope of the Initiative

With respect to the first question — the range of matters to be addressed — I begin with the assumption that any initiative designed to clarify the ground rules for secession should be limited to the *process* whereby it would be achieved, as opposed to the specific *outcomes* that would result from negotiations on substantive questions, such as debt division, trade links, citizenship, and so on.[28] Even if only process issues are addressed, however, a federal initiative might focus on at least three distinct stages:

- the events or steps that must be followed to trigger the requirement to commence secession negotiations;
- the manner in which secession negotiations are to be conducted, including the parties to the negotiation and the issues that must be addressed; and
- the manner in which any resulting agreement on the terms of secession should be implemented.

An initiative to clarify the ground rules governing secession could address some but not all of these stages.

In my earlier *Commentary*, I argued in favor of contingency legislation that would require the federal government to table in the House of

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27 The reference to the Supreme Court was announced by Attorney General Allan Rock on September 26, 1996. The Court's opinion was handed down some 23 months later, in August 1998.

28 For discussion of this assumption, see Monahan and Bryant (1996, 5–6).

Commons an assessment of the clarity of any referendum question in advance of the holding of that referendum. I also proposed that the legislation establish the membership of a "Canadian negotiating authority" to be constituted in the event that a majority of Quebecers voted in favor of sovereignty on a clear question, set out decision rules for that authority, and address the manner in which any agreement on the terms for secession would be implemented (Monahan and Bryant 1996, 46–48).

I am now persuaded that this earlier proposal was overly ambitious. I propose instead what I term a minimalist approach. It seeks to limit the agenda to matters that were expressly addressed by the Supreme Court of Canada in the *Secession Reference*. This approach follows from the exercise's underlying justification: to give concrete form to the obligations and responsibilities identified by the Court in its judgment.

As discussed in the previous section, the focus of the Supreme Court's intervention was on four distinct matters: the clarity of the question, the requirement of a clear majority, the fact that secession negotiations would be multilateral rather than bilateral, and the fact that difficult issues, such as potential border adjustments, would have to be addressed. Federal legislation ought not to go beyond those parameters.

The reason for limiting the agenda in this fashion is important. Although federal attempts to define the appropriate ground rules for secession cannot be held hostage to short-term considerations of the likely public reaction in Quebec or elsewhere, neither should Ottawa be blind to these potential impacts. Any attempt on its part to dictate rules on matters that were not addressed by the Supreme Court would be condemned as an illegitimate attempt by one of the parties to the debate to impose its terms on the other.

Even if the agenda is limited in this fashion, however, caution is necessary. Any federal intervention must be seen to be based on a good faith elaboration of the Supreme Court's requirement of clarity, as opposed to an attempt to create gratuitous obstacles blocking the secessionist project. This requirement also argues in favor of proposals or initiatives that can be justified as necessary or logical corollaries of the principles elaborated by the Court.

"Any federal intervention must be seen to be based on a good faith elaboration of the Supreme Court's requirement of clarity."

The Definition of a Clear Question

The federal government cannot limit the ability of the government of Quebec to hold referendums on questions that are ambiguous or unclear. Nor can it attempt to write the question itself so as to ensure clarity. What it can do is to indicate the kinds of questions that would give rise to a clear mandate for secession, triggering the constitutionally recognized duty to negotiate.

Moreover, it is entirely appropriate that the federal government submit the issue of the clarity of any referendum question to the House of Commons, to permit all parties to debate and to formulate a collective view

on the matter. The House of Commons is surely one of the "political actors" the Supreme Court referred to as having a role in defining whether a referendum question is clear.

The Supreme Court indicated that, before secession negotiations can be undertaken, there must be an "unambiguous expression of a clear majority of Quebecers that they no longer wish to remain in Canada" (para. 104).[29] This standard should be applied by Ottawa in determining the clarity of a referendum question.

The more difficult question is whether the federal government should attempt to set out in advance additional criteria on which its assessment would be based. It could indicate, for example, that it would not negotiate secession unless the referendum question referred to or used the term *secession*, or that secession could not be linked with the elusive term *partnership*, as was done in 1995. A difficulty with this approach, however, is that no precise formula or form of words can capture all the possible variations on questions that could be described as clear. Thus, an attempt to rule out certain questions in advance could be attacked on the basis that Ottawa was attempting to dictate to Quebec the content of a referendum question.

"[T]he federal government [could] require the involvement of the opposition parties in the Quebec National Assembly in the drafting of a referendum question."

Another possibility is for the federal government to require the involvement of the opposition parties in the Quebec National Assembly in the drafting of a referendum question. The existing *Referendum Act* in Quebec requires only a bare majority to approve the wording of a referendum question.[30] Thus, a government that controls a majority in the Assembly could draft a misleading or ambiguous question and then impose it over the objections of the opposition parties.

Existing Quebec law already points to the remedy for this situation. Not uncommonly, it requires a two-thirds majority in the National Assembly when an individual is being appointed to a sensitive and nonpartisan public office. For example, the Quebec *Elections Act*[31] provides:

> On a motion of the Prime Minister, the National Assembly, by a resolution approved by two-thirds of its Members, shall appoint a chief electoral officer chosen from among the electors and fix his salary and the conditions of his employment. (Sec. 478.)[32]

Note that the appointment must be approved by two-thirds of the members of the National Assembly (MNAs), not simply two-thirds of the members voting on the resolution. Thus, in the current assembly composed of 125 MNAs,

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29 See also the Supreme Court's statement that secession in a federal state "typically takes the form of a territorial unit seeking to withdraw from the federation" (para. 83).

30 *Loi sur la Consultation populaire*, RSQ 1999, C-64.1, ss 7–10. It permits only the premier to table the motion.

31 *Loi électorale,* RSQ 1977, c. E-3.3, s. 478.

32 For other examples of the same two-thirds requirement, see section 526 of the *Loi électorale*, providing for the appointment of the members of the Commission de la représentation, and section 1 of the *Loi sur le Protecteur du citoyen*, RSQ 1977, c. P-32, providing for the appointment of the public protector.

at least 84 must approve the appointment. This requirement effectively guarantees the opposition parties a meaningful role in these appointments since the governing party only rarely controls two-thirds of the seats in the assembly.

If it is appropriate to require the support of two-thirds of the MNAs to sanction the appointment of key public officers, it is difficult to see why the identical requirement should not apply to a resolution or bill approving the question in a sovereignty referendum. The appointment of a chief electoral officer (and of similar independent officeholders), while certainly important, is of much less significance than the wording of the question in a sovereignty referendum, whose outcome, unlike the appointments to these public offices, could permanently alter Quebec's political status.

The attraction of this formula is that it is already widely accepted under Quebec law. Moreover, the federal government would not attempt to prohibit the holding of a referendum that did not meet the two-thirds of MNAs requirement. It would merely serve notice that it would not negotiate secession except in accordance with a referendum whose question had been approved in advance by two-thirds of the members of the National Assembly.

Mandating the approval of the opposition parties for the wording of a referendum question would represent a significant advance over the existing situation, in which the formulation would be left entirely to the unfettered discretion of the Quebec premier. Rather than negotiating the wording of the question only with other pro-sovereignty leaders (as occurred under the negotiation of the June 12, 1995, agreement between then premier Jacques Parizeau, Lucien Bouchard, and Mario Dumont of Action Démocratique), the Quebec government would be forced to obtain the consent of the leader of the opposition. This proposal is inherently reasonable, since it merely ensures that the question cannot be written exclusively by one of the two sides in the debate.

"[P]roviding the opposition with an effective voice in the wording of the referendum question must be seen as a necessary but not a sufficient basis for the commencement of secession negotiations."

Of course, such a requirement would not guarantee that any question posed was clear or unambiguous, since the opposition parties in the National Assembly might agree to a question that failed to satisfy this requirement. In this sense, providing the opposition with an effective voice in the wording of the referendum question must be seen as a necessary but not a sufficient basis for the commencement of secession negotiations. It would still be necessary for the federal government to come to its own, independent assessment of the clarity of a referendum question.

The Definition of a Clear Majority

As I indicated earlier, the vast majority of national constitutions prohibit secession outright.[33] The few countries that permit secession have no

33 For a review of the relevant constitutional provisions in 89 different countries, see Monahan and Bryant (1996, 7–19).

uniformity about the relevant majority required. Moreover, in the 1980 and 1995 referendum campaigns, the federal government was equivocal on this issue; although it hinted that a majority of 50 percent plus one was not an acceptable basis for the commencement of secession negotiations, it did not expressly reject such a threshold. In large part because of this lack of clear rejection of the Quebec government's position on this question, I earlier concluded (Monahan and Bryant 1996, 29) that the federal government should agree to commence secession negotiations on the basis of a bare majority of 50 percent plus one of valid votes cast.

"The Supreme Court's intervention has now fundamentally altered the terms of [the] debate [on a clear majority]."

The Supreme Court's intervention has now fundamentally altered the terms of this debate. The Court has indicated that it is appropriate to require a "substantial consensus" before undertaking a fundamental and permanent constitutional change, such as the establishment of an independent state. However, although a bare majority of votes cast in a referendum would not satisfy this requirement, the Court did not specify what level of support would constitute a clear majority.

International experience suggests a range of possible decision rules that could reasonably be said to satisfy the Court's insistence on a clear majority. Given that Quebec referendums have historically drawn very large voter turnouts (about 94 percent in 1995), the most modest movement above 50 percent plus one of votes cast would be a requirement of 50 percent of eligible voters.[34] At the high end of the scale, representing the most rigorous enhanced majority standard for which there is significant international precedent, would be a requirement of two-thirds of votes cast.[35]

Public opinion polls conducted in Quebec over the past few years have indicated support for a threshold somewhere in the neighborhood of 60 percent of votes cast in order to commence the secession process.[36] Given the fundamental nature of the change associated with secession and the

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34 The republics of Latvia and Lithuania adopted this decision rule in referendums held on secession from the former Soviet Union. In the event, the actual majorities in favor of secession far exceeded this standard (93.2 percent in the case of Lithuania and 74.9 percent in Latvia).

35 The constitution of St. Christopher and Nevis uses the two-thirds standard for a referendum vote and also requires that any bill authorizing secession be approved by a two-thirds vote in the Nevis Island assembly. In a 1998 referendum, 61.7 percent of voters favored secession. Since the result fell below the two-thirds threshold mandated by the constitution, secession was not pursued.

Examples of higher thresholds exist. The 1990 constitution of the former Soviet Union required two-thirds of eligible voters to approve secession, while the Danish-Icelandic Act of Union of 1918 required three-quarters of votes cast. A 1944 referendum held in Iceland resulted in the "yes" side obtaining more than 98 percent of the votes cast. For a discussion of these international precedents, see Dion (1999).

36 See the August 1999 CROP Poll. See also the March 1996 CROP poll conducted for the CBC/Radio-Canada programs *The National/Le Point*, which found that only 31 percent of Quebec voters supported a threshold of 50 percent plus one, with most favoring a threshold of between 56 and 60 percent. Note, however, the Groupe Leger and Leger December 1999 Poll, which found that 49.8 percent of respondents indicated that 50 percent plus one of decided voters should be sufficient for Quebec to move toward sovereignty, while 47.3 percent disagreed.

need, as recognized by the Supreme Court, to protect minority rights in such a situation, a requirement of 60 percent appears both reasonable and justifiable.

On the other hand, any federal initiative to further clarify the ground rules applicable to secession should be cautious and minimalist. The federal government's proposals should be justified as the necessary or logical corollary of the principles of clarity endorsed by the Supreme Court of Canada. Of the available options, the only one that meets this minimalist standard is that of a simple majority (50 percent plus one) of eligible voters.

This standard has two principal attractions. First, on the assumption that the Supreme Court is correct in holding that some form of enhanced majority is appropriate in this context, a majority of eligible voters is the least exacting such standard.[37] As such, this threshold can rightly be seen as a reasoned and fair-minded attempt to give concrete form to the Supreme Court's requirement that a "clear majority" favor secession. In fact, certain formulations of the requirement in the Court opinion appear to imply the concept of a majority of eligible voters. In particular, the Court refers at various points to the fact that sovereignty must be supported by a "clear majority of the population of Quebec" or by a "clear majority of Quebecers," not to a majority of those casting ballots in a referendum (see paras. 92, 93, 104, and 151).[38]

Second, the majority of eligible voters standard has been publicly endorsed by former Quebec Liberal leader Claude Ryan.[39] The fact that a respected federalist figure such as Ryan has endorsed this standard means that it has some measure of political plausibility within Quebec political circles.

As in the earlier discussion of the wording of the question, what I propose is that the federal government indicate that this threshold is the *minimum* that must be achieved before secession negotiations could be commenced. In other words, meeting the majority of eligible voters standard would be a necessary but not sufficient condition for the commencement of sovereignty negotiations. It would still be appropriate for the federal government to undertake what the Supreme Court referred to as a "qualitative assessment" of the referendum result.

"[M]eeting the majority of eligible voters standard would be a necessary but not sufficient condition for the commencement of sovereignty negotiations."

For example, notwithstanding a clearly worded question, the debate during the referendum campaign itself might have produced such public confusion that it could not be said that there was a clear expression of a desire to secede from Canada. However, failure to achieve a majority of eligible

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37 In the 1995 Quebec referendum, this threshold would have translated into a requirement of approximately 54 percent of votes cast.

38 See, however, the discussion of this aspect of the Court's reasoning by Brun (1999, 4–5).

39 For example, in an August 21, 1998, interview on the CBC program *Dayside*, Ryan was asked "What is a clear majority?" He responded: "I suggested a few months ago that, if you at least had a majority of the registered voters, rather than a majority only of the voters who went to the polls,...it will bring the total to somewhere near between 53 and 55 percent. That would be safer. I don't think it should go too far in direction of upping the ante here" (transcript provided by Bowden Media Monitoring Limited, Ottawa).

voters in favor of secession on a clearly worded question should be regarded as evidence of a lack of substantial consensus in favor of this option.

Other Matters

With respect to the remaining two principles identified by the Supreme Court — the multilateral character of secession negotiations and the fact that difficult issues such as borders would necessarily be addressed — the federal government should avoid attempting to legislate a result or even a set of criteria governing either matter. There is simply no consensus on either of these issues. The views held by sovereigntists and federalists differ; so do those among federalists themselves. Any reference to these matters should be framed in the most general terms possible.

The Need for Legislation

In the fall of 1999, some commentators argued that the federal government should undertake an initiative designed to clarify the rules governing secession, but not through enactment of a statute. Instead, they suggested, the government could publish a white paper setting out its policy on the matter or introduce a resolution into the Senate and House of Commons.

The attractiveness of the white paper option is it would allow Ottawa to deal with the issue quickly and decisively. Also, Quebecers would likely regard such an initiative as less provocative than legislation since it would merely amount to a statement of government policy that could be subsequently modified at the stroke of a prime ministerial pen.

"[L]imiting the federal initiative to the tabling of a white paper would have significant disadvantages."

On the other hand, limiting the federal initiative to the tabling of a white paper would have significant disadvantages. Two principal objectives underlie and justify the desire to provide concrete form to the principles established by the Supreme Court of Canada. The first is to signal, well in advance, how the federal government would react in the context of a future sovereignty referendum. The intended audience would be not only the government of Quebec but also ordinary Quebec voters. Sending this signal would have the potential to promote democratic choice and dialogue by ensuring a fair and transparent process and allowing all parties to make their own choices with a clear understanding of how Ottawa would respond. A second, related justification is to legally bind the current federal government, as well as future governments, to the principles identified. Giving those principles a legally binding character would increase the likelihood that they would be respected in the crunch, even in the face of political pressure or controversy.

A white paper would accomplish neither of these objectives. Tabling one, rather than enacting legislation, would likely be interpreted as a subtle indication that the government was only partially committed to the ground rules identified. It would thus send a mixed signal to the government and

voters of Quebec and encourage the assumption, justified or not, that the principles would be abandoned if enough political pressure were brought to bear. Neither would a white paper accomplish the objective of legally binding the federal government itself, since it would be a mere declaration of government policy that had no legal force.

The other possible option — the passage of a resolution by the House of Commons — would suffer from even greater defects. Unlike legislation, a resolution would not be legally binding, but its introduction would expose the government to the same risks of a debate and a vote in the House of Commons associated with legislation.

Even if the government were successful in carrying that vote, a parliamentary resolution would likely be dismissed as mere window dressing. Consider the reaction to the "distinct society" resolution introduced into the House of Commons in late 1995 immediately following the last sovereignty referendum. Because resolutions are not legally binding, the initiative was widely condemned within Quebec as a meaningless gesture. It was also compared unfavorably with the distinct society clause in the Meech Lake Accord, which would have mandated interpretation of the Constitution in accordance with the recognition of Quebec as a distinct society.[40] A similar derisive reaction would no doubt greet the introduction of a resolution seeking to establish ground rules for a new referendum.

"[T]he federal government was correct to...introduce a bill giving effect to the requirements established by the Supreme Court."

I conclude that the federal government was correct to reject the option of a white paper or a resolution, and to introduce a bill giving effect to the requirements established by the Supreme Court of Canada.

The Federal *Clarity Act*

As noted above, the federal government introduced the *Clarity Act* in December 1999. How does the legislation measure up against the criteria and analysis set out in the previous section of this *Commentary*?

The Content of the Act

The *Clarity Act* consists of a mere three sections. Section 1 deals with the Supreme Court's requirement of a clear question, section 2 with the requirement of a clear majority, and section 3 with certain aspects of the secession negotiations. The preamble to the bill states that its purpose is merely to clarify the circumstances under which the government of Canada would enter into secession negotiations and that it does not restrict the right of a provincial government to consult its population through a referendum on a question of the province's own choosing.

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40 The federal government argued that the resolution was an interim measure, and that it would continue to seek support among the provinces for a constitutional amendment recognizing Quebec as a distinct society. See the discussion of the resolution in Monahan (1997, 196–197).

With respect to a clear question, the bill states that, within 30 days of a provincial government's officially releasing a referendum question on secession, the House of Commons would be asked to express its opinion, through a resolution, as to whether the question is clear. Section 1(3) sets out the standard that must be met in this regard:

> In considering the clarity of a referendum question, the House of Commons shall consider whether the question would result in a clear expression of the will of the population of a province on whether the province should cease to be a part of Canada and become an independent state.

This formulation seems almost a direct quotation from the relevant Supreme Court passages on this issue.

Section 1(5) requires that the House of Commons, in judging the wording of the question, take into account the views of other political actors, including the opposition parties in the legislative assembly of the province whose government is proposing secession. The mandatory nature of this requirement suggests that, if the opposition in the Quebec National Assembly refused to endorse a question as clear, the House of Commons would have difficulty coming to a different opinion. This innovation is important and constructive for the reasons discussed earlier in this *Commentary*. The federal government is prohibited from entering into negotiations on secession if the House of Commons determines that a referendum question is not clear.

"[I]f the opposition in the Quebec National Assembly refused to endorse a question as clear, the House of Commons would have difficulty coming to a different opinion."

In my view, the only controversial aspect of the legislation's treatment of the clear question issue relates to section 1(4), which seeks to deem certain questions unclear. It provides:

> For the purpose of subsection (3), a clear expression of the will of the population of a province that the province cease to be part of Canada could not result from
>
> > (a) a referendum question that merely focuses on a mandate to negotiate without soliciting a direct expression of the will of the population of that province on whether the province should cease to be part of Canada; or
> > (b) a referendum question that envisages other possibilities in addition to the secession of the province from Canada, such as economic or political arrangements with Canada, that obscure a direct expression of the will of the population of that province on whether the province should cease to be part of Canada.

Arguably, the requirements of section 1(4) go beyond the principles mandated by the Supreme Court of Canada. No doubt the 1995 referendum question, with its convoluted reference to an offer of partnership "within the scope of the Bill respecting the future of Quebec and of the agreement signed on June 12, 1995" was confusing. It is not self-evident, however, that a referendum question that "envisages other possibilities in addition to the

secession of the province from Canada, such as economic or political arrangements with Canada" would necessarily obscure the expression of the will of the population of the province on whether it should cease to be part of Canada. As Pellet argues in his recent analysis of the federal legislation (1999, 3), one can imagine Quebecers being asked a question that envisaged some form of continuing association with Canada (a free trade area, for example) without thereby rendering the question unclear.

One way to deal with this concern would be to amend the opening phrase in section 1(4) to require that such matters only be taken into account by the House in reaching its assessment (similar to the formulation in section 1(5)), rather than deeming such questions necessarily unclear.[41]

With respect to the requirement of a clear majority, section 2 of the bill requires that the House of Commons express its view, by resolution, on whether there had been a "clear expression of a will by a clear majority of the population of that province that the province cease to be part of Canada." In forming that assessment, the House is instructed to take into account a number of factors, including the size of the majority of valid votes cast in favor of the secessionist option and the percentage of eligible voters voting in the referendum. The House is also required to take into account the views of other political actors, including the opposition party in the legislature of the province seeking to secede. The federal government is prohibited from entering into secession negotiations unless the House of Commons determines that there has been a "clear expression of a will by a clear majority of the population of that province that the province cease to be part of Canada" (section 2 (4)).[42]

"[T]he government [could] state clearly in advance the threshold that would have to be achieved in order to trigger secession negotiations. "

Section 2 seems a faithful rendering of the statements of the Supreme Court. Unfortunately, however, it fails to go beyond the analysis offered by the Court itself. In particular, it does not provide any meaningful guidance as to what level of support would be required to constitute a clear majority. Certainly, risks would be associated with the federal government's committing itself to any particular standard in advance of a referendum. However, the alternative, reflected in section 2, is to leave the matter entirely to the discretion of the prime minister until after the ballots have been counted.

Arguably, a preferable approach would be for the government to state clearly in advance the threshold that would have to be achieved in order to

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41 Alternatively, section 1(4)(b) could be amended by replacing the words "that obscure" with the words "to the extent that such a reference would obscure." This amendment would clarify that a sovereignty referendum question could refer to political and economic arrangements with Canada as long as the reference did not obscure the expression of the will of the Quebec population to cease to be a part of Canada.

42 The reference in section 2(4) to a "clear expression of a will by a clear majority of the *population of that province*" could be interpreted as requiring, at a minimum, the consent of a majority of eligible voters. This potential interpretation is reinforced by the requirement in section 2(2) that the government consider the percentage of eligible voters voting in the referendum.

trigger secession negotiations. This approach would promote accountability and transparency since it would allow all parties to know in advance the basis on which the federal government would exercise its discretion. It would also reduce the possible confusion and disorder that could result in the aftermath of a very close vote on secession.

Media reports suggest that the federal government refrained from committing itself to a particular threshold because it feared that doing so could give rise to a legal challenge against the bill. It is true that the Supreme Court's opinion stated: "[I]t will be for the political actors to determine what constitutes a 'clear majority on a clear question' *in the circumstances under which a future referendum vote may be taken*" (para. 153; emphasis added). Yet it seems difficult to extrapolate from such a vague statement a prohibition on the advance establishment of any threshold for a clear majority. Otherwise Canadians would be forced to conduct a referendum campaign without any meaningful understanding of the basis on which the judgment as to the existence of a clear majority would be formed.

"[T]he legislation [should] have indicated that a minimum threshold of a majority of eligible voters would be required before secession negotiations could commence."

I remain of the view that it would have been preferable for the legislation to have indicated that a minimum threshold of a majority of eligible voters would be required before secession negotiations could commence, in the manner described earlier. However, even in the absence of such a specification, the legislation does make a contribution to the legal framework by setting out a process to be followed for determining whether a clear majority had been obtained. In the immediate aftermath of a majority "yes" vote, there would be widespread confusion over the consequences of the vote. In setting forth the process that would have to be followed by the political actors at the federal level, the *Clarity Act* at least provides some structure for what would be a very difficult political debate.

Finally, section 3 of the bill specifies that secession would require a constitutional amendment and that the negotiations for such an amendment would involve "at least the governments of all the provinces and the Government of Canada." The reference to the involvement of the provinces can be traced back directly to the Supreme Court's opinion. Moreover, the use of the term *at least* indicates that other political actors may well have a right to play a direct role in the negotiations, a mandate that again is consistent with the Court's reasoning.

Note also the requirement that the negotiations involve "all" the provinces. Legal scholars have an ongoing debate over whether the secession of a province would require the unanimous consent of the provinces or merely that of seven provinces representing 50 percent of the total Canadian population. My own view has been that unanimous provincial consent would be required since the secession of a province would directly affect matters identified in section 41 of the *Constitution Act, 1982* (Monahan 1995, 6–9).[43] In its submissions to the Supreme Court in the

43 The matters identified in section 41, such as the office of the Lieutenant Governor, the use of the English and French languages, and the composition of the Supreme Court of...

Secession Reference, however, the federal government refused to take a position on the applicable amending formula and urged the Court to refrain from commenting on this issue, advice that the Court accepted.[44] The requirement that all the provinces participate in the constitutional negotiations does not necessarily lead to the conclusion that they must all consent to an amendment.[45] However, it certainly tends to support such a rule as a practical matter.

Section 3 also indicates certain matters that would have to be "addressed in negotiations," including "the division of assets and liabilities, any changes to the borders of the province, the rights, interests and territorial claims of the Aboriginal peoples of Canada, and the protection of minority rights." Significantly, while such matters would have to be "addressed in negotiations," they need not be addressed in the constitutional amendment itself. This approach is also in keeping with the Court's opinion, which states that there are no predetermined outcomes on any of the matters that would be the subject of negotiations. Thus, while the issue of borders or the territorial claims of aboriginal peoples would have to be considered, they need not result in actual border changes. All that would be required is that both parties be prepared to negotiate such matters in good faith.[46]

An Assessment

"[The Clarity Act*] is a reasonable attempt to give expression to the principles identified by the Supreme Court of Canada."*

What overall assessment can be offered of the *Clarity Act*? In general terms, it is a reasonable attempt to give expression to the principles identified by the Supreme Court of Canada. In particular, it focuses on the circumstances that would trigger the duty to negotiate identified by the Court.

The bill is not, as some critics maintain, an attempt to undermine the right of the Quebec government to draft a referendum question of its own choosing, much less to dictate the substantive outcome of the sovereignty negotiations. Rather, it is a reflection of the Supreme Court's own instruction that the political actors give "concrete form to the discharge of their constitutional obligations." With the Court's having imposed on the government of Canada an obligation to negotiate secession if certain

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Note 43 - cont'd.

...Canada, can be amended only with the consent of the Senate and House of Commons and the legislative assemblies of all ten provinces.

44 In the *Secession Reference*, the Court says it "refrain[s] from pronouncing on the applicability of any particular constitutional procedure to effect secession unless and until sufficiently clear facts exist to squarely raise an issue for judicial determination" (para. 105).

45 It is logically possible that, although all provinces would participate in the negotiations, only seven of them would be required to adopted a resolution authorizing the constitutional amendment.

46 As the Court states in para. 93, a party that failed to act in accordance with the underlying constitutional principles would "put at risk the legitimacy of the exercise of its rights."

conditions are met, it is clearly appropriate and necessary for Ottawa to set out the criteria on which that judgment is to be based. Assuming that the government's criteria are a good faith attempt to give concrete form to the principles identified by the Court, which is the case with the *Clarity Act*, no objection to the legislation can be convincing.

To see clearly why this is so, consider the alternative scenario under which the federal government would be required to enter into secession negotiations whenever requested by Quebec. Under this approach, such negotiations would be obligatory whenever Quebec declared that there was a clear majority on a clear question in favor of secession. In other words, one of the parties to the negotiations could unilaterally dictate to the other the circumstances under which they must be commenced. Such a situation would be directly contrary to the entire framework set out by the Supreme Court, which clearly stated that no single majority or perspective is entitled to trump any other.

"[T]he federal government must be able to state the circumstances under which its independent discretion would be exercised. This is what the Clarity Act *seeks to achieve."*

Given that Quebec has no right to dictate to the federal government on the issue of commencing negotiations, it follows inexorably that the federal government must be able to state the circumstances under which its independent discretion would be exercised. This is what the *Clarity Act* seeks to achieve.[47]

In fact, it is the Quebec government's own recently introduced legislation on this issue that fails to respect constitutional rights of other governments. Bill 99 states, among other things, that "the Quebec people alone has the right to decide the political regime and legal status of Quebec" (section 2). The bill also states that the Quebec National Assembly is bound only by Quebec law in regard to the exercise of the right to self-determination (section 10). These provisions are a direct contradiction of the Supreme Court of Canada's declaration that Canadian law provides no unilateral right to secession. In short, Bill 99 seems to reflect the very constitutional unilateralism that the Quebec government claims to oppose.

What of the argument made recently by federal Progressive Conservative leader Joe Clark to the effect that the *Clarity Act* is deficient because it "offers no process for those in Quebec, or in the other provinces, who want to renew Confederation" (Clark 2000, A13)? Mr. Clark has proposed amending the legislation to provide a process for enacting constitutional changes dealing with matters such as Senate reform or changes to the division of powers.

With respect, Mr. Clark's criticisms are unpersuasive. First, the *Clarity Act* does not bar or limit the ability of provinces to hold referendums or to pass constitutional resolutions on subjects other than secession. The

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47 One hears an alternative argument that the federal government has a right to form a judgment as to when secession negotiations should begin but only after a referendum has occurred, not before. This argument is no more plausible than the one outlined above in the text. If Ottawa is entitled to form an independent opinion on a matter, it is surely also entitled to decide for itself how and when to come to that opinion.

"Any province that wished to initiate constitutional reform on other issues could continue to do so in whatever manner it believed appropriate, without regard to the terms of the legislation"

legislation deals exclusively with the circumstances under which negotiations on secession could be commenced. Any province that wished to initiate constitutional reform on other issues could continue to do so in whatever manner it believed appropriate, without regard to the terms of the legislation.

But what of the argument that the *Clarity Act* should be amended to require the House of Commons to consider such constitutional reform initiatives, or to regulate the manner in which the government can enter into constitutional negotiations on these matters? In my view, such a specification would be not only unnecessary but unwise.

Currently, governments have a general discretion as to the circumstances and the manner in which constitutional reform should be undertaken. Far from posing a problem, this flexibility has proven to be essential for securing provincial consensus for difficult constitutional change. If constitutional amendments in general were made subject to requirements similar to those set out in the *Clarity Act*, achieving constitutional reform would be more difficult rather than less. This is because the legislation, through its insistence on a clear referendum question and a clear majority, *limits* the ability of the federal government to enter into constitutional negotiations or to introduce constitutional amendments. What possible basis could there be for imposing such limitations on the right of the government to enter into constitutional discussions or to enact amendments on matters other than secession?

Consider, for example, the impact such restrictions would have had on the negotiations that led to the Meech Lake Accord. In early 1986, the federal government and the provinces entered into "informal discussions" on proposals that the Quebec government had put forward to secure Quebec's political assent to the constitutional changes that had been enacted in 1982. These discussions eventually led to unanimous provincial agreement to the terms of the Meech Lake Accord in 1987. Prior to that agreement, the House of Commons did not need to take a formal position on whether Quebec had put forward "clear" proposals or on whether there was a "clear majority" supporting them. Ottawa's evaluation of the wisdom and timing of any constitutional negotiations was a purely political rather than a legal matter. This flexibility permitted Ottawa to gauge the level of support for various potential amendments and to ensure that negotiations would not be commenced until there was reasonable assurance that they would prove successful.[48]

There is little doubt that similar flexibility will be essential whenever negotiations are initiated in the future on amendments designed to secure the Quebec government's political assent to the 1982 constitutional

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48 Of course, while the negotiations were successful in the sense that they resulted in the unanimous agreement of the federal and provincial governments, the accord ultimately failed to achieve the necessary legislative ratification, in part due to the "closed door" nature of the negotiations that produced it.

amendments. It would therefore be self-defeating for proponents of "Plan A" to seek to bring such negotiations within the scope of the *Clarity Act*. Such legal regulation would only make negotiations more complicated to start and more difficult to bring to a successful conclusion. It would be far better, in my view, to leave consideration of such matters to the political arena, with governments retaining needed flexibility to determine the manner and mode of constitutional negotiations designed to renew the federation.

Conclusion: The Time to Act

The final matter to be considered is whether now is an appropriate time to move ahead with this initiative. Many thoughtful commentators argue that, with the pro-sovereignty forces currently on the defensive, the federal government should have adopted a wait-and-see approach to this file. The Quebec government may decide not to hold a third sovereignty referendum, in which case the *Clarity Act* will be rendered superfluous. Moreover, proceeding with the bill risks reviving the flagging fortunes of the Parti Québécois and helping to create the winning conditions that Premier Bouchard seeks to call and win a referendum.

"[T]he federal government... should move forward as quickly as possible to enact [the Clarity Act*] into law."*

These arguments have some force, but, on balance, I believe that the federal governm ent was right to introduce the *Clarity Act* and that it should move forward as quickly as possible to enact it into law. The legislation is, on the whole, a reasoned and appropriate elaboration of the constitutional principles identified by the Supreme Court of Canada. It is designed to promote democratic accountability and protection against arbitrary action by government, both in framing the referendum question and in ensuring that there is an appropriate political mandate for fundamental political change. These safeguards are reasonable and appropriate for any society committed to the rule of law.

The government of Canada has a moral obligation to ensure that these values are respected, regardless of the short-term effect on nationalist sentiment in Quebec. While Ottawa obviously cannot afford to ignore public opinion, neither should the enactment of sound public policy depend entirely on a calculus in which the only variables are public opinion polls.

The alternative to taking action now would have been to wait until another sovereignty referendum was imminent. At that point, the risks of such an initiative would have increased dramatically. Attempting to clarify secession ground rules when winning conditions were already on the horizon would have meant that the federal initiative would undoubtedly become the major issue in the referendum campaign itself. In contrast, by acting now, when the waters are relatively calm, there is good reason to expect that any short-term negative reaction will have played itself out by the time Premier Bouchard is contemplating calling a third sovereignty referendum.

In any event, it cannot be assumed that these proposals will generate a sustained anti-federalist backlash among ordinary Quebecers. The intervention of the Supreme Court of Canada has been widely accepted within Quebec as legitimate. The *Clarity Act* is a kind of truth-in-advertising measure, designed to promote a transparent and understandable referendum question and to ensure that secession will occur only if a clear majority of Quebecers desire it. If the underlying rationale is properly communicated and defended, there is every reason to hope that most Quebecers will come to recognize it as being consistent with their own interests.

The considerations in favor of not taking action would be more decisive if the Quebec government had firmly renounced plans to hold a third sovereignty referendum. But Premier Bouchard has refused to back away from his plan to hold a third referendum (see Clark and Fife 1999).

Of course, the political benefits of the *Clarity Act* extend far beyond the mandates of the current governments in Ottawa and Quebec City. Enacting such legislation completes a larger project that began with the federal intervention in the *Bertrand* litigation. This project is to permanently redefine the terms on which this debate is conducted and understood in Quebec and Canada as a whole. If such a redefinition can be achieved, it would significantly decrease the likelihood that another sovereignty referendum will be held.

"No matter [when] another referendum is called..., ordinary Canadians... will be protected by fair and appropriate ground rules ensuring respect for democracy and the rule of law."

Prior to the Supreme Court reference, the Quebec government had been given free rein to maintain that it alone would define the terms on which the province could secede from Canada. The silence of the federal government in response to this claim was irresponsible and, had the 1995 referendum result gone the other way, would likely have produced political chaos. Ordinary Canadians across the country, particularly those living in Quebec, would have paid a high price for Ottawa's folly in attempting to ignore this issue in hopes that it would magically disappear of its own accord.

Having finally reached open ground, the way ahead is clear. No matter whether another referendum is called six months, six years, or sixty years from now, ordinary Canadians in all provinces and territories will be protected by fair and appropriate ground rules ensuring respect for democracy and the rule of law. These are enduring values that Canadians in all parts of the country share and believe in. By collectively reaffirming our commitment to them now, we will have reinforced the foundations on which the success and prosperity of future generations of Canadians will be built.

References

Angus Reid Group. 1999. "Quebecers on a Clear Question and a Clear Majority." December 14. Poll available at Internet website: www.angusreid.com.

Aubry, Jack. 1999. "Referendum rules from PM unwelcome, Charest says." *National Post*, October 30.

Brassard, Jacques. 1997. *Quebec and Its Territory.* Québec: Secrétariat aux affaires intergouvernementales canadiennes.

Brun, Henri. 1999. "Avis juridique concernant la notion de majorité dans le *Renvoi relatif à la sécession du Québec.*" Québec. Mimeographed.

Bryden, Joan. 1999. "Liberal MPs' support for secession legislation dwindling: Ontario MPs disapprove: Jean Chrétien risks defeat within his ranks." *National Post*, October 25.

Cameron, David R., ed. 1999. *The Referendum Papers: Essays on Secession and National Unity.* Toronto: University of Toronto Press in association with the C.D. Howe Institute.

Centre de recherche sur l'opinion publique (CROP). 1999. "Research in Public Opinion." Poll available at Internet website: www.pco-bcp.gc.ca/aia.

Clark, Campbell, and Robert Fife. 1999. "Bouchard gives PM 'a flat no' to peace offer on referendum rules." *National Post*, December 1, p. A1.

Clark, Joe. 2000. "Let's get back to plan A." *Globe and Mail* (Toronto), January 3, p. A13.

Crawford, James. 1997. "State Practice and International Law in Relation to Unilateral Secession." Expert report filed by the Attorney General of Canada, supplement to the case on appeal in the *Quebec Secession Reference*.

Dion, Stéphane. 1999. "Referendums on Secession and Requirements for Clarity: Examples from Northern Europe." Note for an address at the Conference of the Nordic Association for Canadian Studies. Reykjavik, August 5.

Ekos Research Associates. 1999. "Fin de siècle: fin de la souveraineté?" December 14. Poll available at Internet website: www.ekos.com.

Franck, T., et al. 1992. "L'intégrité territoriale du Québec dans l'hypothèse de l'accession à la soverainеté." In Commission d'étude des questions afférentes à l'accession du Quebec à la souveraineté, *Projet de Rapport*, Annexe. Québec, September.

Grand Council of the Crees. 1995. *Sovereign Injustice: Forcible Inclusion of the James Bay Crees and Cree Territory into a Sovereign Quebec.* Nemaska, Que.: Grand Council of the Crees.

Hogg, P.W. 1999. "The Duty to Negotiate." *Canada Watch* 7 (January–February): 34–35.

Lajoie, Andrée. 1999. "Avis juridique: le sens de l'expression 'question claire' dans le *Renvoi relatif à la sécession du Québec.*" Montréal, Université de Montréal, Faculté de droit. Mimeographed.

Mackie, Richard. 1999. "PM's strategy costs Liberals in Quebec." *Globe and Mail* (Toronto), December 23, p. A1.

Monahan, Patrick J. 1995. "The Law and Politics of Quebec Secession." *Osgoode Hall Law Journal* 33: 1–33.

———. 1997. *Constitutional Law.* Concord, Ont.: Irwin Law.

———. 1999. "The Public Policy Role of the Supreme Court of Canada in the Secession Reference." *National Journal of Constitutional Law* 11 (November): 65–105.

———, and Michael C. Bryant, with Nancy C. Coté. 1996. "Coming to Terms with Plan B: Ten Principles Governing Secession." *C.D. Howe Institute Commentary* 83. June.

Newman, Warren J. 1999. *The Quebec Secession Reference: The Rule of Law and the Position of the Attorney General of Canada*. Toronto: York University, Centre for Public Law and Public Policy.

Pellet, Alain. 1999. "Avis juridique sommaire sur *Le Project de loi donnant effet à l'exigence de clarté formulée par la Cour Suprême du Canada dans son avis sur le Renvoi sur la sécession du Québec*. Université de Paris X-Nanterre, December 13. Mimeographed.

Quebec Liberal Party. 1991. Constitutional Committee.. *A Quebec Free to Choose*. Report of the committee chaired by Jean Allaire. Quebec.

Robertson, Gordon. 1996. "Contingency Legislation for a Quebec Referendum." Paper distributed at the Confederation 2000 Conference, March 8.

Wells, Paul. 1999. "Other provinces would have no say in separation talks, Quebec says." *National Post*, November 19, p. A1.

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