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Communiqué

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Negotiate, ratify any Quebec sovereignty agreement under existing rules of Canadian Constitution, says C.D. Howe Institute study

In the event of a "yes" vote in another sovereignty referendum in Quebec, the terms of Quebec's accession to sovereignty should be negotiated and ratified in a way that involves the least chaos and disruption — that is, under the existing rules for amending the Canadian Constitution, says a *C.D. Howe Institute Commentary* released today.

The study, *Ratifying a Postreferendum Agreement on Quebec Sovereignty*, was written by Peter Russell, a political scientist at the University of Toronto, and Bruce Ryder, a law professor at Osgoode Hall Law School, York University.

The authors note that, while some Quebec sovereigntists might object even to trying to follow the constitutional route, there is now nearly complete consensus — likely soon backed by the Supreme Court of Canada — that Quebec cannot claim a right to unilateral secession under international law and that, in any event, there are a number of Aboriginal peoples in Quebec whose moral and legal right to self-determination is stronger than the Québécois can claim. Moreover, while Quebec has not ratified the *Constitution Act, 1982*, Quebec governments have already shown their willingness to use elements of the act when it suited their purposes. Finally, while the constitutional process would be difficult, it is better than the alternatives; with an awareness of the chaos that would result if the constitutional process fails, it should be possible to arrive at a negotiated sovereignty agreement.

Russell and Ryder suggest that a negotiated sovereignty agreement with Quebec could include constitutional changes that fall into some or all of five categories:

- constitutional amendments terminating the authority of existing federal and provincial institutions over the territory and people of Quebec;
- constitutional and statutory amendments to make remaining federal institutions workable in the short term;
- provisions, constitutional or otherwise, for any new links established between Quebec and Canada;

- new treaties, or a commitment to negotiate them, among Aboriginal peoples, Quebec, and Canada; and
- nonconstitutional items to be implemented by legislation, executive orders, or treaties.

To meet the requirements of the Canadian Constitution's amending formulas, Russell and Ryder say, many of these changes would have to be ratified by Parliament and the relevant provincial legislatures. This could be done by "unpacking" or separating the components of the agreement and subjecting them to a multitrack process of legislative ratification, or, Meech-style, by treating the agreement as a single package subject to the unanimity rule set out in the Constitution.

Russell and Ryder argue that, while only Alberta and British Columbia require a referendum on a constitutional amendment before its being presented to their provincial legislatures, moral and political legitimacy would demand that such changes also be ratified through a national referendum on substantial amendments. The changes should be deemed to have been accepted by the Canadian people if the referendum passes in each of Canada's five regions, rather than in each individual province.

Finally, Russell and Ryder insist that the separate consent of Aboriginal peoples in Quebec to any sovereignty agreement would be required by the spirit of the *Constitution Act, 1982*, by Canada's fiduciary obligations to Aboriginal peoples, and by emerging norms of international law. This would likely include the need to complete a trilateral treaty process with each Aboriginal nation in Quebec.

This publication continues the C.D. Howe Institute's postreferendum research agenda, which comprises two *Commentary* series. One series — of which the paper by Russell and Ryder is a part — is called "The Secession Papers," which, in the light of the results of the 1995 Quebec referendum, aims to assist Canadians to "think about the unthinkable." Papers already published in this series are *Coming to Terms with Plan B: Ten Principles Governing Secession*, by Patrick J. Monahan and Michael J. Bryant with Nancy C. Coté; and *Looking into the Abyss: The Need for a Plan C*, by Alan C. Cairns.

Complementing this effort is another series called "The Canadian Union Papers," focusing on ways to enhance Canada's political, economic, and social union. Papers already published in this series are: *Securing the Canadian Economic Union: Legal and Constitutional Options for the Federal Government*, by Robert Howse; *Drawing on Our Inner Strength: Canada's Economic Citizenship in an Era of Evolving Federalism*, by Daniel Schwanen; *Language Matters: Ensuring That the Sugar Not Dissolve in the Coffee*, by John Richards; *Time Out: Assessing Incremental Strategies for Enhancing the Canadian Political Union*, by Roger Gibbins; and *Citizen Engagement in Conflict Resolution: Lessons for Canada in International Experience*, by Janice Gross Stein, David R. Cameron, and Richard Simeon, with Alan Alexandroff.

Both series are being published under the supervision of David Cameron, a political scientist at the University of Toronto.

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Communiqué

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Négociez et ratifiez toute entente de souveraineté avec le Québec dans le cadre des règlements existants de la constitution canadienne, affirme une étude de l'Institut C.D. Howe

Si le « Oui » devait l'emporter lors d'un autre référendum québécois sur la souveraineté, il faudrait négocier les modalités d'un accès du Québec à la souveraineté et les ratifier d'une manière qui entraînera le moins de bouleversement et de perturbation possibles — c'est-à-dire dans le cadre des règles existantes afférentes aux modifications de la constitution canadienne, affirme un *Commentaire de l'Institut C.D. Howe* publié aujourd'hui.

L'étude, intitulée *Ratifying a Postreferendum Agreement on Quebec Sovereignty (La ratification d'une entente postréférendaire sur la souveraineté du Québec),* est rédigée par Peter Russell, un politicologue à l'Université de Toronto, et Bruce Ryder, professeur de droit à l'Osgoode Hall Law School de l'Université York.

Les auteurs indiquent que même si certains souverainistes québécois s'opposent ne serait-ce qu'à essayer de suivre la voie constitutionnelle, le consensus est presque entier — et il sera sans doute sous peu appuyé par la Cour suprême du Canada — que le Québec ne peut revendiquer un droit à la sécession unilatérale en vertu du droit international, et que toute manière, il existe plusieurs peuples autochtones au Québec dont le droit moral et légal à l'autodétermination est plus fort que celui des Québécois. Au demeurant, bien que le Québec n'ait pas ratifié la *Loi constitutionnelle de 1982,* les divers gouvernements du Québec ont manifesté leur empressement à avoir recours à certains éléments de ladite loi lorsqu'elle leur convenait. Finalement, même si le processus constitutionnel devait être ardu, il vaut mieux que toute alternative; en gardant à l'esprit les perturbations qui s'ensuivraient en cas d'échec du processus constitutionnel, il devrait être possible de parvenir à une entente négociée sur la souveraineté.

MM. Russell et Ryder proposent qu'une entente négociée sur la souveraineté avec le Québec comporte des changements constitutionnels portant sur certaines ou toutes les cinq catégories suivantes :

- des modifications constitutionnelles mettant fin à la compétence des établissements fédéraux et provinciaux existants sur le territoire et le peuple québécois;

- des modifications constitutionnelles et législatives qui permettront aux institutions fédérales restantes de fonctionner à court terme;
- des dispositions, constitutionnelles ou autres, afférentes à tout nouveau lien établi entre le Québec et le Canada;
- de nouveaux traités, ou un engagement de négociation envers ceux-ci, englobant les peuples autochtones, le Québec et le Canada;
- des éléments d'ordre non constitutionnel à mettre en œuvre par le biais de mesures législatives, de décrets ou de traités.

Pour répondre aux exigences des procédures de modification de la constitution canadienne, les auteurs affirment que plusieurs des changements devront être ratifiés par le Parlement et les assemblées législatives pertinentes. On pourrait y parvenir en « dégroupant » ou en dissociant les éléments de l'entente et en les soumettant à un processus multivoie de ratification législative, ou, à la manière de Meech, en traitant l'entente en bloc sujette à la règle de l'unanimité prévue par la Constitution.

MM. Russell et Ryder soutiennent que même s'il n'y a que l'Alberta et la Colombie-Britannique qui prévoient la tenue d'un référendum sur une modification constitutionnelle avant sa soumission aux assemblées législatives provinciales, la légitimité morale et politique exigent que de telles modifications soient ratifiées par le biais d'un référendum à l'échelle nationale. Les modifications ne devraient être considérées comme acceptées par le population canadienne que si le référendum est appuyé dans chacune des cinq régions canadiennes, plutôt que dans chaque province.

Finalement, les auteurs soulignent que l'esprit de la *Loi constitutionnelle de 1982* dicte qu'il faut obtenir le consentement des peuples autochtones du Québec à toute entente de souveraineté, en vertu des obligations fiduciaires du Canada envers les peuples autochtones, et des normes nouvelles du droit international. Ceci comporterait probablement un processus de traité trilatéral avec chaque nation autochtone du Québec.

Ce document poursuit le programme de recherche postréférendaire de l'Institut C.D. Howe, qui englobe deux séries de *Commentaires.* L'une des séries, dont fait partie le document de MM. Russell et Ryder, est intitulée « Les cahiers de la sécession »; à la lumière des résultats du référendum québécois de 1995, elle se veut d'aider les Canadiens à « concevoir l'inconcevable ». Parmi les documents déjà publiés dans cette série, figurent *Coming to Terms with Plan B: Ten Principles Governing Secession,* par Patrick J. Monahan et Michael J. Bryant avec la collaboration de Nancy C. Coté, et *Looking into the Abyss: The Need for a Plan C,* par Alan C. Cairns.

Parallèlement à cette série, en figure une autre intitulée « Les cahiers de l'union canadienne », qui porte sur les moyens d'améliorer l'union politique, sociale et économique du Canada. Parmi les documents déjà publiés, figurent les suivants : *Securing the Canadian Economic Union: Legal and Constitutional Options for the Federal Government,* par Robert Howse, *Drawing on Our Inner Strength: Canada's Economic Citizenship in an Era of Evolving Federalism,* par Daniel Schwanen, *Language Matters: Ensuring That the Sugar Not Dissolve in the Coffee* par John Richards, *Time Out: Assessing Incremental Strategies for Enhancing the Canadian Political Union* par Roger Gibbins, et *La participation des citoyens au règlement des conflits : les leçons de l'expérience internationale pour le Canada,* par Janice Gross Stein, David R. Cameron et Richard Simeon, avec la collaboration d'Alan Alexandroff.

Les deux séries sont dirigées par David Cameron, un politicologue de l'Université de Toronto.

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Ratifying a Postreferendum Agreement on Quebec Sovereignty

by

Peter Russell
and Bruce Ryder

If the sovereigntists win another referendum in Quebec, the terms of Quebec's accession to sovereignty should be negotiated and ratified under the existing rules for amending the Canadian Constitution, despite some sovereigntists' objections that Quebec need not abide by the terms of the *Constitution Act, 1982*, which it has never ratified. Any other process, however, is likely to lead to more chaos and disruption than would otherwise occur.

A sovereignty agreement could include constitutional changes that fall into some or all of five categories: constitutional amendments terminating the authority of existing federal and provincial institutions over the territory and people of Quebec; constitutional and statutory amendments to make remaining federal institutions workable in the short term; provisions, constitutional or otherwise, for any new links established between Quebec and Canada; new treaties, or a commitment to negotiate them, among Aboriginal peoples, Quebec, and Canada; and nonconstitutional items to be implemented by legislation, executive orders, or treaties.

The Constitution's amending formulas would require that many of these changes be ratified by Parliament and by the relevant provincial legislatures. This could be done by separating the components of the agreement and subjecting them either to a multitrack process of legislative ratification, or, Meech-style, by treating the agreement as a single package subject to the unanimity rule set out in the Constitution.

Moral and political legitimacy would demand that such changes also be ratified through a national referendum on substantial amendments. The changes should be deemed to have been accepted by the Canadian people if the referendum passes in each of Canada's five regions, rather than in each individual province.

Finally, the separate consent of Aboriginal peoples in Quebec to any sovereignty agreement would be required by the spirit of the *Constitution Act, 1982*, by Canada's fiduciary obligations to Aboriginal peoples, and by emerging norms of international law.

Main Findings of the Commentary

- In the event of a "yes" vote in another sovereignty referendum in Quebec, the terms of Quebec's accession to sovereignty should be negotiated and ratified in a way that involves the least chaos and disruption — that is, under the existing rules for amending the Canadian Constitution.
- While some Quebec sovereigntists might object even to trying to follow such a process, there is now nearly complete consensus — likely soon backed by the Supreme Court of Canada — that Quebec cannot claim a right to unilateral secession under international law and that, in any event, there are a number of Aboriginal peoples in Quebec whose moral and legal right to self-determination is stronger than the Québécois can claim. Moreover, while Quebec has not ratified the Constitution Act, 1982, Quebec governments have already shown their willingness to use elements of the act when it suited their purposes. Finally, while the constitutional process would be difficult, it is better than the alternatives; with good will and flexibility on all sides, it should be possible to arrive at a negotiated sovereignty agreement.
- A negotiated sovereignty agreement with Quebec could include constitutional changes that fall into some or all of five categories:
  - constitutional amendments terminating the authority of existing federal and provincial institutions over the territory and people of Quebec;
  - constitutional and statutory amendments to make remaining federal institutions workable in the short term;
  - provisions, constitutional or otherwise, for any new links established between Quebec and Canada;
  - new treaties, or a commitment to negotiate them, among Aboriginal peoples, Quebec, and Canada; and
  - nonconstitutional items to be implemented by legislation, executive orders, or treaties.
- To meet the requirements of the Canadian Constitution's amending formulas, many of these changes would have to be ratified by Parliament and the relevant provincial legislatures. This could be done by "unpacking" or separating the components of the agreement and subjecting them to a multitrack process of legislative ratification, or, Meech-style, by treating the agreement as a single package subject to the unanimity rule set out in the Constitution.
- While only Alberta and British Columbia require a referendum on a constitutional amendment before its being presented to their provincial legislatures, moral and political legitimacy would demand that such changes also be ratified through a national referendum on substantial amendments. The changes should be deemed to have been accepted by the Canadian people if the referendum passes in each of Canada's five regions, rather than in each individual province.
- Finally, the separate consent of Aboriginal peoples in Quebec to any sovereignty agreement would be required by the spirit of the Constitution Act, 1982, by Canada's fiduciary obligations to Aboriginal peoples, and by emerging norms of international law. This would likely include the need to complete a trilateral treaty process with each Aboriginal nation in Quebec.

If there is another sovereignty referendum in Quebec and the sovereigntists win, negotiations undoubtedly would follow between the government of Quebec and authorities representing other components of the Canadian federation regarding the terms of Quebec's change in constitutional status. Assuming such negotiations take place and are brought to a successful conclusion, the question of ratification then arises: How could the outcome of these negotiations be approved by the bodies to which the negotiators are responsible, and be given legal effect? The purpose of this Commentary is to outline a ratification process for a potential agreement on the terms of Quebec's accession to sovereignty that would be consistent with the requirements of Canadian law.[1]

In the first section, we present our case for choosing to implement sovereignty for Quebec through the instrument of the Canadian Constitution, despite the objections many sovereigntists have expressed and would no doubt continue to express to such a course. We also stress the importance of a "good faith" attitude for all participants, and consider the alternatives to a constitutionally sanctioned process — the very undesirability of which, ironically, may help our case.

Next, we briefly outline some issues related to ratification that would need to be covered in the agreement negotiations themselves for the process to work; the more all sides agree on process from the beginning, the better.

The third section outlines the components that would likely be included in a sovereignty agreement with Quebec and the constitutional and other changes that would be required to implement them. Although we advocate (and expect) that these changes would be kept to the minimum necessary in the short term, they are nevertheless extensive — not surprisingly, since the removal of a founding province from the federation would affect almost every aspect of Canadian government, law, and the justice system, as well as relations with Aboriginal peoples.

This exercise allows us, in the next section, to categorize these amendments in terms of what process would be necessary to ratify them. The Canadian Constitution offers five different amending formulas — which one applies in which case depends on the content of the amendment.

Once this "unpacking" has made clear which legislatures' approval would be constitutionally necessary to ratify various parts of a sovereignty agreement, we look at the ratification process in the context of Canadian political realities, which would have to include not just legislative sanction but popular consultation by referendum and treaty arrangements with the Aboriginal peoples of Quebec.

Finally, we briefly discuss an extreme situation in which the limits of constitutionalism might be reached and strict adherence to the rule of law might be unreasonable.

The Constitutional Route to Sovereignty

The Case for a Constitutional Process

We hold the view that, if there is to be a radical change in Quebec's constitutional status — including its becoming an independent state — such a change should be effected through a process that is consensual and retains legal continuity. Thus, we favor a process of ratification that is carried out under the existing rules for amending the Canadian Constitution. This is not the only way Quebec could achieve sovereignty, but it is the way that involves the least chaos and disruption.

Many Canadians may regard this effort to spell out how Quebec's sovereignty could be achieved under the Constitution as a contradictory, dangerous, or even treasonous exercise. In the words of one colleague, "it is like telling the burglar who is about to break into your house how to unlock the door so that he won't smash any windows."

On the other hand, Quebec sovereigntists are apt to argue that requiring that the transition to sovereignty be achieved through the rules of the Canadian Constitution places them in a legal straitjacket. "It is like telling us," they

might say, "how to unlock the door but giving us a key that just will not work."

We hope this Commentary helps persuade both of these groups that, in the event of a sovereigntist win in a Quebec referendum, it would be in the interest of all parties involved to try to reach a settlement through the existing constitutional machinery.

As for Canadians who oppose thinking about the unthinkable, we join other recent C.D. Howe Institute Commentary authors in believing that the narrowness of the federalists' win in the 1995 Quebec referendum demonstrates that we can no longer afford to take an ostrich-like approach to the possibility of Quebec sovereignty.[2] While we would like to see Quebec's constitutional aspirations accommodated through federal restructuring, this may not happen; a Plan B is clearly needed. Only those who are unwilling to support Canada's recognition of Quebec sovereignty under any circumstances can oppose efforts to find a process that would reduce the economic and societal disruption that would follow a clear indication by Quebecers of their will to secede. On this point, we support the position taken by then-federal justice minister Allan Rock on announcing his government's decision to refer questions on Quebec secession to the Supreme Court of Canada: "This country will not be held together against the will of Quebecers clearly expressed."[3] Like Mr. Rock and most Canadians, we hope that independence from Canada will not become the clear preference of most Quebecers. But if it does, we believe it would be best for everyone that this choice not be blocked by force, and that a serious effort be made to give effect to that choice through a process that observes the rule of law. Such a process entails the least threat of economic dislocation, legal uncertainty, and communal violence.

Sovereigntist Objections

Quebec sovereigntists tend to resist even more than Canadian patriots the idea of achieving Quebec's independence through the instrument of the Canadian Constitution. They advance at least three arguments to support this view:

- that secession following a sovereigntist referendum victory could be accomplished unilaterally, and would be sanctioned by international law despite its violation of Canadian constitutional law;
- that, since the government of Quebec did not ratify the *Constitution Act, 1982*, it should not be bound by the rules for amending the Constitution set out in part V of that act; and
- that any attempt to implement a sovereignty agreement in accordance with the amending procedures would prove futile — the rigidity of the amending formulas means they would simply serve to keep Quebecers in a constitutional straitjacket.

Let us consider each of these objections in turn.

The Right of Self-Determination

The first point, that Quebecers as a people have, under international law, a right of self-determination that takes precedence over the Canadian Constitution, is the nub of two of the questions the federal government has referred to the Supreme Court of Canada (see Box 1).

We believe the Supreme Court will reject the view that international law gives Quebec the right to secede unilaterally. One reason for this conclusion is that the inhabitants of the province of Quebec as a whole are not a single people, and therefore the province does not constitute a self-determination unit for the purposes of international law. Even for a single people, the broadest interpretation of the international right of self-determination gives rise to a right of secession only in situations where the people in question suffer under an alien or colonial regime or endure analogous forms of oppression, such as the widespread deprivation of civil rights. Since, clearly, the Québécois people do not suffer political oppression, there is nearly complete consensus

Box 1: ***The Supreme Court of Canada Questions***

On September 26, 1996, the federal government announced that it would refer to the Supreme Court of Canada three questions on whether Canadian constitutional law or international law supported the Quebec government's assertion that the province has the right to secede unilaterally from Canada. These questions, set out in Order-in-Council 1996-1497, are as follows:

Whereas the Government of Quebec has expressed its view that the National Assembly or government of that province has the right to cause Quebec to secede from Canada unilaterally;

Whereas the Government of Quebec has expressed its view that this right to cause Quebec to secede unilaterally may be acquired in a referendum;

Whereas many Quebecers and other Canadians are uncertain about the constitutional and international situation in the event of a unilateral declaration of independence by the government of Quebec;

Whereas principles of self-determination, popular will, democratic rights and fundamental freedoms, and the rule of law, have been raised in many contexts in relation to the secession of Quebec from Canada;

And whereas the Government of Canada sees fit to refer the matter to the Supreme Court of Canada;

Therefore, His Excellency the Governor General in Council, on the recommendation of the Minister of Justice, pursuant to section 53 of the Supreme Court Act, hereby submits to the Supreme Court of Canada for hearing and consideration the following questions:

1. Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally?
2. Does international law give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?
3. In the event of a conflict between domestic and international law on the right of the National Assembly, legislature or government of Quebec to effect the secession of Quebec from Canada unilaterally, which would take precedence in Canada?

among legal commentators that neither the province of Quebec nor the Québécois people can claim a right to unilateral secession as an element of the right of self-determination as it is currently understood in international jurisprudence.[4]

In the face of this consensus, which the Supreme Court in all likelihood will confirm, sovereigntist commentators no longer rely, in their public statements, on the international right of self-determination as the legal basis for their political project. For example, the text and preamble of Quebec's Bill 1 — introduced just prior to the 1995 referendum to set out the rationale for seeking sovereignty and the procedures by which it would be obtained — contained no reference to the international right of self-determination.[5] Thus, when sovereigntists say that international law will provide the basis for their accession to sovereignty, what they must mean is that, ultimately, the new state would be recognized by other states if it can establish effective political control of its territory.[6] This political control could be accomplished either by constitutional negotiations and agreement or by winning a high-risk contest of political wills with the rest of Canada and dissident minorities within Quebec; our point is simply that the former route is to be preferred.

It must also be recognized that there are a number of Aboriginal peoples within the province of Quebec whose right to self-determination — in both moral and legal terms — is as strong, if not stronger, as any that the Québécois people can claim.[7] Therefore, a majority vote of Quebecers cannot be regarded as having the legal or moral authority to seal the constitutional destiny of Aboriginal peoples whose homeland is partly or entirely in Quebec.[8] On the other hand, because Quebec is also the principal homeland of French Cana-

dians, one of the founding peoples of the federation, a clear expression by Quebecers of their desire for a fundamental change in Quebec's constitutional status would provide a moral imperative on the part of all the constituent parts of the Canadian federation to enter into constitutional negotiations with Quebec.

If we are wrong, and Canada's highest court finds that Canada must recognize the right of the Quebec National Assembly or the Quebec government to effect the secession of Quebec unilaterally, then there would be no need to consider how the terms of secession might be ratified under the Constitution of Canada. A secession agreement would take the form of an international agreement, and be subject to procedures in the two separate countries for giving legal effect to international treaties. But because such a result is unlikely, we think it is important for sovereigntists to be more amenable to the possibility of achieving sovereignty pursuant to the Constitution.

The "Illegitimacy" of the *Constitution Act, 1982*

The second sovereigntist argument against requiring that the terms of sovereignty be ratified pursuant to the Constitution is a moral one, alleging the illegitimacy of the changes made to the Constitution in 1982 — which include the rules governing its amendment — because they were not approved by Quebec's National Assembly.[9] Although the Constitution Act, 1982 is the only instance since Confederation where constitutional changes affecting Quebec's powers have been made without Quebec's consent, the Supreme Court of Canada in its 1982 opinion in the Quebec Veto Reference found that there was, in fact, no constitutional convention requiring Quebec's consent for such changes.[10]

The reasons advanced by the Court in support of this finding were not, however, very convincing. As the Court itself acknowledged, in the final analysis constitutional conventions are determined not in the legal but in the political arena. The risk of proceeding with constitutional changes affecting Quebec but not approved by its elected provincial government has been widely acknowledged since 1982; removing this risk to national unity has been the principal rationale for attempting to make further constitutional changes that would restore the legitimacy of the Constitution in Quebec.

Still, while all of this lends support to the illegitimacy charge, the fact remains that the Constitution Act, 1982 provides the only legally authorized way of formally amending the Constitution. Quebec governments, despite their position on the illegitimacy of the 1982 process, have nonetheless been willing to make use of provisions of the act when they deemed it in their interest to do so — for example, Quebec's use of the notwithstanding clause in the Charter of Rights and Freedoms, and its willingness to explore the possibility of a bilateral agreement with Ottawa regarding denominational school rights. We submit that it would be in the interests of the Quebec government, if it wins a sovereignty referendum, to endeavor to achieve its constitutional objectives through the lawful procedures for effecting constitutional change in Canada.

A Constitutional Straitjacket

This brings us to the third, and most practical, of the objections the Quebec government might have to complying with the Canadian constitutional amending rules: the danger of being subjected to a constitutional straitjacket. Most of the popular and scholarly discussion on this subject — on both the federalist and sovereigntist sides — has emphasized how difficult it would be to settle the terms of Quebec sovereignty through the demanding Canadian constitutional amendment process. Indeed, there has been a tendency on the part of those federalists who insist that Quebec comply with the rule of law almost to flaunt the stringency of the constitutional requirements. This is the epitome of "tough love" constitutionalism, which has little hope of persuading Quebec sovereigntists that it would be in their interest

to make a sincere effort to achieve their goals through established constitutional procedures.

Our approach is not to deny the difficulty of the constitutional process, but to explore carefully how it might apply to a Quebec sovereignty agreement — to see how it could work with maximum flexibility. Recognizing the large number of obstacles to a legally ratified agreement, we also consider the circumstances under which it might be reasonable, for both sides, not to insist on full compliance with the rule of law.

The Need for Good Faith

The workability of constitutional amendment procedures depends on much more than the rules themselves. The likelihood of actually forging an agreement depends just as much on the moods and attitudes of the constitutional negotiators and on the political context in which their efforts take place. There would be virtually no hope of persuading sovereigntist victors in a Quebec referendum to enter into negotiations governed by the existing Constitution if the Canadian government adopted a posture that, in effect, said to Quebec: "You can only have independence through Canada's constitutional process. You had better understand how long and difficult that process is bound to be, and you can't count on our doing anything to make it any easier. And bear in mind that, if we cannot reach agreement with you through this process, you will just have to forget about your sovereigntist plans."

Nor would there be any point in the federal government and the other partners in Confederation agreeing to negotiate with a Quebec government that adopted a take-it-or-leave-it approach — that said, in effect: "Negotiate the terms of the Quebec-Canada partnership we desire or we will simply go ahead and unilaterally declare Quebec's independence from Canada." Without a commitment on both sides to bargain in good faith — to making an honest effort to come to mutually acceptable terms — there is really no point to constitutional bargaining, no matter how flexible or rigid the formal amending rules may be.

For bargaining in good faith to take place under the existing Constitution, both sides must have strong reasons to want the process to succeed. The incentive cannot be based on shared constitutional objectives. Quite to the contrary, as Alan Cairns so lucidly argues, the constitutional objectives of the Quebec and Canadian governments are likely to be as far apart as they have ever been after yet another acrimonious referendum debate.[11] But both governments — and all Canadians — would have one strong motive for bargaining in good faith under the Constitution: a desire to avoid the unattractive consequences of the alternatives to that process.

Alternatives to the Constitutional Process

What are the alternatives to a negotiated settlement under the Constitution? Essentially, they come down to a unilateral declaration of independence (UDI) by Quebec, followed by two possible responses.

One response — indeed, the one Quebec sovereigntists have been counting on — is for Canada to recognize an independent Quebec before there is any agreement on such vital issues as the rights of Aboriginal peoples and other minorities within Quebec, land transportation connections between the Atlantic provinces and the rest of Canada, apportionment of the debt, currency, citizenship, borders, and trade relations. According to this scenario, Canada would raise these and other matters with Quebec after recognizing it as an independent country. Negotiations would then be conducted not within the framework of the Canadian Constitution but on a nation-to-nation basis within the framework of international law.[12]

We can well understand why Quebec sovereigntists would welcome this outcome. Except for a political partnership with Canada, it would give them nearly everything they seek, on a silver platter. But we cannot see how it could be right or prudent for the government of Canada to concede so much to Quebec. Among other things, such a course of action

would mean abandoning Canada's fiduciary obligation to Aboriginal peoples in Quebec, leaving in limbo the Canadian citizenship rights of Quebecers, and exposing taxpayers in the rest of Canada to a significantly increased burden of public debt. The government of Canada has neither the legal power nor the political mandate to make such concessions.

Ottawa's silence during the 1995 referendum on what it might do if the sovereigntists won may have encouraged sovereigntists to believe that it would accede to a Quebec UDI without any negotiations. Ottawa has since made it clear that it rejects the possibility of unilateral secession, however, and it will likely use the outcome of the reference to the Supreme Court of Canada to underline its newfound resolve on this issue. Thus, for Canada to recognize a sovereign Quebec based on a UDI without any real effort to negotiate the terms of secession is neither a desirable nor a realistic possibility.[13]

The remaining alternative is a unilateral declaration by Quebec that is not accepted by Canada. A challenge by the Canadian government to a Quebec UDI would plunge us all into a situation in which two regimes, the one legal and constitutional, the other illegal and unconstitutional, confront each other, both claiming authority over the same territory and people, both with armed security forces at their disposal, both with passionate supporters. This surely is a recipe for disaster with the gravest consequences for economic stability and social peace. But we might very well end up in just such a mess if a negotiated agreement on the terms of Quebec sovereignty were not reached and ratified. Unless we are convinced that is the only choice, it would be the height of imprudence to plan to be in such a situation from the outset, or to fall into such a situation simply through the lack of any other plan. Our paper aims to show the viability of another plan.

Past rejection of more modest attempts to reach a constitutional accommodation with Quebec may well give rise to skepticism about the possibility of reaching agreement on the terms of Quebec's accession to sovereignty. We acknowledge the possibility that anger and hostility generated by an affirmative referendum vote might prompt some groups to seek to block the move to sovereignty, or to punish Quebec by inflating the costs it would have to bear. We believe, however, that the pressures toward achieving a reasonable and rapid agreement would be more powerful. A postreferendum scenario likely would give rise to a more promising context for agreement than we have seen in previous rounds of constitutional negotiations precisely because of the sense of urgency and crisis it would engender.

The Limits of Constitutionalism

Concerned though we are that, if Quebec were to secede from Canada, it do so in a manner that does not lead to a disruptive break in legal continuity, we recognize that there are very real political limits to maintaining constitutionalism. Even a constitutional process that is entered into in good faith by all concerned, operated with the maximum degree of flexibility, and carried out over a reasonable period of time might still fail to reach the degree of consensus required by the Constitution to achieve Quebec's sovereignty. In such a situation, there would be very little likelihood that a Quebec government that had won a referendum on sovereignty would accept defeat in the Canadian constitutional process and simply abandon the sovereignty project.

At that point, Canada would be at a very dangerous impasse. There would be a strong possibility that the government of Quebec might proceed unilaterally — and, in our view, unconstitutionally — to declare Quebec a sovereign country no longer bound by the Constitution of Canada. We do not think that such a dangerous situation could be avoided by such means as insisting that Quebec agree never to attempt a UDI as a precondition to beginning sovereignty negotiations; such a demand would require Quebec to discard a great deal of its bargaining strength. However much Canadians outside Quebec may detest Quebec's

"knife to the throat" tactics, no Quebec government elected with a sovereignty mandate and accountable to a majority of "yes" voters following a sovereignty referendum would agree to abandon completely the possibility of a UDI. Insisting on the abandonment of the possibility of unilateralism would simply invite a UDI sooner rather than later.

By the same token, Quebec sovereigntists could not expect the federal government to agree to accept a Quebec UDI unconditionally if the effort to negotiate and effect secession in a constitutional manner were to fail. Ottawa must retain its freedom to withhold recognition of Quebec sovereignty if that sovereignty has been achieved unconstitutionally. It would be unconscionable for the federal government or other negotiating bodies to agree in advance that, no matter what issues have led to a breakdown in negotiations or in what circumstances there has been a failure to ratify a negotiated agreement, it would recognize Quebec as an independent country. Such an agreement would require the government of Canada to abandon its legal and political responsibilities and to concede far too much of its bargaining power.

Participants in sovereignty negotiations might be expected to agree in advance on what they would do if negotiations succeeded, not on what they might do if negotiations or ratification failed. Neither side would forswear, as a precondition of entering into such a process, acting directly to secure its own vital interests if the process failed.

Yet the dire nature of what might happen if a constitutional sovereignty process failed, though fearful to contemplate, may provide the very discipline needed to induce accommodation and compromise.

There is a scenario in which it would be reasonable to recognize Quebec's sovereignty outside of a constitutional process: If a negotiated agreement had been reached and popularly supported by majorities in all parts of Canada but still lacked formal ratification by all of Canada's legislative assemblies, it might, in some circumstances, make sense for the federal government to go ahead and recognize Quebec's sovereignty — on terms that had a wide basis of support across the country — rather than let strict adherence to the letter of the law trump all other principles. We discuss this possibility toward the end of this Commentary, in the section on the ratification process.

Ratification Issues in the Negotiations

In the past, efforts at major constitutional change in Canada have failed to take into account how proposals agreed to by the negotiators would be ratified. This lack of sufficient attention to the ratification process was evident in both the Meech Lake and Charlottetown rounds. In both cases, the negotiation stage was a success; the negotiators reached unanimous agreement. Yet both efforts at constitutional renewal failed because the agreements did not survive the ratification process. Any future negotiations contemplating major changes to Canada's Constitution should avoid this mistake.

The negotiating stage of the constitutional amendment process is not governed by rules set out in the Constitution. The only constitutional provision pertaining to the process of negotiating amendments is a requirement that the prime minister invite "representatives of the aboriginal peoples of Canada to participate in the discussions" of a first ministers' conference before any amendment is made to sections of the Constitution that expressly refer to Aboriginal peoples.[14] Aside from this important legal commitment, all other features of the negotiating process are matters of political judgment.

Canada has a strong tradition of using "executive federalism" — meetings of first ministers and other senior ministers and officials from both levels of government — as the basic means of negotiating and drafting proposals for constitutional change. In the "multilateral process" that led to the Charlottetown Accord, territorial ministers and representatives of Aboriginal organizations participated along with federal and provincial ministers. For negotia-

tions on a matter as fundamental as removing a province from the federation or significantly altering its status, the negotiating process is bound to be at least as broad and complex as the Charlottetown process.

In an earlier Commentary, Patrick Monahan and Michael Bryant set out a multilateral structure and process for negotiating a post-referendum agreement.[15] Although we do not, in this paper, address the negotiating process per se, we consider it crucial to decide on some ratification issues at the negotiating stage. We have identified three such issues for consideration below.

The Referendum Process

First and foremost, negotiators should agree in advance as to whether or not ratifying referendums are to be held in some or all of the jurisdictions. If they are, further important questions are: What would the question be? What would constitute a "yes" result, committing the parties to proceed with formal legislative ratification? Some analysts of the Charlottetown process have argued that the negotiators might have arrived at a somewhat different accord had they agreed from the start that the product of their negotiations was going to be subjected to a referendum process.

A Single Package?

The second issue relates to the package of proposals on which the negotiators have agreed. As we will show, some elements of a sovereignty agreement would not require any kind of constitutional amendment, while others would be subject to constitutional amendment rules more flexible than the unanimity rule, and a few items might require ratification by all the provincial legislatures and the federal Parliament. Therefore, the possibility of breaking the package up for the ratification stage, rather than treating the agreement as a seamless whole, is a vital issue that must be considered in the negotiation phase. The position and expectations of the negotiators regarding this point might well affect bargaining on various parts of the package. Our analysis in the next section of the likely ingredients of a sovereignty agreement will probe the possibility of a multitrack ratification process.

The Timetable

The third ratification process issue that needs to be addressed in the negotiation phase is the timetable. A fatal mistake in the Meech Lake round was the negotiators' failure to commit to a timely ratification schedule. If a referendum is to be part of the process, all parties would need to reach agreement on the timing of both the referendum and the subsequent legislative process. Given that some legislatures require committee hearings on any constitutional proposals brought before them, the timetable would have to accommodate these. Aboriginal participants might well have their own ratification processes, which would also have to be fitted into the ratification timetable.

Likely Components of a Sovereignty Agreement

The Canadian Constitution does not contain an explicit clause setting out the rules for removing a province from the federation. This is not unusual for a constitution; most states — federal or unitary — make no provision in their founding documents for the secession of a part of the state.

The absence of an explicit secession clause does not mean, however, that the general rules governing constitutional amendments cannot be applied to the secession of a province or to any other change in a province's constitutional status. Part V of the Constitution Act, 1982 sets out amending procedures for different categories of amendment, which together cover all conceivable changes to the Constitution. Thus, we take the view, shared by other constitutional scholars, that the existing procedures for amending the Constitution could be used to effect the secession of a province.[16] Where we depart from others who have written on this subject is in viewing a sovereignty agreement as having a number of components,

as well as in questioning the assumption that every part of the agreement would necessarily be subject to a single ratification rule and process.

The Minimum Changes Necessary

To make our case, we must try to predict what the components of a sovereignty agreement with Quebec would be. One key assumption is that the changes to the Constitution at this stage would be the minimum necessary to remove Quebec from, or alter its relationship with, Canada. We know that there would be great pressure to rework the Constitution for a Canada without Quebec. The dominance of Ontario, which would have nearly half the seats in the House of Commons, and the need to replace or abolish the Senate are just two of the issues that would give rise to calls for an immediate revamping of the Constitution should Quebec become sovereign.

These rebalancing issues would not, however, be of direct relevance to the government of Quebec; they are matters for negotiation among the governments that would remain subject to the Constitution. Keeping these rebalancing issues separate from the sovereignty issues in the process of negotiation would be a difficult task, but an essential one. Otherwise, as Monahan and Bryant have argued, the period of uncertainty following the referendum could be far lengthier and costlier than it need be.[17] In the end, we believe Cairns' arguments for a temporary structure as close as possible to the status quo would carry the day, and that the Constitution of a Canada without Quebec would be reconstructed, without Quebec's participation, after the sovereignty process was complete.[18] Thus, our analysis describes only those changes necessary to facilitate an orderly transition to Quebec sovereignty.

Five Categories of Change

These amendments would fall into five categories, as follows:

1. constitutional amendments terminating the authority of existing federal and provincial institutions over the territory and people of Quebec;
2. constitutional and statutory amendments to make remaining federal institutions workable in the short term;
3. provisions, constitutional or otherwise, for any new links established between Quebec and Canada;
4. new treaties, or a commitment to negotiate them, among Aboriginal peoples, Quebec, and Canada; and
5. nonconstitutional items to be implemented by legislation, executive orders, or treaties.

Removing Quebec from Existing Constitutional Arrangements

The first step would be the simple but major one of removing Quebec from the application of the current Canadian Constitution and terminating the authority of existing federal and provincial institutions over the territory and people of Quebec. Amendments would be needed to define the territory of Quebec and to declare it no longer subject to the Canadian Constitution. Existing constitutional provisions referring to the executive, legislative, and judicial branches of the government of Quebec — that is, the lieutenant governor, the National Assembly, and the courts of Quebec — would have to be repealed.

It might seem at first that this step could be accomplished with a long list of amendments removing every reference to Quebec from the Canadian Constitution. However, such an approach would be merely cosmetic, unnecessary, and in some instances would amount to a meddlesome attempt to rewrite history. Consider, for example, section 5 of the Constitution Act, 1867, which provides that "Canada shall be divided into four provinces, named Ontario, Quebec, Nova Scotia, and New Brunswick." Simply deleting Quebec from this provision would leave the text describing a Canada of three provinces that never existed.

Of course, references to the other six provinces and the three territories created since 1867 could be added at the same time as Quebec is deleted, but it is hard to see what the point of such an exercise in modernization might be. The Constitution is composed of many historical layers; those who have drafted its constitutional documents over the past 130 years have generally chosen to add new layers of text rather than to rewrite earlier historical realities. If the Constitution Act, 1867 has survived this long with its image of a Canada of four provinces nestled snugly under Britain's colonial wing, we see no reason some of its provisions could not be left intact to remind us that a sovereign Quebec was once a province, too.

Redefining Federal Institutions

With Quebec excised from the constitutional definition of Canada, we would need a package of amendments ensuring that the remaining constitutional provisions and federal institutions were legitimate and workable in the short term. Thus, for example, the constitutional provisions setting out Quebec's representation in the House of Commons and the Senate would need amending, and legislation would have to be passed removing the current guarantee that three Quebec judges sit on the Supreme Court of Canada.

Establishing New Links

It is possible that a third group of amendments of a more positive nature would also form part of the sovereignty package — namely, new provisions in the Constitution dealing with relationships between a sovereign Quebec and Canada. These links could include matters ranging from special citizenship or mobility provisions, to a trade dispute mechanism pending Quebec's admission to the North American Free Trade Agreement, to the full political association desired by the present leadership of the Parti Québécois.

We take no position on which, if any, of these links should be agreed to and given constitutional expression. We are concerned only with considering how any such constitutional changes agreed to in negotiations would be ratified.

Concluding Treaties

One kind of constitutional change that would be necessary in the event of Quebec's accession to sovereignty does not involve amendments in the ordinary sense: the conclusion of treaties with Aboriginal peoples. Section 35(1) of the Constitution Act, 1982 recognizes and affirms the treaty rights of Canada's Aboriginal peoples. Section 35(3) specifically provides that these treaty rights include "rights that now exist by way of land claims agreements or may be so acquired."

Much of northern Quebec is covered by the James Bay and Northern Quebec Agreement (1975) and the Northeastern Quebec Agreement (1978), comprehensive agreements entered into by Quebec, Canada, and the Cree, Inuit, and Naskapi peoples. These agreements include terms stating that they cannot be changed without the agreement of the signatories. Since the provisions of these treaties are constitutionally protected by section 35(1), it follows that, as long as section 35 remains in force in its present form, changes necessitated by Quebec sovereignty would have to be negotiated and agreed to by all parties, and provision would have to be made to entrench the contents of the new treaties in the constitutions of Quebec and Canada. The same would be true of any new comprehensive agreements with Aboriginal peoples in Quebec included in the sovereignty settlement.

The northern Quebec treaties could be legally altered without the consent of the Aboriginal signatories only if section 35 itself were amended to remove the treaties from their existing constitutional protection. This may be legally possible, since the amending formulas in the Constitution Act, 1982 give no formal role to Aboriginal peoples. But the notion that Aboriginal peoples ought to have a veto over amendments that would affect their rights has become a basic political principle, and perhaps even a constitutional convention.[19] Amending

section 35 without Aboriginal consent, to enable the abrogation of treaty rights without Aboriginal consent, would constitute an obvious and flagrant violation of fundamental moral and political principles. It would violate both the Crown's fiduciary obligations embodied in Canadian domestic law, as well as emerging international norms. Indeed, in the face of such an oppressive exercise of state power, the courts might superimpose the Crown's fiduciary obligations on the operation of the amending formulas, thus making it impossible to alter fundamentally the constitutional status of Aboriginal peoples without their consent.

We therefore conclude that, while there is room to debate whether or not it is legally possible to remove by constitutional amendment the current legal requirement of Aboriginal consent to any changes to the northern Quebec treaties, Canadian governments would not consider pursuing such a morally objectionable course. Thus, we assume that changes to existing treaties and new treaties with Aboriginal peoples in Quebec would have to be negotiated and their terms agreed to by all signatories. As we discuss further below, arrangements would have to be made to complete this lengthy negotiation process after Quebec had acceded to sovereignty over much of its territory.

Nonconstitutional Items

Finally, some elements of a sovereignty agreement would not require any form of constitutional expression. These include some of the most important and contentious issues likely to emerge in the negotiations. Consider, for instance, matters such as the apportionment of Canada's national debt; arrangements regarding the potential use of the Canadian dollar as the currency of a sovereign Quebec; the right of Quebecers to maintain Canadian citizenship and Canadian passports; or the status of Hydro-Québec's contract for hydroelectric power from Churchill Falls. These crucial components of a sovereignty agreement might be given legal effect through acts of Parliament, or executive orders, or international treaties between the new Canada and a sovereign Quebec. A large number of these nonconstitutional items would be included in any negotiated agreement on the terms of Quebec's sovereignty.

Summary

We anticipate that a negotiated settlement with Quebec following a sovereigntist referendum win could include elements that, from a constitutional perspective, fall into some or all of the five categories discussed above. With these categories in mind, we proceed in the next section to consider the degree of legislative approval necessary to enact into law the constitutional elements of the package (potentially, the first four categories above). We will then be in a position to consider the appropriate process for ratifying a sovereignty agreement under the Constitution of Canada.

The Applicable Constitutional Amending Procedures

The Constitution Act, 1982 includes five amending formulas; which of them applies in any given situation depends on the part of the Constitution to be amended. The transformation of Quebec's status from province to sovereign nation would have an impact on a wide range of constitutional matters falling under the rubric of several different amending formulas; indeed, all five formulas potentially would be implicated. In this section, we endeavor to further "unpack" the likely components of a sovereignty agreement, outlined above, in terms of the specific changes that would be needed to various sections of the Constitution, and then group them according to the amending formulas that would need to be applied to implement them.

Seeking Flexibility in Ratification

Given a sovereignty package of proposed constitutional amendments that fall under several

different amending formulas, two possible paths to ratification present themselves. The first would be to put the entire package of constitutional amendments forward for ratification together, in which case the cumulative requirements of the applicable amending formulas would have to be followed. Since Quebec's accession to sovereignty would affect several matters subject to the unanimity procedure, the entire package would have to be ratified by both houses of Parliament and all of the provincial legislatures. This was the procedure that governments attempted to follow with respect to the Meech Lake Accord and that they appeared prepared to follow had the Charlottetown Accord been approved in the national referendum.

The second approach would be to break up the package of constitutional amendments according to the applicable amending formulas and to pursue their ratification on separate tracks. This approach would offer the obvious advantage of greater flexibility, since those matters requiring unanimity could be dealt with separately, while the rest of the package could be subjected to the more forgiving requirements of the other amending formulas. Even though — as we conclude in the next section — there would be great pressure to subject all substantial or controversial amendments to a single ratification process, if the possibility of pursuing a multitrack ratification process is to be considered at all, which we believe it should, the "unpacking" exercise we pursue below is a necessary one.

One could argue that flexibility would be enhanced by drafting amendments that would remove Quebec from Canada with a few broad legal strokes. The unanimity amending formula could then be circumvented, some might argue, by avoiding explicit reference to any of the matters listed in section 41 of the Constitution Act, 1982 that require unanimity to be amended.

Yet, whatever the wording of the amendments, there is no doubt that Quebec sovereignty would have a dramatic impact on these section 41 matters. For example, the office of the lieutenant governor of Quebec would cease to exist in its current form in an independent Quebec; all 75 Quebec seats in the House of Commons would have to be removed; and constitutional protection of language rights might be modified or eliminated.

José Woehrling has argued that, as long as an amendment says nothing on its face about these subjects, it would not be "in relation to" section 41 matters, and therefore unanimous approval would not be required to implement it.[20] Woehrling's position appears to be that an amendment is "in relation to" a matter such as the office of the lieutenant governor of Quebec only if its purpose or object is to alter that matter. In his view, indirect effects on section 41 matters do not trigger the unanimity requirement; thus, since the abolition of the office of the lieutenant governor would be an indirect consequence, rather than the object, of secession amendments, the unanimity rule would not apply.

We share the spirit of Woehrling's attempt to interpret section 41 narrowly and thus introduce greater flexibility into the amending procedures. However, we cannot agree that even amendments with drastic effects on section 41 matters are not "in relation to" those matters. In our view, not just the purposes but the effects of a proposed amendment must determine which amending formula applies to it. Otherwise, as Monahan has argued, the form in which an amendment is pursued would triumph over its substance.[21] The strong degree of constitutional protection afforded to section 41 matters should not be so easily circumvented. In our view, the unanimity procedure should be applicable whenever a proposed amendment would have a substantial or material impact on a matter listed in section 41.[22] Several of the amendments that would be necessary to implement a sovereignty agreement with Quebec certainly qualify. Thus, we are of the view that the strictures of the unanimity rule cannot be avoided with respect to at least some aspects of such an agreement.

The "7/50" Procedure

Most amendments necessary to accomplish Quebec's orderly secession would fall within the section 38 general ("7/50") amending formula, which applies to all amendments in relation to matters not specifically allocated to one of the other four formulas. Secession is such a matter. Amendments under the section 38 formula require the passage of resolutions by both houses of Parliament and the legislatures of at least seven of the provinces constituting together at least 50 percent of Canada's population.

The Constitutional Amendments Act, which came into force in February 1996, superimposed five regional vetoes on the operation of the "7/50" amending formula.[23] The combined effect of the Constitution and the legislation is that a proposed "7/50" amendment must have the support of the federal Parliament, British Columbia, Ontario, Quebec, at least two of the prairie provinces comprising 50 percent of their combined population — that is, at current population levels, Alberta and at least one of Manitoba and Saskatchewan[24] — and at least two of the Atlantic provinces comprising 50 percent of their combined population.[25] Under this arrangement, the consenting provinces would represent at least 92 percent of Canada's population.[26]

Defining and Removing Quebec

Foremost among the amendments that could be made pursuant to the "7/50" formula would certainly be defining the territory of Quebec and then removing it from the authority of the Constitution. Defining the territory of the new sovereign state of Quebec would, however, be among the most contentious issues to be negotiated following a sovereigntist referendum win.

Quebec's current boundaries are defined by a variety of legal sources. Section 6 of the Constitution Act, 1867 defined the province of Quebec by reference to the pre-existing boundaries of Lower Canada, thus incorporating by reference the boundary between Lower and Upper Canada set out in a 1791 order-in-council and the boundary between New Brunswick and Lower Canada set out in 1851 British legislation.[27] The Ontario-Quebec boundary was clarified by British legislation passed in 1889.[28] The northern boundary of the province of Quebec was extended twice by federal legislation, in 1898 and 1912.[29] Finally, the Quebec-Labrador boundary was established by a 1927 Privy Council decision.[30]

As long as Quebec remains a province of Canada, it can claim the protection of section 3 of the Constitution Act, 1871, which provides that its boundaries can be altered only with its consent. This does not mean, however, as some sovereigntists have asserted, that a sovereign Quebec would have a right to maintain its existing borders. The act refers to the alteration of the boundaries of provinces within Canada; it has nothing to say about the removal of a province from Confederation.

Following a sovereigntist referendum victory, the borders of a sovereign Quebec would be an issue for negotiation. Quebec's existing borders would be challenged on two fronts: by Aboriginal peoples, and by regions with federalist majorities in the referendum vote, especially those contiguous to the Ontario border.

At least some of Quebec's Aboriginal peoples would almost certainly insist on remaining part of Canada.[31] As we argued above, existing legal norms and moral principles dictate that new treaties among Quebec, Canada, and the Aboriginal nations of Quebec would have to be concluded. These treaties would include land-claim settlements and perhaps also self-government agreements following the pattern set by recently concluded agreements in British Columbia and the Yukon. They could thus have an impact on both the definition of Quebec's territory and the nature and scope of Quebec's jurisdiction over its territory.

It might take many years for Canada, a sovereign Quebec, and the Aboriginal nations to conclude such a round of treaty making; as a result, it is impossible to predict in advance the scope of the territory over which Quebec would be able to assert sovereignty. If treaty

negotiations were still ongoing after all other matters relating to the transition to sovereignty had been negotiated and ratified, interim arrangements could be made; this issue is discussed in more detail in the next section.

In addition to Aboriginal peoples, other local federalist majorities unwilling to join the sovereigntist project would place a great deal of pressure on Canada not to cede territory they inhabit. Since the claims of non-Aboriginal federalist partitionists are not grounded in existing domestic and international law the way those of Aboriginal nations are, Canada would not be under the same legal and moral obligation to advance this issue in negotiations. However, federalist regional majorities' claims that they have the right to remain in Canada follow much the same logic as the sovereigntists' claim that they have the right to secede, so this issue should not be ruled out of the negotiating agenda. The suggestion of Monahan and Bryant that the issue be resolved by cascading referendums is worthy of consideration.[32] From a practical perspective, however, we have grave doubts as to whether the issue of federalist partition is capable of yielding compromises acceptable to both sovereigntists and federalists. If Canada were to insist on protecting the territorial claims of federalist minorities, it would very likely require the use of force and lead to communal violence. In our view, the Canadian negotiating team would be wise to respond to the concerns of Quebec's federalist regions by pressing for protection of language rights and dual citizenship rights in Quebec's constitution, rather than insisting on the partitionist approach.

Other "7/50" Amendments

Other constitutional changes that would likely be necessary for a legal secession could be enacted pursuant to the "7/50" rule, including:

- terminating the federal Parliament's authority to pass laws in relation to Quebec;
- terminating the application of the Charter of Rights and Freedoms in Quebec;
- terminating the authority of the Supreme Court of Canada and the Federal Court of Canada in relation to disputes arising in Quebec, as well as the jurisdiction of all courts in Quebec constituted pursuant to the Canadian Constitution;
- removing Quebec's seats from the Senate[33] (section 22 of the *Constitution Act, 1867* would have to be amended to reduce the number of regional divisions in the Senate from four to three, to delete the references to Quebec, and to remove the 24 Quebec senators; section 23(6), which deals with the qualifications of Quebec senators, would also need to be repealed);
- amending section 108 of the *Constitution Act, 1867*, which provides that certain kinds of federal property situated in the province (such as canals and post offices) belong to Canada, in order to transfer ownership of these properties to a sovereign Quebec in return for appropriate compensation; and
- establishing new links between Canada and Quebec of the kind discussed in category 3 of the previous section.

The "Unanimity" Procedure

Following our interpretation of section 41, discussed above, unanimity would be required to authorize three kinds of changes that Quebec's accession to sovereignty would provoke.

The first of these changes are those required by the fact that a sovereign Quebec presumably would no longer be a monarchy.[34] In such circumstances, the office of the lieutenant governor would cease to exist, and unanimous consent would be required for the changes to the various provisions of the Constitution Act, 1867 that set out the status and powers of that office.[35]

The second kind of changes are those required to remove Quebec's seats from the House of Commons. While changes to the makeup of the House can ordinarily be made by the federal government alone, pursuant to

the unilateral formula in section 44 of the Constitution Act, 1982, an exception to this rule is made to protect guarantees of provincial representation from unilateral reduction. Pursuant to the "Senate floor" provision of the Constitution Act, 1867 (section 51(a)), Quebec is guaranteed at least 24 members in the House of Commons. Since the "Senate floor" principle is a matter subject to the unanimity formula, it follows, in our view, that the removal of Quebec's seats from the House could be accomplished only by unanimous consent.[36]

Finally, unanimous consent would be necessary to sanction the fact that the following language rights would no longer apply in Quebec or to Quebecers:[37]

- the right to use English or French in Parliament and federal courts, as set out in section 133 of the *Constitution Act, 1867* and sections 16–19 of the Charter;
- the right to use English or French in federal government offices, as set out in section 20 of the Charter; and
- the right of Quebec anglophones to educate their children in English, as set out in section 23 of the Charter.

These are the only aspects of a sovereignty agreement that would require unanimous approval. It is true that the composition of the Supreme Court of Canada would have to be changed by removing the guarantee of three Quebec judges. But even though the Court's composition is a matter subject to the unanimity formula,[38] this change would not require a constitutional amendment because, oddly enough, that composition has never been set out anywhere in the Constitution.[39]

The "Bilateral" Amending Procedure

The section 43 amending formula gives Parliament and the Quebec National Assembly the power to amend provisions of the Constitution that apply to some but not all of the provinces if the amendments have legal effect only in Quebec. In the event of Quebec sovereignty, only a few provisions of the Constitution could be altered or repealed pursuant to the section 43 bilateral procedure — namely:

- an amendment specifying that subsections 93(1) to (4) of the *Constitution Act, 1867* in relation to denominational school rights no longer apply in Quebec;[40]
- the repeal of section 98 of the *Constitution Act, 1867*, which provides that Quebec judges will be appointed from the bar of Quebec;
- the repeal of the portions of section 133 of the *Constitution Act, 1867* relating to the use of English or French in the judicial and legislative branches of the Quebec government; and
- the repeal of section 59 of the *Constitution Act, 1982*, relating to minority language education rights in Quebec.

The "Federal Unilateral" Procedure

Section 44 enables Parliament unilaterally to amend provisions of the Constitution relating to aspects of the legislative or executive branches of the federal government not of direct concern to the provinces. A few minor amendments of this type would relate to Quebec sovereignty:

- Consequential amendments to sections 26–28 of the *Constitution Act, 1867* would be required after the removal of Quebec senators to reflect the fact that there would be three, rather than four, regional divisions, and that the maximum number of senators would be reduced by 24; and
- the portions of section 40 of the *Constitution Act, 1867* that relate to Quebec's electoral districts would need to be repealed, along with related provisions in existing federal statutes, such as the *Electoral Boundaries Readjustment Act*.[41]

While it would not amount to an amendment to the Constitution, the federal government could pass legislation without the consent of the provinces to amend the Supreme Court Act to reflect Quebec's departure, deleting the guarantee in section 6 that three judges be appointed from Quebec.[42] Eventually, the composition of the Court would have to be redefined to better reflect the realities of Canada without Quebec. In the interim, a Court reduced by the loss of its Quebec members could nevertheless operate without further changes to the law: any five judges of the Supreme Court can "constitute a quorum" and "may lawfully hold the Court."[43]

The "Provincial Unilateral" Procedure

Section 45 enables a province unilaterally to alter provisions of the Canadian Constitution that form part of the "constitution of the province" — that is, provisions that relate to matters internal to the province and its institutions and are not of concern to the federation as a whole. Thus, except for provisions relating to the office of the lieutenant governor, described above, Quebec could unilaterally repeal the provisions of the Constitution Act, 1867 establishing the legislature of Quebec. It could, for example:

- repeal sections 72–79 of the act in relation to the legislative council of Quebec;
- repeal section 80 of the act constituting the legislature of Quebec; and
- amend sections 83–87 of the act to delete references to Quebec and its legislature.

Most of these provisions are of no practical significance in any case, as they have long been superseded by Quebec legislation. But to eliminate any possibility of confusion about the constitutional status of the Quebec legislature, it would be wise to repeal those provisions as part of the sovereignty agreement.

Summary

In order to comply with the legal requirements of the Constitution Act, 1982, the components of a sovereignty agreement would have to be ratified by the relevant legislatures to meet the requirements of the five amending formulas described above. This could be done by separating the components of the agreement and subjecting them to a multitrack process of legislative ratification, or by treating the agreement as a single package subject to the unanimity rule — as was attempted in the case of the failed Meech Lake Accord. The legal requirements of the 1982 act, however, are not the only elements of a legally sound and politically legitimate ratification process; in particular, both the emerging convention of a national referendum on substantial amendments and the federal government's legal obligations to Aboriginal peoples add further layers to the procedures that would have to be followed. In the next section, we expand our view beyond the legal requirements of the Constitution Act, 1982 and the federal Constitutional Amendments Act to come up with a more complete description of the process for ratifying a sovereignty agreement.

The Ratification Process

Let us be clear that the ratification process discussed here would, in effect, be the third stage of the larger process through which Quebec sovereignty might be effected pursuant to the Canadian Constitution. Stage one would be a win for the "yes" side in a sovereignty referendum. Stage two would be agreement on the terms of Quebec's accession to sovereignty reached through negotiations between Quebec and the rest of Canada. Accomplishing both these earlier stages would require agreement on a number of contentious procedural points, including the nature of the referendum question and the size of the majority needed for a sovereigntist win, and the participants, agenda, and organization of the negotiating process. This Commentary does not deal with these

issues, but we have written it on the assumption that these matters could be dealt with successfully.[44]

The process for ratifying and giving legal effect to an agreement on the terms of Quebec's accession to sovereignty would have three distinct steps. The first would involve popular consultation through a Canada-wide referendum — a political imperative for a matter as important as the terms of Quebec's accession to sovereignty. In the second step, following a successful referendum, the various legislatures would take action to approve and give legal expression to the elements of the agreement. Both of these steps should be undertaken as quickly as possible following completion of the negotiation stage.

The third element of ratification would be the completion of treaty-like agreements with the Aboriginal peoples, which, though agreed to in principle in the negotiations, might take much longer to complete than the first two stages.

The Referendum Stage

The Case for a Referendum

A Canada-wide referendum is not a legally required part of the constitutional amendment process; at the moment, only Alberta and British Columbia legally require a referendum as a condition precedent to submitting a constitutional amendment to the legislature.[45] Nevertheless, to have political legitimacy, an agreement on Quebec sovereignty would need to be ratified by a referendum not only in Quebec but in all parts of Canada.

For a sovereign Quebec to have solid democratic foundations, its people would have to have the opportunity to pass judgment on the terms that their government has been able to negotiate with the rest of Canada for Quebec's accession to sovereignty. These terms might diverge on important points from what was hoped for — and perhaps even promised — by sovereigntist leaders in their successful referendum campaign. The 1980 Quebec referendum question, in which the government of Quebec asked for a mandate to negotiate a sovereignty-association agreement with Canada, contained a clear commitment to submit such an agreement for approval by the citizens of Quebec in a second referendum. The absence of such a commitment by the Quebec government in the 1995 referendum meant that Quebecers were being asked to vote for Quebec sovereignty on conditions set out in Bill 1 that were quite beyond the Quebec government's power to deliver (for example, continuation of Canadian citizenship and currency). To have established Quebec's sovereignty on the basis of a majority "yes" vote in that referendum without securing the promised conditions would not have been in accord with democratic principle.[46] The terms of a negotiated agreement following a sovereigntist victory in a Quebec referendum are bound to be a compromise, falling short of the most optimistic expectations of sovereigntist leaders. If Quebec sovereignty is to be based on the will of Quebecers, its actual terms should be approved directly by them.

An equally compelling case can be made for consulting the Canadian people on the terms of a negotiated agreement on Quebec sovereignty. Here, we part company with Monahan and Bryant, who insist that, while Quebec would have to have a second referendum on the terms of sovereignty, no referendum on these terms would need be held in the rest of Canada other than in Alberta and British Columbia, where provincial statutes require them.[47] Not only would referendums in those provinces place political pressure on governments in other provinces to consult their own populations, but larger considerations of constitutional politics would also bear on the matter. At this stage in the democratization of Canada's constitutional politics, changes of the magnitude involved in the removal of Quebec from the federation and the terms on which that would be done would require the approval of Canadians in all parts of the country.

In his book on the use of referendums in Canada, Patrick Boyer writes:

> Certainly major constitutional amendments should be submitted for ratification by a referendum, and it seems clear following the experience of October 26, 1992, they henceforth will be.[48]

We think most Canadians would agree with Boyer on this point. Submitting proposals for major constitutional amendments to the people is at least an emergent, if not yet crystallized, constitutional convention in Canada. Monahan and Bryant take the position that the democratic requirements of Canada's constitutional process would be satisfied for Canadians outside Quebec simply by their being well represented on the negotiating team. We argue, however, that the legitimacy of the negotiating process — Canadians' willingness to agree to terms that inevitably would be worked out by a small number of leaders and experts, sometimes operating in closed sessions — would be greatly enhanced if Canadians were assured that the product of the negotiation would be submitted to them for their approval.

To appreciate the need for a Canada-wide referendum, consider what would be at stake in an agreement on Quebec sovereignty. In all likelihood, Canadians would be asked to vote on the agreement in its entirety — that is, on both its nonconstitutional components and its proposed constitutional amendments. We do not see how the agreement could be broken up for purposes of popular ratification. Its key terms would embody a set of interlocking agreements that would have to stand or fall as a whole. Some components — such as the apportioning of the public debt, citizenship issues, currency arrangements, trade relations, the issue of a land bridge to connect Atlantic Canada to the rest of the country, and a resolution of the Churchill Falls issue — even though they may not have been dealt with through formal amendments to the Constitution, would be of great importance to all Canadians. On the constitutional side, even if a strategy of minimal changes to existing constitutional structures were pursued, as we and Cairns advocate, major constitutional decisions would nonetheless be at issue. Indeed, it would be unwise to foist even this minimalist approach — whereby Canada minus Quebec would operate for some years under a federal system dominated by Ontario — on Canadians without a broad base of popular support. Moreover, the barest minimum of constitutional changes necessary to implement Quebec's sovereignty would, as we have discussed, include items of major significance such as the links, or the absence of them, between a sovereign Quebec and Canada, the principles and procedures that would apply to Aboriginal peoples, the treatment of linguistic minorities, and changes, if any, to Quebec's borders.

What Counts as a "Yes"?

What level and distribution of popular approval for a negotiated agreement should be regarded as sufficient to go ahead with its formal legislative ratification? In the 1992 referendum on the Charlottetown Accord, the only precedent for a Canada-wide constitutional referendum, no official position was taken on this question — although there seems to have been a widespread expectation that a "yes" win would have required majorities in every province. Of course, the question became academic when the accord failed to win even a national majority.[49]

There is an obvious logic to requiring majority approval in every province if some components of the agreement are subject to the unanimity constitutional amending rule. Still, we think a unanimity referendum rule creates too high a threshold for the federal government (at least) to commit itself to completing the formal ratification process and, in certain circumstances, which we discuss later, recognizing Quebec's sovereignty on the basis of the agreed-on terms. On the other hand, we are apprehensive about defining the threshold for such an undertaking simply as a majority "yes" in both Quebec and Canada outside Quebec. Such a double majority rule would no doubt appeal to Quebec, but it would risk going ahead with an agreement that might have strong support in central Canada but

that had been roundly rejected in other regions. Provincial governments, particularly in western and Atlantic Canada, would be unlikely to accept a process based on such a two-nations concept of the Canadian body politic.

The federal government, too, would find it difficult to endorse a rule so out of phase with its own 1996 Constitutional Amendments Act (which, it should be noted, implicitly allows provinces to give their consent either through their legislatures or in province-wide referendums).[50] In the event of Quebec sovereignty, we believe that a five-region referendum rule based on that act would have a good chance of being accepted by the rest of Canada.

The problem with a five-region referendum rule, of course, is that Quebec might regard it as a straitjacket. Indeed, sovereigntists likely would object to their project's having to garner the approval of a majority of Canadian voters outside Quebec in the first place. Nevertheless, if they are to avoid the risks associated with an unlawful and unconstitutional course of action, sovereigntists would be wise to respect the principles of democratic constitutionalism that Canadians now deem essential.

We doubt the requirements of Canadian constitutionalism could be made any lighter; indeed, some premiers might object even to a five-region rule, which, after all, would commit them to proceeding with legislative ratification of an agreement that might be rejected by a majority of voters in their province. Difficult as it might be for the sovereigntists to accept a five-region referendum rule, we still think they would find it prudent to do so

- if they are convinced that Canada would withhold recognition of a sovereign Quebec if Quebec were to refuse to effect sovereignty through a lawful process; and
- if Quebec were to retain the option of proceeding unilaterally should the constitutional process fail.

The Approval of Aboriginal Peoples

While a "yes" under the five-region referendum rule would be a sufficient mandate for Ottawa and the provinces to proceed with formal ratification of a negotiated sovereignty agreement, those components of the agreement that pertained directly to Aboriginal peoples would, we argue, require their separate approval.[51] Aboriginal peoples constitute such a tiny fraction of the electorate that their consent to changes in their constitutional rights could possibly be said to have been given through approval of the agreement by majorities in five regions of Canada. Full implementation of the principles agreed to with respect to the position of Aboriginal peoples in a sovereign Quebec would require a trinational treaty process, but with proper safeguards this process need not be completed before recognition of Quebec's sovereignty. We discuss this more fully below.

The Legislative Ratification Stage

Once the requirements of the five-region referendum test had been met and the process of Aboriginal approval of provisions relevant to them was at least under way, the legislative ratification of a sovereignty agreement should not prove difficult. By that time, the agreement would have been approved by majorities in provinces representing at least 92 percent of Canada's population (at most, two Atlantic provinces and either Manitoba or Saskatchewan might have voted against the agreement). This means that legislative approval of the nonconstitutional components of the negotiated agreement, and most of its constitutional aspects, would be able to proceed smoothly. The nonconstitutional matters would require legislation simply by the federal Parliament and the Quebec National Assembly, while most of the important constitutional items would be subject to the "7/50" rule. Governments in the seven (or more) provinces whose electorates would have approved the agreement should

have no difficulty moving ahead quickly with ratification in their legislatures.

The Unanimity Components

What about those few constitutional aspects of a secession agreement that would fall under section 41, the unanimity clause in the amending formula? If, in two or three provinces, majorities had voted against the agreement in a Canada-wide referendum, it is likely that the premiers of those provinces would still be committed to submitting to their legislative assemblies — and supporting — resolutions to adopt the constitutional components of the agreement. Except in Alberta and British Columbia, referendums are only consultative, not binding on governments.[52] And if majorities in all regions of the country were in favor of the agreement, it is doubtful that the majority opposed in any dissenting province would be very high. After the vast majority of Canadians both inside and outside Quebec had endorsed an agreement produced by a lengthy and stressful negotiating process, and with the knowledge that failure to ratify could plunge the country into chaos and confusion, it should not be difficult for premiers of dissenting provinces to summon up the political courage to steer the constitutional resolutions through their legislative assemblies.

A Multitrack Process

If this solution were to fail, it might be possible to break up the constitutional components of the agreement according to the different amending formulas that would apply to them, and then have each group of components voted on separately in the various legislatures. Some analysts have argued that such a multitrack ratification process should have been followed in the Meech Lake round, which failed when the Manitoba and Newfoundland legislatures did not pass the necessary resolutions — even though only one of the accord's five components, a change to constitutional amending formulas, required unanimous provincial support. To avoid a similar fate, the few constitutional elements of the sovereignty agreement that would be subject to the unanimity rule could be put before the legislatures in a separate resolution from the rest of the agreement.

This possibility would make it easier to rapidly ratify most of the negotiated agreement; indeed, our "unpacking" of the various likely components of a sovereignty agreement was intended to facilitate discussion of this possibility. Yet we are not convinced that this would be the best way to deal with the potential straitjacket of unanimity.

To begin with, one could argue strongly that an agreement negotiated and voted on as a total package should be treated the same way by legislatures seeking to ratify it. The constitutional elements that required unanimous approval, though few in number, would not be insignificant parts of the agreement. To enact only a part of the agreement might well be to breach the understandings on which it was reached — unless, at the negotiating stage, there had been an agreement to do so — and some premiers might balk at participating in negotiations on that basis. We also note that amendments affecting the constitutional use of the English and French languages, a matter requiring unanimity, might well embody an agreement on the reciprocal treatment of linguistic minorities that was a critical part of the deal. Meanwhile, amendments to eliminate the monarchy in Quebec and to remove Quebec's members from the House of Commons, though less contentious, would still need to be put into legal effect to enable the new machinery of government to operate in Canada and a sovereign Quebec.

The Maastricht Approach

A more plausible and attractive approach would be to proceed as the European Union (EU) did when the Maastricht Treaty, approved by 11 of its 12 members, was rejected by a small majority of Danish voters in a referendum. Though subject legally to a unanimity rule, the EU agreed to go ahead with imple-

menting the treaty while a special "opt-out clause" to accommodate Denmark was negotiated. Danes subsequently approved the treaty, with this change incorporated, in another referendum.[53] A similar approach might work in Canada, too, if one of the smaller provinces refused to ratify a sovereignty agreement because of a discrete, negotiable provision dealing with, say, the continuing entrenchment of minority language rights in the Canadian Constitution as part of a reciprocal agreement with Quebec. In such a case, the dissenting province might be accommodated through an opting-out arrangement.

Bending the Rules: An Extreme Case

The possibility exists — though we think it is quite remote — that none of these approaches would work, and that the required legislative approval would not be forthcoming in one or more provinces whose electorates had rejected the agreement. Should this happen, we believe it would be reasonable for the federal government to press ahead with implementing the agreement and to recognize Quebec's sovereignty even though the constitutional requirements for amending the Constitution had not been fully met.

Bear in mind the setting in which this extralegal action would be taking place:

- after months of negotiations, an agreement covering all aspects of Quebec's accession to sovereignty would have been reached through a process representing all components of the federation;
- the agreement would have been approved in a referendum by an overall majority of Canadians and by majorities in provinces with 92 percent of the population;
- an effort would have been made to modify the agreement to satisfy dissenting provinces; and
- the consequences of not going ahead would almost certainly prolong and deepen a crisis that was already causing serious economic damage, paralyzing government, and traumatizing Canadians inside and outside Quebec.

At this point, under these conditions, to insist on full compliance with the constitutional amendment rules would be to turn the rule of law into a foolish fetish and the unanimity rule into a tyranny. In such circumstances, we hope that the governments of Canada, Quebec, and the other provinces that had supported the agreement would have the good sense to recognize Quebec's accession to sovereignty on the basis of the negotiated agreement. As Peter Hogg has argued, such a de facto secession:

> is an important safeguard for Quebec against the possibility of Canada not fulfilling its obligation to provide constitutional force to a negotiated secession agreement. The possibility of a *de facto* secession would also act as a deterrent to any provincial government that might be inclined to withhold its assent to a negotiated secession agreement, making it less likely that the crisis would develop in the first place.[54]

The Aboriginal Treaty Stage

A crucial part of the negotiated sovereignty agreement would be the principles and procedures concerning Aboriginal peoples in Quebec. Aboriginal organizations would participate in these negotiations and, as we have discussed, their acceptance of this part of the agreement at the very least is required not only by the spirit of section 35.1 of the Constitution Act, 1982, but also by Canada's fiduciary obligation to Aboriginal peoples under Canadian law, and by emerging norms of international law.[55]

We think the approach most likely to be agreed to would involve a treaty process whereby the rights and status of each Aboriginal nation with some or all of its homeland in Quebec would be defined through three-way treaties among Canada, Quebec, and the relevant Aboriginal nation.[56] A nation-to-nation treaty approach is at the core of the structural relationship that Aboriginal peoples wish to

have with Canadian and Quebec authorities.[57] This approach is also embodied in the comprehensive agreements signed by Canada, Quebec, and the Cree, Naskapi, and Inuit of Northern Quebec in the 1970s, and in the "Comprehensive Offer" the Quebec government made to the Atikamekw and Montagnais nations in 1994.[58]

A genuine treaty-making process that has integrity and legitimacy cannot be carried out overnight. Working out and establishing treaty arrangements with Aboriginal nations in Quebec that have not yet negotiated land and self-government agreements and renovating the agreements of those that have done so would take years, not months, to complete. It would be unreasonable to expect a Quebec government that had won a referendum to postpone accession to sovereignty and recognition of its independence indefinitely until the treaty process had been completed with all of Quebec's Aboriginal peoples, if all other aspects of secession had been agreed to. Similarly, as a matter of principle, Aboriginal peoples could not reasonably be expected to accept Quebec sovereignty if it were attained in a form fundamentally inconsistent with their wishes, whether expressed in referendums or otherwise.

Instead, we suggest that Canada could recognize Quebec independence before the treaty-making phase was complete in a manner consistent with its fiduciary and constitutional obligations to Aboriginal peoples and without giving Quebecers' moral claim to self-determination priority over the similar claims of Aboriginal peoples. In such a situation, the fully sovereign powers of the new Quebec state would not extend over Aboriginal peoples and lands while the treaty-negotiating process was still under way. The existing situation, where sovereignty is shared among three orders of constitutional government, would remain in place. Canada, or some agreed-on international guarantor, could be granted responsibility for safeguarding Aboriginal rights during the treaty-making period. It is possible that one or more Aboriginal peoples might agree to a treaty with Quebec and Canada only on condition that a permanent condominium — a tripartite sharing of sovereignty — attach to their lands. In return, Quebec would likely insist that revenues from hydro-electric installations and other resource developments on treaty lands be guaranteed — without such a deal, the economic viability of an independent Quebec would be seriously compromised.

No doubt the qualified accession to sovereignty outlined above would not go down well with many Quebec sovereigntists. On the federal side, too, devotees of *realpolitik* likely would be willing to have Canada renege on its legal and moral obligations to Aboriginal peoples if that seemed the easiest way to conclude an agreement on Quebec sovereignty.[59] Nonetheless, we believe that Canada and Quebec should try to do better than this. Our approach holds out the possibility of securing the vital interests of the majority of both Quebecers and Canadians without sacrificing the rights of Aboriginal peoples or building a new relationship between Canada and Quebec by reimposing imperial control over native peoples.

Conclusion

We would prefer to see the aspirations of Quebecers accommodated within the Canadian federation. But after two failed attempts to achieve a post–1982 constitutional reconciliation with Quebec, the prospects of achieving formal constitutional change in the near future are not good.

Given the general rejection of the constitutional status quo in Quebec and the fact that, since fall 1995, polls have indicated that close to half of Quebec voters favor sovereignty, it would be foolhardy not to prepare to deal with the consequences of a possible "yes" win in a future sovereignty referendum. Should that happen, we are convinced that an attempt ought to be made to resolve the issue of Quebec's accession to sovereignty through the Canadian Constitution. In this Commentary, we have suggested a strategy to make that process as flexible as possible while keeping it as just and as fair as possible for all Canadians.

Granted, the process would be neither simple nor easy — although we do not think it would be as daunting as, say, the strictness of the unanimity formula initially might suggest.

The democratic imperative of a Canada-wide referendum is a prerequisite to invoking the amending formulas for constitutional changes as great as those that Quebec sovereignty would require. The results of that referendum would play a greater role in determining whether formal legislative ratification of a sovereignty agreement moved ahead than would the views of individual provincial governments. The major challenge posed by the ratification process we have outlined would thus be to fashion, and then to sell, a complicated sovereignty agreement to majorities of voters in the five regions of the country spelled out in the Constitutional Amendments Act. We are confident that an affirmative referendum vote on such an agreement would generate sufficient momentum to ensure Quebec's accession to sovereignty on the agreed-upon terms.

We do not claim that a constitutional process is the only way Quebec could effect sovereignty following a "yes" win in a referendum. There are other paths by which Quebec could become sovereign and other ways of negotiating the terms of its sovereignty, and a point might be reached where the effort to comply with constitutional requirements no longer made sense. But the advantages to all sides in maintaining legal continuity and following constitutional processes — minimizing the risk of violence and economic dislocation, and maximizing the consensual nature of the sovereignty agreement — are such that it would be foolish not to try to make the transition to Quebec sovereignty through the disciplines of constitutionalism. Only if these disciplines failed would it make sense to step outside the process, and even then Canadians, including Quebecers, would be better off for having used the constitutional process to regulate their behavior to that point.

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It is simplistic to argue that, because the Canadian Constitution has proven incapable of accommodating Quebec's aspirations in the recent past, the amending formulas would pose an insurmountable obstacle to the ratification of a sovereignty agreement. This argument fails to take into account the distinct political and economic conditions — and thus the unique bargaining dynamics — that would be created by a "yes" win in a sovereignty referendum. We think the process would have a better chance of working because of the crisis environment in which it would take place; unlike Meech Lake and Charlottetown, this crisis would be real, not just a threat. The consequences of failure would be obvious to all, giving the proceedings a tighter discipline. Be-

fore rejecting the approach we have outlined, critics — Quebecers and non-Quebecers alike — should consider carefully the alternatives, and ask whether either side would really be better off if it did not even try to reach agreement through a constitutional process.

Notes

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1 We prefer the phrase "accession to sovereignty" over "secession" to describe the process of constitutional change likely to follow a "yes" vote. "Secession" suggests a clean exit — the cutting of all political ties with Canada. But a "yes" vote in a sovereignty referendum could lead to the creation of new federal or confederal arrangements ("sovereignty association") between Quebec and Canada. When we do use the term "secession," we are referring to the removal of Quebec from *existing* constitutional arrangements, understanding that *new* forms of political association between Quebec and Canada are possible.

2 See Patrick J. Monahan and Michael J. Bryant (with Nancy C. Coté), *Coming to Terms with Plan B: Ten Principles Governing Secession*, C.D. Howe Institute Commentary 83 (Toronto: C.D. Howe Institute, June 1996), pp. 3–4; and Alan C. Cairns, *Looking into the Abyss: The Need for a Plan C*, C.D. Howe Institute Commentary 96 (Toronto: C.D. Howe Institute, September 1997).

3 Canada, Parliament, House of Commons, *Debates*, September 26, 1996, p. 4707.

4 The arguments and literature are reviewed in Neil Finkelstein, George Vegh, and Camille Joly, "Does Quebec Have a Right to Secede at International Law?" *Canadian Bar Review* 74 (1995): 225; Thomas Franck et al., "L'intégrité territoriale du Québec dans l'hypothèse de l'accession à la souveraineté," in Commission d'étude des questions afférentes à l'accession du Québec à la souveraineté, *Projet de Rapport (annexe)* (Quebec, 1992), pp. 382–383; Grand Council of the Crees, *Sovereign Injustice: Forcible Inclusion of the James Bay Crees and Cree Territory into a Sovereign Quebec* (Nemaska, Que., 1995), pp. 103–118; Sharon Williams, *International Legal Effects of Secession by Quebec* (North York, Ont.: York University, Centre for Public Law and Public Policy, 1992), pp. 13–22. See also James Crawford, "State Practice and International Law in Relation to Unilateral Secession" (report filed with the factum of the Attorney General of Canada in the Supreme Court reference, February 19, 1997).

A contrary view can be found in Daniel Turp, "Quebec's Democratic Right to Self-Determination: A Critical and Legal Reflection," in Stanley H. Hartt et al., *Tangled Web: Legal Aspects of Deconfederation*, The Canada Round 15 (Toronto: C.D. Howe Institute, 1992), pp. 99–124.

5 Bill 1, *An Act Respecting the Future of Quebec*, 1st Session, 35th Leg., Quebec, 1995.

6 For example, in the *Bertrand* case, the Attorney General of Quebec's legal submissions stated:

> [l]e processus d'accession du Québec à la souveraineté relève essentiellement d'une démarche démocratique fondamentale qui trouve sa sanction dans le droit international public.

Motion to dismiss (April 12, 1996), *Bertrand v. Bégin*, Quebec 200-05-002117-955 (Sup. Ct.).

7 See Grand Council of the Crees, *Sovereign Injustice*; S. James Anaya, Richard Falk, and Donat Pharand, *Canada's Fiduciary Obligation to Aboriginal Peoples in the Context of Accession to Sovereignty by Quebec, Vol. 1: International Dimensions* (Ottawa: Canada Communications Group, 1995); Renée Dupuis and Kent McNeil, *Canada's Fiduciary Obligation to Aboriginal Peoples in the Context of Accession to Sovereignty by Quebec, Vol. 2: Domestic Dimensions* (Ottawa: Canada Communications Group, 1995); and Canada, Royal Commission on Aboriginal Peoples, *Report*, Volume 2(1) (Ottawa: Canada Communications Group, 1996), pp. 93–106.

8 See Mary Ellen Turpel, "Does the Road to Quebec Sovereignty Run through Aboriginal Territory?" in Daniel Drache and Roberto Perin, eds., *Negotiating with a Sovereign Quebec* (Toronto: Lorimer, 1992), pp. 93–106; and Kent McNeil, "Aboriginal Nations and Quebec's Boundaries: Canada Couldn't Give What It Didn't Have," in Drache and Perin eds., *Negotiating with a Sovereign Quebec*, pp. 107–123.

For a discussion of the Aboriginal peoples of Quebec and their homelands, see Ovide Mercredi and Mary Ellen Turpel, *In the Rapids: Navigating the Future of First Nations* (Toronto: Viking, 1994), pp. 165–185.

9 See Guy Laforest, *Trudeau and the End of a Canadian Dream* (Montreal; Kingston, Ont.: McGill-Queen's University Press , 1995), for a thorough explication of the reasons the *Constitution Act, 1982* lacks legitimacy in Quebec.

10 *Re Objection by Quebec to a Resolution to Amend the Constitution*, [1982] 2 S.C.R. 793. After the federal government decided to proceed with patriation, the Quebec government asked the Supreme Court of Canada to rule on whether the conventional requirement of a substantial degree of provincial consent to amendments affecting provincial powers had to include Quebec. The Court, in this reference, answered no.

11 Cairns, *Looking into the Abyss*.

12 For an argument in favor of such an approach by a non-Quebec Canadian scholar, see Denis Stairs, *Canada and Quebec after Québécois Secession: "Realist" Reflections on an International Relationship* (Halifax, NS: Dalhousie University, Centre for Foreign Policy Studies, 1996).

13 See also the arguments on this point in Monahan and Bryant, *Coming to Terms with Plan B*, pp. 21–25.

14 See s. 35.1, *Constitution Act, 1982*.

15 Monahan and Bryant, *Coming to Terms with Plan B*, pp. 31–33.

16 For example, Peter Hogg, *Constitutional Law of Canada*, 4th ed. (Toronto: Carswell, 1996), p. 125.

17 Monahan and Bryant, *Coming to Terms with Plan B*, pp. 651–652.

18 Cairns, *Looking into the Abyss*.

19 See Canada, Royal Commission on Aboriginal Peoples, *Report*, vol. 5, p. 130.

20 José Woehrling, "Les aspects juridiques d'une éventuelle sécession du Québec," *Canadian Bar Review* (74): 293. Woehrling's conclusion finds support in two influential textbooks: Hogg, *Constitutional Law of Canada*, p. 125; and Henri Brun and G. Tremblay, *Droit constitutionnel*, 2d ed. (Cowansville, Que.: Yvon Blais, 1990), p. 236.

21 Patrick Monahan, "The Law and Politics of Québec Secession," *Osgoode Hall Law Journal* 33 (1, 1995): 9.

22 A similar test is proposed by James Ross Hurley, who states that, to determine whether section 41 applies to a proposed amendment, "one would have to begin by asking whether [it] would materially alter or affect any matter subject to the unanimity procedure." See *Amending Canada's Constitution: History, Processes, Problems and Prospects* (Ottawa: Canada Communications Group, 1996), p. 81.

23 S.C. 1996, c. 1.

24 Alberta has a *de facto* veto since it has more than half the population of the prairie provinces.

25 The Atlantic provinces' veto could be invoked by any two of the three most populous provinces (New Brunswick, Nova Scotia, and Newfoundland). In addition, pursuant to an executive agreement negotiated by the premiers of Prince Edward Island, Nova Scotia, and New Brunswick — an agreement with moral if not legal force — the Atlantic veto could be exercised by Prince Edward Island with the support of either New Brunswick or Nova Scotia. The premiers agreed that Prince Edward Island would receive the automatic veto support of both New Brunswick and Nova Scotia if it first obtains the agreement of either of those governments. See "PEI wins share in veto plan for constitutional changes," *Globe and Mail* (Toronto), January 4, 1996.

26 According to the 1991 census, the combined population of the relevant provinces would be at least 25.8 million (92 percent of the total national population of 28.1 million), as follows: Ontario, 10.47 million; Quebec, 7.08 million; British Columbia, 3.38 million; Alberta, 2.6 million; one of Manitoba or Saskatchewan, at least 1.00 million; and two of New Brunswick, Nova Scotia, or Newfoundland, at least 1.33 million.

27 See Norman L. Nicholson, *The Boundaries of the Canadian Confederation* (Toronto: Macmillan, 1979), pp. 33, 93, for a description of the 1791 and 1851 enactments, respectively.

28 *Canada (Ontario Boundary) Act, 1889*, 52 & 53 Vict., c. 28 (U.K.).

29 See *An Act respecting the North-Western, Northern and North-Eastern Boundaries of the Province of Quebec*, S.C. 1898 (61 Vict.), c. 3; *The Quebec Boundaries Extension Act*, 1912, S.C. 1912 (2 Geo. V), c. 45.

30 *Re Labrador Boundary*, [1927] 2 D.L.R. 401.

31 The Cree, Inuit, and Montagnais likely would reject Quebec sovereignty decisively in a future referendum, as they did in three separate ballots held immediately prior to the official 1995 referendum — by 96 percent, 95 percent, and 99 percent, respectively. See Alan C. Cairns, "The Legacy of the Referendum: Who Are We Now?" *Constitutional Forum* 7 (winter/spring 1996, nos. 2 and 3): 36.

32 See the discussion of the process followed in determining the borders of the Swiss canton of Jura in Monahan and Bryant, *Coming to Terms with Plan B*, pp. 16-17, 36-37.

33 Section 42(1)(c) of the *Constitution Act, 1982* provides that the "7/50" formula applies to an amendment in relation to "the number of members by which a province is entitled to be represented in the Senate."

34 Section 41(a) of the *Constitution Act, 1982* requires unanimous approval of amendments in relation to "the office of the Queen, the Governor General and the Lieutenant Governor of a province."

35 See sections 63 (power to appoint Cabinet members), 65 (continuation of executive powers), 71 (definition of the Quebec legislature), 82 (the power to summon the Quebec legislature), and 90 (powers of reservation and disallowance) of the *Constitution Act, 1867*.

36 Section 41(b) of the *Constitution Act, 1982* requires unanimous approval of amendments in relation to:

> the right of a province to a number of members in the House of Commons not less than the number of Senators by which the province is entitled to be represented at the time this Part comes into force.

37 Section 41(c) of the *Constitution Act, 1982* requires unanimous approval of amendments to provisions in relation to "the use of the English or the French language" in all of the provinces. We agree with Monahan ("The Law and Politics of Quebec Secession," pp. 11–13) that an amendment that has the effect of canceling the

application of these provisions in Quebec qualifies for the purposes of section 41(c).

38 See section 41(d) of the *Constitution Act, 1982*.

39 Instead, an amendment to the *Supreme Court Act*, R.S.C. 1985, c. S-26, deleting the guarantee of three Quebec judges, could be passed through the ordinary legislative process. See Hogg, *Constitutional Law of Canada*, pp. 70–71, 80; Woehrling, "Les aspect juridiques d'une éventuelle sécession du Québec," p. 311, n. 38.

For arguments to the contrary, see Monahan, "The Law and Politics of Quebec Secession," pp. 14–15; and Robert A. Young, *The Secession of Quebec and the Future of Canada* (Kingston, Ont.; Montreal: McGill-Queen's University Press, 1995), p. 248.

40 An amendment to this effect will likely soon be passed in any case. A resolution introduced in the House of Commons by Stéphane Dion, Minister of Intergovernmental Affairs, on April 22, 1997, would, if ratified by Parliament and the National Assembly, end the application of subsections 93(1) to (4) in Quebec. See Canada, Parliament, House of Commons, *Debates*, April 22, 1997, p. 10029.

41 R.S.C. 1985, c. E-3.

42 R.S.C. 1985, c. S-26.

43 Section 25 of the *Supreme Court Act*, R.S.C. 1985, c. S-26.

44 One way of doing so has been put forward in Monahan and Bryant, *Coming to Terms with Plan B*.

45 In British Columbia, the relevant legislation is the *Constitutional Amendment Approval Act*, R.S.B.C. 1996, c. 67, s. 1 (obligation to hold referendum prior to introduction of motion to ratify constitutional amendment in the legislature) and the *Referendum Act*, R.S.B.C. 1996, c. 400, ss. 4 and 5 (preference of more than 50 percent of validly cast ballots is binding on the government that initiated the referendum). In Alberta, it is the *Constitutional Referendum Act*, S.A. 1992, c. 22.25, s. 2(1) (obligation to hold referendum prior to holding ratification vote in legislature) and s. 4(1) (preference of majority of validly cast ballots binding on the government that initiated the referendum).

An Ontario legislative committee has recommended adopting requirements similar to those in British Columbia and Alberta, and the government is considering introducing a bill to implement the committee's proposals in the fall of 1997. See Ontario, Legislative Assembly, Standing Committee on the Legislative Assembly, *Final Report on Referenda*, 1st Session, 36th Leg. (June 1997), pp. 6–9; and James Rusk, "Tax referendums proposed in Ontario," *Globe and Mail* (Toronto), July 4, 1997, p. A3.

At least four other jurisdictions have legislation that permits and facilitates, but does not require, the holding of a referendum on matters of public interest. See the *Referendum and Plebiscite Act*, S.S. 1990-91, c. R-8.01, s. 3(1); the *Election Act*, R.S.N., c. E-3; *Loi sur la consultation populaire*, R.S.Q., c. C-64.1; the *Referendum Act*, S.C. 1992, c. 30, s. 3(1).

46 For an elaboration of this argument, see Peter W. Hogg, "The Effect of a Referendum on Quebec Sovereignty," *Canada Watch* 4 (August 1996, nos. 5 & 6): 89.

47 Monahan and Bryant, *Coming to Terms with Plan B*, pp. 33–35.

48 Patrick Boyer, *Direct Democracy in Canada: The History and Future of Referendums* (Toronto: Dundurn Press, 1992), p. 254.

49 The accord garnered majority support in just four provinces. See Peter H. Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?* 2nd ed. (Toronto: University of Toronto Press, 1993), ch. 11.

50 The act provides that federal ratification of an amendment to which the act applies will not proceed "unless the amendment has first been consented to by a majority of the provinces" (*Constitutional Amendments Act*, S.C.1996, c.1, s.1(1)). In the absence of a definition of provincial consent, we submit that either legislative ratification or popular assent through a referendum would suffice.

51 Section 35.1 of the *Constitution Act, 1982* supports the participation of representatives of Aboriginal peoples in the negotiation of constitutional amendments related directly to them. We do not rule out the possibility that these representatives might choose to be guided by the wishes of their peoples as expressed through referendums; how they seek to determine and express their position is their affair. Our point is that, in addition to a five-region "yes" vote on a negotiated agreement as a whole, Aboriginal approval of the provisions affecting their rights would also be required.

52 The five-region referendum rule would require majority approval in these provinces in any case, since British Columbia is a region all its own and, as noted, Alberta has more than 50 percent of the population of the prairie provinces.

53 See J. Monar et al., *The Maastricht Treaty on European Union: Legal Complexity and Political Dynamic* (Brussels: European Interuniversity Press, 1993).

54 Peter W. Hogg, "Principles Governing the Secession of Quebec" (paper presented at the conference on "Law, Democracy and Self-Determination," Canadian Bar Association, May 22–23, 1997), p. 10.

55 For a full elaboration of these points, see Grand Council of the Crees, *Sovereign Injustice*; Anaya, Falk, and Pharand, *Canada's Fiduciary Obligation*, vol. 1; and Dupuis and McNeil, *Canada's Fiduciary Obligation*, vol. 2.

56 These are the Abenaki, Algonquin, Atikamekw, Cree, Huron, Mikmaq, Mohawk, Montagnais, Naskapi, and Malicite, and the Inuit of Ungava.

57 See Grand Council of the Crees, *Sovereign Injustice*, ch. 8; and Canada, Royal Commission on Aboriginal Peoples, *Report*, vol. 2, ch. 2.

58 See Canada, Task Force to Review Comprehensive Claims Policy, *Living Treaties: Lasting Agreements* (Ottawa: Department of Indian Affairs and Northern Development, 1985), ch. 1; and Quebec, *Summary of the Comprehensive Offer of the Quebec Government to the Atikamekw and Montagnais Nations* (Quebec City: Government of Quebec, December 1994).

59 Robert Young suggests that there will be strong pressures in this direction; see *The Secession of Quebec and the Future of Canada*, pp. 226–227.