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Commentary

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The Referendum Papers

Cooler Heads Shall Prevail:

Assessing the Costs and Consequences of Quebec Separation

by

Patrick J. Monahan

The Quebec government's draft bill on sovereignty, tabled in the Quebec National Assembly on December 6, 1994, assumes that Quebec has the unilateral right to secede from Canada on terms and conditions that it alone will determine. It also assumes that Quebec's accession to sovereignty will not affect Quebec's territory, currency, borders, treaties, or the citizenship rights of Quebec residents.

This *Commentary* takes direct issue with these assumptions. Under Canadian law, no province has the unilateral right to secede from the federation. Secession requires the consent of the federal Parliament, as well as the legislatures of all the provinces. Therefore, the Quebec draft legislation, which assumes that Quebec can secede through an ordinary statute of the Quebec National Assembly, is plainly unconstitutional under current Canadian law.

It is extremely unlikely that a constitutional amendment authorizing Quebec secession would achieve the unanimous consent of the provinces and the federal Parliament. But failure to achieve unanimous consent would not necessarily block Quebec's attempt to secede. Quebec could still issue a unilateral declaration of independence (UDI), in breach of the existing Canadian Constitution. (The Quebec draft legislation on independence contemplates, in substance, a UDI.) This UDI would be legally effective — despite its contravention of the Canadian Constitution — if the Quebec government were able successfully to oust the jurisdiction of the Canadian government and to exercise effective control over Quebec territory.

The attitude and response of the Canadian government to a unilateral declaration of independence by Quebec would be the critical factor in its eventual legal effectiveness. This *Commentary* argues that the Canadian government would likely challenge a Quebec UDI, leading to a debilitating and costly contest for supremacy between the Canadian and Quebec governments, at huge cost to Canadians in all parts of the country.

Main Findings of the Commentary

- If Quebec is to secede from Canada, it will occur through one of two possible processes: an amendment passed in accordance with the existing constitutional amending formula, or a unilateral declaration of independence (UDI) issued by the Quebec government.
- Although the existing Constitution is silent on the issue of provincial secession, a province could secede from Canada through a constitutional amendment approved by the Senate and the House of Commons and the legislatures of all ten provinces.
- There is no basis for a constitutional convention supporting Quebec's right to secede from Canada unilaterally. The 1980 Quebec referendum, as well as all subsequent discussions of the issue by Canadian politicians, have been premised on the assumption that mutually acceptable terms for secession would be agreed to in advance.
- Section 35(1) of the *Constitution Act, 1982* requires the government of Canada to obtain the consent of aboriginal peoples in Quebec before agreeing to an amendment permitting Quebec to secede.
- Although such an amendment is theoretically possible, it is practically unlikely for a variety of reasons: it is unclear who would be entitled to negotiate with the government of Quebec; unanimous provincial consent is very difficult to obtain; and it would prove impossible in practice to divide the existing Canadian debt and assign a portion of it to any new Quebec state.
- Quebec's draft bill on independence contemplates a Quebec UDI and, as such, is clearly unconstitutional under Canadian domestic law.
- For a Quebec UDI to be legally effective, it would be necessary for the Quebec government to exercise effective control over Quebec territory and to oust the jurisdiction of the Canadian government. If Quebec were able to exercise effective control over only a portion of that territory, then the UDI would be legally effective only in relation to those lands. Other parts of what is now Quebec, such as the northern half of the province with its majority aboriginal population, could remain within the jurisdiction of Canada.
- The attitude and response of the Canadian government to a Quebec UDI would be the critical factor in its eventual legal effectiveness. The Canadian government would likely contest the validity of the UDI and take action to prevent Quebec from seceding unilaterally.
- This contest would produce a period of legal uncertainty, during which both Canada and Quebec would assert sovereignty over Quebec territory. The existence of two rival regimes competing for authority would produce widespread confusion and the possibility of civil unrest in Quebec. It would also result in a massive selloff and devaluation of Canadian securities, a drop in the value of the Canadian dollar, and a significant increase in interest rates.
- These costs would be not a product of unreasonable behavior on the part of politicians but the inevitable result of the contest for supremacy that the Quebec UDI would precipitate. Such costs are avoidable only if some accommodation can be found that will permit Quebec to remain a province within the Canadian federation.

Those who observe that the separation of Quebec from Canada would entail large economic, social, and political costs are often advised that such advice is of limited utility in the continuing national unity debate. A country, it is rightfully said, cannot be held together by threats of economic disaster or fear of the political alternatives. In any event, Canadians in all parts of the country have grown weary of warnings of economic Armageddon if voters reject the preferred constitutional option of the government of the day. Such prophecies of doom have been uttered so often in the past — and have so frequently been disproved by subsequent events — as to produce widespread indifference, cynicism, and even hostility when a new one is trotted out for inspection by voters.

Thus, anyone who today argues that Quebecers should reject political independence because of the huge economic costs associated with separation is likely to be dismissed as a scaremonger. Precisely this label was attached to British Columbia Premier Mike Harcourt and Saskatchewan Premier Roy Romanow (at least in Quebec circles[1]) when they warned in 1994 that the process of separation would be bitter, acrimonious, and costly for Canadians in all parts of the country.

Cynicism about such threats is certainly understandable, but it is also extremely dangerous. The danger arises from the possibility that Quebecers (or other Canadians) may make a tragic miscalculation when they are called on to make decisive collective choices about their political future. In particular, if Quebecers assume the economic costs of separation to be low and discount any warnings to the contrary, they may make a decision on the basis of assumptions that turn out to be unfounded. Separation from Canada might turn out to be far more complicated and costly than Quebecers had been led to expect. The problem is that by the time the true costs involved become apparent, it may be too late. Political events, once set in motion, rarely unfold according to a predetermined script. Nor can they be rewound to a prior set of arrangements with the players pretending that nothing has happened in the interim. A decisive event or decision may start a chain reaction, a whole series of subsequent events or decisions that may never have been intended but are beyond anyone's capacity to control. The tragedy is that, had the true nature of the costs and political realities been appreciated at the outset, the original decision to proceed might never have been taken.

The possibility that Quebecers may fall prey to such a tragic miscalculation in the immediate future is far from fanciful. The number of Quebecers who believe that economic conditions in an independent Quebec would improve or stay the same has doubled from the levels observed just 20 years ago. Public opinion in Quebec today is almost evenly split between those who say that separation would be economically beneficial or produce no change and those who believe that it would be harmful to Quebec's interests.[2] Moreover, the belief that Quebec secession can be accomplished quickly and painlessly is central to the message and the political appeal of the Parti Québécois. According to the PQ, the only obstacle to a speedy and painless divorce is the possibility that Canada might decide to behave in an irrational and vindictive manner, imposing large transition costs on everyone. Ultimately, maintains the PQ, Canada will have to forgo indulging the natural human desire for vengeance. At the end of the day, cooler heads will prevail. The economic costs of an acrimonious separation are so massive that Canada will be forced to behave reasonably, regardless of the inflammatory posturing of Canadian politicians or extremists' desire to exact revenge on Quebec.

What if the PQ's rosy scenario is wrong? What if the separation of Quebec from Canada would inevitably exact huge economic costs, not only from Quebecers but also from Canadians in all parts of the country? What if these costs, far from being a product of irrational posturing on the part of renegade politicians, would simply be the unavoidable price of taking Quebec out of Canada?

If the costs turned out to be far larger than advertised or expected, then Quebecers would have fallen victim to precisely the kind of tragic miscalculation described above. Having endorsed sovereignty in a referendum on the assumption that political separation could be accomplished quickly and at low cost, they would then discover that separation actually posed a serious threat to their economic prospects and well-being. The problem is that with the process of separation initiated, reverting to the situation prior to the referendum might well prove impossible. Quebecers and Canadians in other parts of the country could well find themselves prisoners in an unfolding drama that no one could halt, much less control.

To undertake fundamental political decisions on the basis of assumptions that are demonstrably false is both unwise and unnecessary.* Accordingly, this paper seeks to analyze the various ways in which Quebec secession might actually come about and thus to determine whether any potential costs can be avoided through cooperative or rational behavior on the part of the players involved. Simply put, my objective is to test the PQ's hypothesis that, as long as cooler heads prevail, the costs associated with Quebec's separation from Canada would be low and inconsequential.

My analysis proceeds on the premise that a majority of Quebecers vote in favor of sovereignty in the referendum to be held in 1995. (I make this assumption not because I believe this referendum outcome to be likely but simply because it forms the necessary starting point for the analysis that follows. If Quebecers reject sovereignty in the referendum, then the debate over political sovereignty for Quebec will — for a time at least — be brought to an end. Only if a majority of Quebec voters support sovereignty does the prospect of secession and its associated costs become a matter of immediate political consequence.)

The paper is generally organized in four parts. The first provides a kind of roadmap for the analysis that follows. Looking at the legal framework governing secession in both Canadian and international law, a framework that would form the backdrop for the behavior and decisions of political leaders and exert an important influence on the outcome of the process, I describe the manner in which events might unfold during the period immediately following a positive referendum result. This section also takes issue with the claim that Quebec secession is a matter for Quebecers alone to decide. I argue that, under the existing Constitution, Quebec secession would require the consent of Parliament, the ten provincial legislatures, and the aboriginal peoples in the province of Quebec.

I then analyze each of the two ways — there are only two — in which Quebec could secede from Canada. The first is by an amendment to the Canadian Constitution, a route I call the legal continuity scenario. The second is through the Quebec government's making a unilateral declaration of independence (UDI), a course denoted here as the legal discontinuity scenario.

In the paper's second section, I consider the legal continuity scenario in more detail. After pointing out the difficulties of this route, I conclude that it is extremely unlikely that Quebec secession could occur on this consensual basis, pursuant to terms agreed to in advance by both Quebec and the rest of Canada (ROC). In the far more likely scenario, examined in the third section, Quebec would unilaterally declare itself a sovereign state, notwithstanding the fact that it had failed to reach an agreement with the ROC over the terms of separation.

A UDI by Quebec would be a high-risk political gamble. Its success would turn, to a very large extent, on the way in which the Canadian government responded to Quebec's declaration. I conclude that Canada would almost certainly contest a Quebec UDI in some way.

The decision to contest — like the UDI itself — would be high risk and high stakes; I conclude that Canada would likely respond in this way because doing so would be in its self-interest. Canada would have a great deal to lose by simply allowing a Quebec UDI to go unchallenged. Topping the list of potential Canadian losses would be responsibility for

the existing Canadian government debt of approximately $550 billion. Absent some agreement from Quebec to assume its share of that debt upon separation, Canada would remain liable for all of it. If Quebec were to secede through a unilateral declaration of independence, no agreement on debt sharing (or on any other issue) would be in place. Therefore, an uncontested UDI might well allow Quebec to escape any responsibility for the debt and leave the ROC liable for the entire indebtedness. In order to avoid this possibility, Canada would insist that Quebec could secede only through the prior agreement of both parties, rather than through a UDI. If Quebec were to proceed unilaterally, Canada would dispute the validity of the declaration and demand that Quebec rescind or suspend its effect pending satisfactory resolution of the major issues in dispute.

The upshot of this analysis is that a Quebec UDI would likely precipitate a Quebec-Canada standoff in which Quebec would claim the status of an independent state while Canada maintained that Quebec remained a province until such time as mutually acceptable separation terms could be negotiated. In effect, we would have a period of legal and political uncertainty, with two rival regimes contending for power. It goes without saying that such a period of legal and political uncertainty, even if relatively brief, would be enormously costly to all Canadians, particularly in the light of our heavy reliance on foreign investors and capital to maintain our living standards. Thus, regardless of which government eventually prevailed, both governments and their people would emerge as certain losers.

The last section of the paper briefly reviews the prospects for Canada and for Quebec in the light of my analysis. There is little basis for believing that Quebecers would be willing to endure the kinds of costs and disruptions that secession from Canada would necessarily entail. Thus, assuming Canadians come to appreciate properly the risks and costs that would be associated with Quebec separation, there seems little or no likelihood that Quebec will actually secede from Canada.

The conclusion that Quebec is unlikely to secede from Canada is by no means an inconsequential one. That being said, it is important to recognize the limited role that the analysis offered in this paper can and should play in assessing Canada's political future.

Canadians in general and Quebecers in particular may not want to risk their standard of living for the sake of achieving constitutional changes that are risky and untested. Yet it is equally unlikely that Quebecers will be persuaded of the merits of Canadian federalism by fear of the costs and consequences of secession. Once people lose their faith in their current political arrangements, that faith is not likely to be restored by an argument that all the available alternatives will make them worse off.

In effect, Canada cannot hope to win the battle for the hearts and minds of Quebecers by default. Thus, we must convince Quebecers (and Canadians in all regions) that there are benefits and advantages associated with remaining in Canada, rather than simply focus on the alleged disaster that awaits anyone who questions the merits of the status quo. At the end of the paper, I offer some tentative and very general suggestions as to how we might go about responding to this challenge.

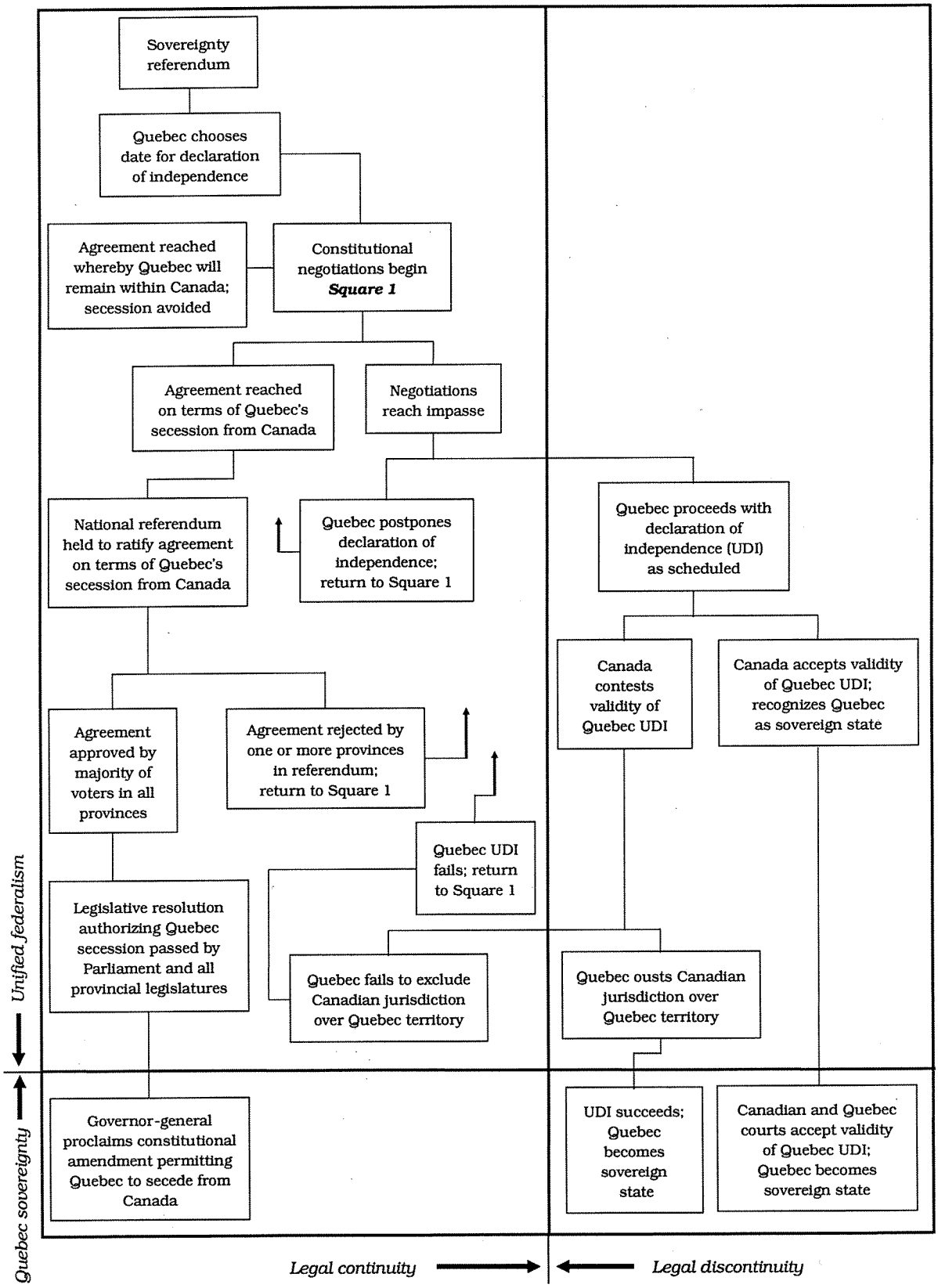
Two Scenarios

It is impossible to predict in advance the precise sequence of events that might lead to Quebec's separation from Canada. We can, however, identify their general trajectory. We know, for example, that if Quebec is to secede from Canada, it will do so in one of two ways: the legal continuity or the legal discontinuity scenario. Figure 1 depicts these two scenarios and the manner in which they might unfold.

The Legal Continuity Scenario

The first avenue is through a constitutional amendment, which would provide for the orderly separation of Quebec from Canada and

Figure 1: ***The Road to Quebec Sovereignty: Options and Critical Path***



deal with any postseparation political institutions that might be needed. As the left-hand side of Figure 1 indicates, resolutions authorizing the amendment would be passed by Parliament and the required provincial legislatures, and the amendment itself would be proclaimed by the governor general of Canada.

The Canadian Constitution is, of course, silent on the right of a province to secede from the federation. The amending formula, contained in part V of the *Constitution Act, 1982*, makes no explicit reference to provincial secession. Yet the absence of any explicit reference to secession should not lead one to suppose that it cannot occur under the terms of the existing amending formula.

The *Canada Act, 1982* (UK) 1982, c.11 terminated the United Kingdom's legal authority in relation to Canada and vested all previous imperial authority in the appropriate Canadian political institutions.[3] In terms of constitutional amendment, therefore, domestic political institutions now possess the full range of rights and powers that were previously exercised by Westminster. Prior to 1982, Westminster had the right to extend or alter the boundaries and territory of Canada.[4] Therefore, Canadian domestic political institutions must now enjoy a similar authority. Thus, even though part V of the *Constitution Act, 1982* does not specifically mention the issue of provincial secession, it must provide a mechanism whereby a province can secede from the federation.

Some commentators, on observing the lack of any explicit reference to secession, assume that it would, therefore, fall under the general amending formula of section 38 of the *Constitution Act, 1982*, which applies in cases in which a proposed amendment does not fall within any of the categories specified in part V. Amendments under the general procedure require the consent of both federal houses plus two-thirds of the provinces representing 50 percent of the Canadian population.

Such a conclusion inevitably suggests a number of anomalies. First, it seems to open up the possibility that seven provinces representing 50 percent of the population could, in effect, impose secession on an unwilling sister province by voting to expel it from Canada even though it wished to remain in the federation.

Professor José Woehrling, who maintains that the general amending procedure applies to secession, concedes that forced expulsion would be theoretically possible. He concludes, however, that the province that was the subject of the resolution could opt out of the amendment under section 38(3).[5] It provides that, if an amendment under section 38 derogates from provincial rights or powers, a province may pass a resolution of dissent; the amendment will not take effect in any province that has thus opted out. To take a concrete example, if seven other provinces with more than 50 percent of the population voted to "expel" Ontario, it could dissent from the amendment under section 38(3) and the amendment would not take effect in Ontario.

Woehrling's attempted resolution of this anomaly seems merely to introduce further complications, however. Passage of a resolution of dissent under section 38(3) does not nullify or invalidate a constitutional amendment; it merely protects the rights of the dissenting province by providing that the amendment shall not take effect there. Thus, under the scenario sketched above, Ontario's dissent from the constitutional amendment would not prevent the amendment's proceeding in the seven other provinces where it had been authorized. In those provinces, the courts would no longer regard Ontario as part of Canada. In Ontario itself, on the other hand, the courts would treat the amendment as ineffective and assume that Ontario remained a part of Canada. Thus, Ontario would have been thrown into a state of suspended constitutional animation, with courts in different parts of the country taking different views on whether it was part of the country.

This situation would be so bizarre that it makes the section 38 procedure seem wholly inappropriate for dealing with secession. Courts in all provinces must take identical views on what constitutes the territory of the country. Thus, the section 38 procedure, which pro-

vides for a right to opt out of amendments,[6] cannot govern the case of provincial secession, and this matter must necessarily fall under one of the other amending procedures outlined in part V.[7]

In fact, another section of the amending formula seems to be directly implicated in any instance of provincial secession. It is section 41, which requires unanimous provincial consent for certain specified classes of amendments, including those in relation to "the office of the Queen, the Governor General and the Lieutenant Governor of a province." The secession of a province would necessarily and directly affect both the office of its lieutenant-governor and the office of the governor general. Upon the secession of Quebec, the office of its lieutenant-governor would be abolished.[8] The courts have already determined that an attempt to provide for the enactment of legislation through a referendum procedure amounts to legislation impairing the office of the lieutenant-governor of a province.[9] If creating a legislative process in which the lieutenant-governor plays no part is an amendment to the "office of the lieutenant governor," then surely an amendment abolishing that office entirely must be regarded as falling within the same classification.

The secession of a province also appears to be an amendment in relation to the office of the governor general of Canada. Because the office of the lieutenant-governor would be abolished upon secession, the power of the governor-general-in-council to appoint the lieutenant-governor would also be terminated. Moreover, under the current Constitution, the lieutenant-governor of a province may "reserve" any bill enacted by the legislature for the assent of the governor general of Canada. A bill held back in this manner can become law only if it is approved by the governor-general-in-council within two years.[10] The governor-general-in-council also has the power to "disallow" any provincial legislation within two years of its enactment by a province, even if the lieutenant-governor has already signed the bill into law. These powers of reservation and disallowance would have to be abolished in respect of any province that seceded, since such powers would be wholly inconsistent with status as an independent state. The elimination of these powers and prerogatives appears to be an amendment in relation to the office of the governor general and accordingly would require unanimous consent.

Provincial secession also seems to directly implicate an additional class of amendment in section 41: the "composition of the Supreme Court of Canada." Currently, the *Supreme Court Act* guarantees Quebec three members on the court. If Quebec were to secede, its membership on the court would necessarily be terminated. The number of judges that must be drawn from a particular region appears to be an aspect of the "composition of the Supreme Court" and thus such a change would require unanimous consent.[11]

Woehrling rejects the possibility that section 41 governs provincial secession without offering any analysis. He merely observes that the conclusion that section 41 applies appears "very artificial" and that it would be advanced by "those who will oppose the secession of a province [and] obviously will want to make it as difficult as possible."[12] Yet Woehrling concedes that an amendment that provided for a binding referendum procedure in a province would be an amendment in relation to the "office of the Lieutenant Governor" and would require unanimous consent.[13] Given this conclusion, it is difficult to understand how an amendment abolishing the office of the lieutenant-governor entirely would not also require unanimous consent.[14]

Professor Peter Hogg is somewhat more tentative in his discussion of this question. He says that secession could "probably" be accomplished under the general amending procedure but acknowledges that it is possible that the "indirect impact of a secession on the matters enumerated in s. 41 makes the unanimity procedure applicable."[15] He does not consider any of the complications or anomalies that would arise if section 38 were applicable.

In short, the better view seems to be that provincial secession falls under section 41(a) and (d) of the *Constitution Act, 1982* and thus

would require unanimous provincial consent as well as resolutions passed by the Senate and the House of Commons.[16]

In this sense, no province has a right to secede from Canada. A provincial government's or population's expression of a clear desire to leave the country may give rise to a political or moral obligation to negotiate the terms of secession in good faith, but such an obligation does not, in itself, carry legal consequences. Secession can be legally accomplished under the existing Constitution only if it is approved by all the other partners in the federation.

Some Quebec commentators have suggested that, whatever the formal legal position, there is a constitutional convention[17] recognizing Quebec's right to secede unilaterally from Canada. This constitutional convention is said to be based on the fact that "the Canadian governments and parliament acquiesced to the 1980 referendum and thus recognized Quebec's right to decide its own political status."[18] Certain statements by Quebec politicians to the effect that "English Canada has no say in the future of Quebec"[19] are also cited as evidence that Quebec has the right to secede unilaterally.

It is true that Canadian politicians acquiesced in the holding of the 1980 referendum. But this can hardly be said to have established Quebec's right to secede *unilaterally*. This is because the referendum asked for a mandate to *negotiate* sovereignty-association with the rest of Canada. In short, far from asserting that Quebec could secede unilaterally, the referendum was premised on the assumption that secession was a matter for negotiation with the rest of Canada. In this sense, the wording of the referendum question directly contradicts the assertion that Quebec secession is a matter for Quebecers alone to decide. In fact, it suggests precisely the opposite: Quebec secession must be the subject of negotiation with the rest of Canada and can only occur on terms that are *mutually acceptable*.

As for statements made over the years to the effect that English Canada has "no say in the future of Quebec," it is important to distinguish between statements made by Quebec politicians and those made by political leaders elsewhere in the country. This is because, in order to establish a constitutional convention, *all* the relevant political actors have to recognize the existence of a binding rule or norm.[20] No Canadian political leader outside Quebec has ever stated that the province has a right to secede unilaterally from the federation. In other words, while certain politicians in English Canada might have spoken generally about Quebec's right to "self-determination,"[21] this has always been premised on the assumption that acceptable terms for separation would be negotiated with the rest of the country.

Quebec's separation from Canada would implicate the interests of Canadians in all parts of the country. As such, the terms of its secession are a matter of legitimate concern to all Canadians. This is consistent with the constitutional requirement that all provinces and the federal Parliament give their consent prior to the secession of any province.

Moreover, there appears to be a constitutionally mandated role for aboriginal peoples before any such secession could occur, since section 35(1) of the *Constitution Act, 1982* protects the "existing aboriginal and treaty rights of the aboriginal people of Canada." The Supreme Court of Canada has held that section 35(1) constitutionalizes a "fiduciary duty" that the Crown owes to aboriginal peoples.[22] With respect to Indian lands, this fiduciary duty requires that the Crown deal with reserve lands for the benefit of the surrendering Indians.[23] More generally, the Supreme Court, in the *Sparrow* case, described the "guiding principle" underlying section 35(1) as follows:

> The Government has responsibility to act in a fiduciary capacity with respect to Aboriginal peoples. The relationship between the Government and Aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of Aboriginal rights must be defined in light of this historic relationship.[24]

Section 35(1), unlike certain of the guarantees in the Charter of Rights and Freedoms, is not subject to a legislative override by Parliament. Therefore, the secession of a province from the federation must comply with the requirements of section 35(1) to be constitutionally valid.

It appears that section 35(1) would require the federal government to oppose any provincial secession that had not been approved by the aboriginal peoples who would be directly affected by it. Under normal principles of trust law, a fiduciary relationship that arises from operation of law — such as the fiduciary obligation in section 35(1) — can be terminated only with the consent of the beneficiary of the relationship.[25] The secession of a province would have the effect of terminating or severing the fiduciary relationship between the Crown and the aboriginal peoples in the seceding province.[26] Therefore, it would be unconstitutional for the government of Canada to support a constitutional amendment authorizing the secession of a province unless the aboriginal peoples residing there had consented to the amendment.

In this sense, the fiduciary obligation constitutionalized through section 35(1) imposes an additional responsibility on the government of Canada for purposes of the amending formula. The government of Canada is under a binding and legally enforceable obligation to ensure that aboriginal peoples who would be directly affected by the secession of a province consent to it in advance.[27]

The Quebec government's draft legislation on independence, tabled in early December 1994, purports to declare Quebec's secession from Canada through an ordinary statute of the Quebec National Assembly. Such a statute, if enacted, would be plainly unconstitutional according to existing Canadian law. No province has the legal right to secede through means of a UDI. Yet the mere fact that a provincial UDI might be unconstitutional does not mean that it will prove to be legally ineffective, as the analysis in the next section explains.

The Legal Discontinuity Scenario

The other possible route to secession starts with a unilateral declaration of independence by Quebec. This second scenario envisages a revolutionary change — one that would be accomplished wholly outside the existing rules of the constitutional order, involving a break in legal continuity and the establishment of a new constitutional order based on a new legal foundation.

It goes without saying that a UDI by Quebec would be wholly illegal and unconstitutional from the point of view of existing Canadian law. As we have just seen, no province can secede absent the consent of Parliament, all the other provinces, and aboriginal peoples in Quebec. How, then, can it be said that a UDI by Quebec could lead to that province's secession from the federation?

The answer lies in the recognition that, in certain circumstances, a breach in legal continuity "may have to be treated as superseding the constitutional and legal order and replacing it by a new one."[28] Whether this kind of legal revolution occurs depends ultimately on whether the new regime can successfully oust the old one. If the old constitutional order disappears and officials, judges, and the general public acquiesce in the laws, rules, and orders issued by the new holders of power, then sooner or later a new legal order will have come into being. This reality explains how the rebellion of the 13 American colonies led to the creation of a new legal order, the United States of America, even though their 1776 declaration of independence was wholly illegal under British law. As one leading commentator says,

> Legal theorists have no option but to accommodate their concepts to the facts of political life. Successful revolution sooner or later begets its own legality....Thus, might becomes right in the eye of the law.[29]

At what point can it be said that a legal revolution has occurred? What degree of political effectiveness is required before the courts will

recognize a new regime as having legally superseded a prior regime?

In my view, the success of any attempt by Quebec to establish a new legal regime would depend largely on the nature of the response from the government of Canada. If it accepted or acquiesced in a Quebec declaration of independence, then Quebec would almost certainly succeed in attaining the status of a separate and independent state. Canadian acceptance or recognition of the new Quebec state would permit and encourage recognition by other states and by international organizations, such as the United Nations. Even if certain citizens or groups within Quebec contested the validity of the new regime, the absence of external support, from Canada or international organizations, would mean that such domestic opposition would be relatively short-lived.

The process and the result would differ greatly if the Canadian government decided to challenge Quebec's unilateral action. If Canada contested the validity of a Quebec UDI, the immediate result would be a contest for supremacy between the Canadian and Quebec governments. As long as this contest continued, the Canadian government would regard any involvement by other states — including a decision to recognize the new Quebec regime — as an interference in internal Canadian affairs. This stance would discourage other states from recognizing the fledgling Quebec regime (few states would want to appear to be taking sides in the dispute). In short, Canadian opposition would dramatically reduce the chances that the Quebec UDI would succeed. It would make it much more likely that Quebec would eventually be forced to withdraw or suspend the UDI and return to the bargaining table, in order to attempt to reach agreement with Canada on the terms of separation.

More Details and Consequences

Let us consider in more detail each of the two possible responses to a UDI and their associated consequences.

Canada Accepts a Quebec UDI

Suppose the Canadian government acquiesced in a Quebec UDI, even though it did not satisfy the requirements of the existing constitutional amendment formula. What would be the legal and political significance of such acceptance?

In my view, acquiescence in a UDI by the government of Canada would be sufficient to legally trigger the secession of Quebec. The Canadian courts would ultimately defer to the Canadian government on the issue of Quebec independence. If the Canadian government was willing to recognize Quebec as an independent state, the courts would likely take the same view and give legal effect to Quebec's UDI.

This legal result is not as anomalous or unusual as it may at first appear. Canadian courts traditionally defer to the executive on such questions as the recognition of a foreign government, regarding them as matters "within the realm of responsibility of the executive arm of the government and being questions on which the State should speak with one voice."[30] The normal procedure is for the secretary of state for external affairs to provide a certificate as to whether a particular place is within Canada or under the authority of a foreign state, and the courts treat such a certificate as conclusive proof on the matter. If the Canadian government chose to recognize the validity of a Quebec UDI, it could provide such a certificate, and it would likely prove legally conclusive.[31]

The same result would follow even if the courts were, for some reason, willing to look behind the certificate and make an independent inquiry into the matter.[32] If the Canadian government had acquiesced in the Quebec UDI and was no longer asserting any authority or jurisdiction over Quebec territory, the political authorities would have acknowledged the Quebec government as the lawful government of the new sovereign state. Canadian recognition would have opened the door for recognition of Quebec by other states and international organizations.

Some of the ROC Canadian provinces might well be profoundly unhappy with the Cana-

dian government's decision. But they could do little to challenge Quebec's effective control over its own territory since no province's powers extend to another part of Canada. In short, acceptance of the Quebec UDI by the Canadian government would leave the courts with no alternative but to acknowledge this new political reality and to rule that Quebec had successfully seceded from Canada despite the absence of a formal constitutional amendment authorizing the change.

What this analysis reveals is the key role and responsibility that would rest in the hands of the government of Canada in the event of a Quebec UDI. It also opens up the possibility of a way to escape the straitjacket of the existing constitutional amendment formula with its requirement of unanimous provincial consent. A UDI followed by recognition as a separate state by the government of Canada would apparently permit Quebec to sidestep the rules of the existing Canadian Constitution and establish a new state through revolutionary means.

Effects on Institutions

Assume, for purposes of discussion, that I am correct in my conclusion that acceptance of a Quebec UDI by the Canadian government would be legally sufficient to accomplish the secession of Quebec from Canada. What would be the effect on the remainder of the Canadian Constitution and, in particular, on national political institutions? Many of those institutions, including the Senate, the House of Commons, and the Supreme Court, make explicit provision for Quebec representation. If Quebec had seceded through a UDI, rather than a constitutional amendment, there would not yet have been a formal constitutional amendment removing the Quebec representatives from these institutions. Would we therefore continue to have Quebec members of Parliament and Quebec judges on the Supreme Court of Canada until such time as a formal constitutional amendment was passed deleting Quebec's representatives in those institutions?

We are clearly in uncharted waters here, and thus it is difficult to offer any confident predictions as to how the courts might deal with such questions. Yet it would seem wholly anomalous if Quebec were to be considered a sovereign state for certain purposes and a province of Canada for others. Once Canada regarded Quebec as a separate state, then it seems that the courts would have to interpret the entire Canadian Constitution in light of this new political reality, and read it as if it made no reference to the province of Quebec. Those provisions that refer to Quebec representation on or participation in national political institutions would immediately be rendered inoperative, even in the absence of a formal constitutional amendment. For example, the House of Commons would automatically cease to have any Quebec MPs (reducing its size from 295 to 220 seats); the Senate would cease to have any Quebec senators (reducing its size to 80 from 104 seats); and the Supreme Court would continue with only the six non-Quebec judges.

Other constitutional provisions that make explicit reference to Quebec would also have to be read in such a way as to ignore, in a practical sense, any reference to Quebec. Thus, the guarantees in section 133 of the *Constitution Act, 1867* with respect to the use of the English and French languages in the legislative assembly of Quebec would cease to operate since that assembly would no longer exist.[33]

This line of argument is not entirely free of doubt. An alternative interpretation flows from the proposition that changes to the House of Commons or the Senate can be effected only through a duly authorized constitutional amendment. A Quebec UDI — even if accepted by the Canadian government — would not represent such an amendment. Thus, according to this argument, until such time as a formal constitutional amendment was passed, Quebec would have to continue to be represented in national political institutions, even though the Canadian government might have recognized it as a sovereign state.

The problem with this theory is that it would produce a situation in which the Constitution no longer accorded with underlying political reality. We are assuming that Quebec would have attained, in law as well as in a practical political sense, the status of a sovereign state. Other states would have recognized it as independent of Canada. Given this legal and practical reality, it is difficult to conceive of continued Quebec representation in the House of Commons, the Senate, or the Supreme Court of Canada.

There would be significant practical difficulties as well. How, for example, could federal elections be held in Quebec if the Canadian government no longer regarded it as part of the country? The Quebec government would presumably oppose any attempt to hold Canadian elections on its territory. It would also be difficult to appoint senators from the province of Quebec if it had successfully seceded from Canada.[34] Ultimately, the legal validity of actions taken by national institutions, such as the House of Commons and the Senate, would be thrown into confusion and doubt by any attempt to maintain Quebec representation in these institutions.

It seems far simpler to conclude that, once Quebec attained political independence, it would do so for purposes of the entire Canadian Constitution. Thus, all references to Quebec in the Constitution would be read so as to take account of the fact that Quebec was no longer a part of Canada. National institutions would be automatically reconstituted to take account of Quebec's absence; other constitutional provisions that make specific reference to Quebec might be rendered inoperative. It would be up to the courts, in the absence of a constitutional amendment dealing with a specific matter, to determine the nature of the changes that would result from Quebec's departure.

Conclusion

This analysis reinforces my view of the pivotal role and responsibility of the government of Canada in a scenario in which Quebec seeks to secede through a UDI. Canadian recognition would open a shortcut to Quebec independence, enabling Quebec to jump successfully outside the Canadian Constitution and achieve sovereignty through extralegal means. Acceptance would also mean that Canadian political institutions would automatically be reconstituted so as to remove Quebec representation, while other constitutional provisions making reference to Quebec would be rendered inoperative.

Canada Challenges a Quebec UDI

The fact that a scenario of acquiescence is legally possible does not make it likely. Indeed, as I will argue later, the Canadian government's most likely response to a Quebec UDI would be to contest its validity. Let us consider the legal and political consequences of such a response.

An established body of international law and practice deals with cases in which a part of a state attempts to secede from an existing state and the attempted secession is contested. The traditional international law approach to such disputes focuses on whether the new (successor) state is able to oust the authority of the former state successfully:

> A seceding territory could properly be recognized as a State if it governed its territory effectively and with sufficient stability, such that there was no real likelihood of the previous sovereign...reasserting its position.[35]

This traditional test has been modified slightly in cases in which the seceding state has a right to self-determination under international law. For a "self-determination unit" asserting statehood, the criterion to be applied has been described as one of "qualified effectiveness." The principle of self-determination operates in favor of the statehood of the seceding state, making it proper and appropriate to recognize the independence of the territory even if the former ("metropolitan") state continues to dispute the matter with "rational hope of success."[36]

Thus, the question that arises is whether Quebec has a right to self-determination as

that principle is understood under international law. Although the matter is not entirely free of doubt, most writers and jurists take the view that the right of self-determination extends only to situations in which a people is experiencing foreign or alien domination or is subject to racist or fundamentally discriminatory regimes.[37] Such is plainly not the situation of Quebec, whose citizens enjoy full democratic rights under Canadian law. One recent analysis of Quebec's claim to be a self-determination unit at international law summarizes the prevailing view:

> There is simply no basis for a claim that Quebec is a self-determination unit at international law. It is not sufficient to say that the Québec francophone population is a "people" in the special sense of that word at international law. The people of Quebec are not incarcerated in a colonial or neo-colonial situation, nor are they subjected to alien domination. They have not been dealt with on an unequal footing to other people in Canada and cannot claim *carence de souveraineté*, that is, misgovernment, exploitation, and the denial of fundamental human rights and freedoms.[38]

In this sense, Quebec has no right under international law to declare independence unilaterally. This means that, if Canada disputed the validity of a Quebec UDI, the province would attain statehood only in the event that it was able to oust the jurisdiction of Canada over Quebec territory. The criterion for Quebec statehood would be

> the maintenance of a stable and effective government over a reasonably well defined territory, to the exclusion of the metropolitan State, in such circumstances that independence is in fact undisputed, or manifestly indisputable.[39]

Other states would generally apply this test in determining whether to recognize the new state of Quebec.

Quebec's Borders

This consideration leads to an obvious question: what would happen if Quebec were able to exercise effective control over only a portion of the territory that comprised the province of Quebec, with Canada remaining in partial or complete control over the remainder? Such a possibility seems realistic. Aboriginal peoples populate the northern portion of Quebec, and many of them have signified their desire to remain a part of Canada should Quebec choose to secede. Other regions in the province have large concentrations of anglophones or allophones who might similarly be expected to choose to remain in Canada if this option were available to them. It is not at all clear that Quebec would be able to enforce compliance on dissident groups if Canada were to offer them aid and encouragement.

The analysis thus far suggests that, in such a scenario, the Quebec UDI would be effective only with respect to that territory over which the new state had established effective control. This follows from the basic proposition that Quebec has no right, under either Canadian domestic law or international law principles, to declare independence with respect to the entire Quebec territory unilaterally. Its claim to statehood through a UDI would ultimately be based on political reality — the fact that it had been able to oust the jurisdiction of the Canadian authorities over its territory. Accordingly, wherever ouster of Canada was only partial or incomplete, Quebec's claim to political independence would be correspondingly impaired or reduced.[40]

A 1992 opinion provided by five international law experts to a committee of the Quebec National Assembly reaches a contrary conclusion.[41] Quebec Premier Jacques Parizeau repeatedly refers to this legal opinion (hereinafter the "Five Experts' Opinion") as establishing the proposition that the borders of Quebec could not be put in issue if it were to secede from Canada. Since I take the opposite view, the Five Experts' Opinion bears close scrutiny and analysis.

Much of this opinion is directed to consideration of a situation in which Quebec, having already assumed the status of a sovereign state, is confronted with claims by aboriginal peoples or minorities within its borders to secede. The five jurists correctly conclude that these peoples or minorities would not have a right to secede from the newly independent state because aboriginal peoples and minorities in Quebec do not qualify as self-determination units as that term is understood in international law.[42]

The jurists also seem to conclude, however, that Quebec would have some right to the entire territory of the former province following a UDI, even if it were able to exercise effective control over only a portion of that territory. The reasoning and analysis in support of this conclusion is, however, highly confusing and difficult to follow. The Five Experts' Opinion places considerable emphasis on the fact that Quebec's existing provincial borders are guaranteed under the Canadian Constitution.[43] The jurists conclude that any attempt to reduce Quebec's borders without its consent would, therefore, be contrary to the existing rules of constitutional order.

This conclusion is correct but irrelevant in the context of a Quebec UDI that is disputed by Canada. In that situation, Quebec would be attempting to jump outside the existing constitutional order. It could not pick and choose among parts of the Constitution, ignoring those provisions with which it disagreed while seeking to rely on others that operated in its favor. The decision to proceed by way of a UDI would be premised on a break in legal continuity; it would amount to a repudiation of the existing rules of the Canadian constitutional order. Thus, although it is true that, under the existing Constitution, Quebec's borders cannot be altered without its consent, it is also true that the existing Constitution makes no provision whatever for the unilateral secession of Quebec from Canada. If Quebec was attempting to ignore the Constitution and secede unilaterally, it could not be heard to complain that the borders of the new state differed from those permitted under the existing Canadian Constitution.

The Five Experts' Opinion also relies very heavily on a principle known as *uti possidetis* (literally, "that which you possess, you shall continue to possess"), which was developed to resolve border issues between former colonies of the Spanish empire in South America. The administrative divisions of the former empire were deemed to constitute the boundaries of the newly independent successor states, thus excluding any gaps in sovereignty that might precipitate hostilities and encourage foreign intervention.[44] The same principle has been applied in African states, where colonial frontiers existing at the date of independence have been recognized as the borders of newly independent states.

The Five Experts' Opinion concedes that the principle of *uti possidetis* has generally been applied in colonial contexts and that the Quebec situation is entirely different. The jurists argue, however, that *uti possidetis* is now a principle that should apply to resolve border disputes in all contexts. They place heavy emphasis on the fact of its having been recognized in the dissolution of the former Yugoslavia and the former Soviet Union.[45] Based on the Yugoslav and USSR precedents, they argue that the principle of *uti possidetis* should govern any territorial disputes between Quebec and Canada. In the absence of any agreement to the contrary, this would mean that Quebec would automatically be entitled to the entire territory of the former province of Quebec upon secession.

Notice, however, that the Yugoslav and USSR precedents involve situations in which the predecessor state had fragmented into a number of independent successor states. One can see how these precedents might become relevant if the Canadian state were to dissolve into a number of successor states and border disputes arose between them. Suppose, for example, that both Ontario and Quebec emerged as independent, sovereign states following the dissolution of Canada and that a dispute over the Lake Temiskaming border

developed. Here, we would not be dealing with a dispute between a seceding state and a predecessor state (that is, Canada) that could assert a prior or superior claim over disputed territory. Rather, the dispute would involve two successor states, neither of which had any claim to any of the provincial territory of the other. In this context, it is at least plausible to imagine the dispute's being resolved in accordance with the *uti possidetis* principle, so that pre-existing provincial borders would continue to govern, absent an agreement by both parties to the contrary.

A border dispute between Canada and a province that was attempting to secede would be entirely a different matter. Here, the predecessor state (Canada) would not have fragmented. Moreover, we are assuming a situation in which Canada was continuing to exercise effective control over part of the territory of the former province of Quebec. On what possible basis, therefore, can it be said that a newly independent state of Quebec would have a claim to territory that remained in the control of Canada? We have already seen that the province of Quebec has no right, under either domestic law or international law principles, to secede from Canada. Its claim for recognition as an independent state would flow from the fact that it was able to exercise effective control over its territory. By definition, therefore, where it was not able to demonstrate control, its claim to sovereignty would fail.

The Five Experts' Opinion fails to distinguish between a border dispute involving two newly independent successor states and one involving an intact predecessor state and a seceding state. The jurists seem to assume that both types of disputes can be resolved on the basis of the same principles; they accordingly conclude that border disputes involving Canada and an emerging Quebec state should be resolved on the basis of a principle that is obviously inapplicable.

This analysis leads back to my original conclusion: if Quebec attempted to secede by way of a UDI but was able to exercise effective control over only a portion of the territory of the former province of Quebec, its claim to sovereignty would extend only to those lands that were within its control. Lands that remained within the control of Canada would remain part of Canada, and the borders of an independent Quebec would have to be adjusted accordingly.[46] No principle or precedent of international law would compel or suggest a contrary result. The Yugoslav and USSR precedents would have no application, since they involved instances in which the predecessor state had dissolved and any border disputes were between newly independent successor states.

The Borders at Confederation

This conclusion does not depend upon a consideration of the borders of Quebec at Confederation or of the legal significance of Canada's extension of Quebec provincial boundaries in 1898 or 1912.[47] The analysis presented here proceeds entirely on the basis that Quebec's borders following a contested UDI would be determined in accordance with the territory over which the new state was able to establish effective control. Thus, in the event that Quebec was able to exercise effective control over the entire territory of the former province, its claims over such lands would eventually come to be legally effective. Nothing in the history or evolution of Quebec's boundaries would affect this result.

The Legal Continuity Scenario

Having outlined the possible mechanisms for Quebec's independence, I turn now to the far more important task of examining how events might actually unfold in the event that Quebec were to pursue any of these options.

The draft legislation introduced in the Quebec National Assembly in early December establishes the framework for the upcoming debate. The legislation declares that "Quebec is a sovereign country," and provides that this declaration will come into force one year after its approval by referendum, unless the Na-

tional Assembly picks an earlier date. While the legislation does not define the meaning of the term "sovereignty" (the definition is to be supplied through public consultations), it declares that Quebec's borders, its use of the Canadian dollar, its rights under international treaties, and the continuity of all laws would not be affected by Quebec's accession to sovereignty.

The initial response of federalists in Quebec City and Ottawa to the tabling of this legislation has focused on the fact that the Quebec government has no mandate to enact such a law prior to a referendum. But suppose that a majority of Quebecers vote "yes" in the referendum sometime in 1995. A "yes" vote would deal conclusively with the "mandate" issue. Moreover, a "yes" vote would then trigger the one-year countdown to the Quebec declaration of sovereignty.

In effect, Quebec is attempting to make sovereignty the default option. It is taking the position that failure to reach a negotiated agreement over the terms of separation does not affect its intention or right to become sovereign. The fact that Quebec will become sovereign after a "yes" vote would be a given, at least according to its government. The only matter in doubt would be whether sovereignty would come about on a consensual or a non-consensual basis.

How would the government of Canada respond? It would face great difficulties, some of which are not obvious.

The Difficulties of Obtaining a Mandate

The first problem for the federal government in any such situation would be the lack of a political mandate to deal with constitutional issues. The current federal government campaigned explicitly on a promise not to discuss the Constitution. Thus, it lacks a mandate to negotiate any formal constitutional change, much less the secession of a province from Canada. It would desperately need to obtain some kind of political mandate in the aftermath of a Quebec vote in favor of sovereignty. How would it go about attempting securing it?

Reform Party leader Preston Manning has suggested that if the PQ won a referendum the federal government would have lost its moral authority to govern. It should resign and immediately call a national election to seek a new mandate from the Canadian people, he says.

Yet it is not at all clear what kind of mandate could be obtained in such an election. A federal election must be held in all parts of Canada — including Quebec. How, therefore, could the government seek a mandate to negotiate with Quebec over the terms of its secession from Canada? Such a mandate could be obtained only in an election held in the ROC, a contest that would be legally impossible prior to such time as Quebec was no longer a part of Canada. So the election, even assuming it returned the Liberal Party under Jean Chrétien to power, could not provide the government with a mandate to negotiate the terms of Quebec secession.

The holding of an election in the aftermath of a pro-sovereignty referendum vote in Quebec would also likely produce additional polarization and antagonism in all parts of the country. Outside Quebec, there would be calls for taking a hard line against that province; within Quebec itself, sentiments would run in the opposite direction. The likely result would be that the parties at the opposite ends of the constitutional spectrum — the Bloc Québécois and the Reform Party — would see their representation in Parliament increased. The Liberal Party might well lose its majority in the House of Commons. The end result might be a minority government, with a much-reduced capacity to play an effective role in the months following a referendum.

In short, a national election immediately following a PQ referendum win would be a risky proposition. The current federal government would have more than three years remaining in its mandate, with a solid majority in the House of Commons. The calling of an election at this point in the process might not find favor with pragmatic politicians seeking to calm the waters, rather than muddy them.

A second possibility would be a federally sponsored referendum, either in Quebec[48] or nationally. A national referendum would certainly appear politically safe from the government's point of view since, whatever the outcome of the vote, the Liberals would maintain their majority in the House of Commons.

Although the federal government could obtain a constitutional mandate through a referendum, it is difficult to see how such a mandate could extend to the issue of the appropriate strategy or tactics to be employed in any secession negotiations with Quebec. A referendum question must be simple and general; it could hardly purport to deal with the myriad intricate and complex issues that would arise in secession negotiations. Moreover, Canadian politicians will hardly be interested in holding a referendum simply to confirm the result of the PQ's sovereignty referendum. Far more likely would be a federal referendum with the question framed in such a way as to generate a result favoring the continued existence of the Canadian federation. The underlying political objective, in other words, would be to discredit the PQ's claim that Quebecers favor political sovereignty.

Thus, even if the federal government held its own referendum in the aftermath of a Quebec sovereignty vote, that second referendum would not provide a political mandate sufficient to deal with any secession negotiations. Ottawa would need to undertake some other form of popular consultation prior to entering into any secession negotiations with the province of Quebec.

One likely possibility would be a series of public conferences similar to those held in early 1992 in the leadup to the Charlottetown Accord negotiations. Such public meetings could even be described as a form of constituent assembly, with the meetings extending over several days or even weeks and the delegates instructed to provide detailed advice to the government. The written reports produced by the meetings could then be tabled and debated in Parliament.

Another possibility would be the creation of a parliamentary committee that would hold televised hearings across the country. In order to increase such a committee's standing with the general public, its members might include a limited number of eminent and respected ordinary Canadians, in addition to sitting MPs and senators.

Difficulties of Negotiations

That the federal government would have to obtain a political mandate prior to entering into secession negotiations with Quebec is by no means a simple problem, but neither is it insurmountable. It is the kind of problem that has arisen many times in the past with constitutional discussions, and well-established mechanisms exist to deal with it.

The real problem would be the many other obstacles that have never been encountered before. These obstacles relate to issues of process as well as substance, and they would prove extremely difficult to resolve.

The Absence of a Quebec Interlocutor

The first such complication is that it is not at all clear who has the right to undertake secession negotiations with Quebec. The obvious and natural parties in such negotiations would be Quebec and the ROC, the two political entities that would result from the separation of Quebec from Canada. But the ROC does not exist, nor does it have any government or legitimate spokesperson. Thus, there is no natural interlocutor for the province of Quebec — no one with the legal, moral, and political authority to undertake secession negotiations with Quebec and to bring them to a successful conclusion.

Consider the following difficulties, all of which would need to be resolved before it could be determined who should sit across the table from Quebec in any secession negotiations.

- *The uncertain role of the government of Canada.* Quebec would likely insist that

the negotiations be conducted bilaterally between Quebec City and Ottawa. It would argue that, to the extent that the other provinces wished to participate, their involvement should be channeled through Ottawa. (This, of course, was the approach attempted by Robert Bourassa in the period between July 1990 and August 1992.) The problem would be that the government of Canada is the government of the entire Canadian people, rather than the government of the ROC. Moreover, the prime minister of Canada and a significant portion of the federal cabinet are Quebec representatives. All this would make the government of Canada a wholly inappropriate representative for the ROC and effectively preclude bilateral negotiations between Quebec City and Ottawa over the terms of Quebec secession.

- *The role of the provinces.* The provinces would almost certainly insist that they be direct participants in any negotiations with Quebec over the terms of separation. They would point to the precedent of the Charlottetown Accord negotiations, in which they were given seats at the table despite the initial reluctance of Ottawa and Quebec City. The provincial case for direct, rather than indirect, participation would be all the stronger here, given that the stakes would be much higher and that the government of Canada would be an inappropriate representative for the ROC. Moreover, the provinces would point out that any constitutional amendment permitting Quebec to secede must be authorized by all the provincial legislatures. Since provincial consent is a precondition to any amendment, it would make sense to have the provinces directly involved in any negotiations. Thus, although direct provincial involvement would undoubtedly complicate matters, it seems a virtual certainty that the provinces would have to be included in any negotiations with Quebec.

- *The role of aboriginal peoples.* The national aboriginal organizations would also demand a place at the table, in accordance with the precedent established in the Charlottetown Accord process. Their direct participation would elicit a high degree of political support in the ROC, given the interest of the aboriginal peoples of Quebec in the outcome of the negotiations. The fact that section 35(1) of the *Constitution Act 1982* requires the consent of aboriginal peoples in Quebec prior to that province's secession also suggests that they have a legal right to direct involvement. Therefore, representatives of the national aboriginal organizations would have to be included in any delegation negotiating with Quebec.

- *The role of other groups in Quebec.* A number of other constituencies in the province of Quebec — in particular, its English-speaking and other nonfrancophone linguistic minorities — have claimed a right to remain in Canada even if Quebec were to secede. They would argue that a sovereigntist government of Quebec could not adequately represent their interests since the PQ refuses to entertain the possibility that the borders of an independent Quebec could differ from the borders of the province of Quebec. They would also argue that their interests were insufficiently represented by any ROC delegation since, by definition, an ROC delegation would represent the interests of nine provinces only. They would accordingly insist on the right to participate directly in any negotiations.

- *The role of other interest groups.* Other organized groups, interests, and constituencies would also demand a seat at the table, arguing that their interests were insufficiently represented by any government. Alternatively, there might be attempts to create new tables, perhaps in the form of a constituent assembly or some other popular grassroots forum, which would purport to articulate a position for

the ROC separate from that taken by governments. It would be noted that, in the Charlottetown process, a series of public conferences was held in early 1992, but their results were largely ignored or bypassed in subsequent negotiations between governments. This fact would add impetus to the demands for more broad-based public participation in any negotiations with Quebec.

What all of this illustrates is that there would be no natural or legitimate interlocutor for Quebec in any sovereignty negotiations. Before they could begin, such an interlocutor would need to be created. Yet there is no authoritative, obvious, or politically legitimate process that might lead to the creation of such an interlocutor, at least within the limited time that would exist following a Quebec referendum.

The problem can be illustrated by contrasting the Canadian situation with the events in Czechoslovakia leading to the dissolution of that federation in 1992.[49] Since Czechoslovakia was a two-state federation, the secessionist Slovak state had a natural interlocutor in its Czech partner. As the process moved toward separation, the central government essentially withered away and negotiating power shifted to the republics. The critical negotiations in the final months of the process were conducted almost entirely at the level of the republican national councils, rather than between the national government and the government of Slovakia. The leading national politicians gravitated to the level of the Czech Republic (they included President Vaclav Havel, who resigned from the national government in July 1992 following a declaration of sovereignty by the Slovak National Council). The actual negotiations were conducted between a small number of political leaders from the Czech and Slovak republics, who held a series of crucial closed-door meetings between June and November of 1992.[50]

Such a solution would not be possible in the Canadian case, in which there are ten provinces, not two. Moreover, it seems unlikely that Canadians in the ROC would be content to have the sovereignty negotiations conducted by the nine ROC premiers. So we return to our original dilemma — the absence of an interlocutor for Quebec and of a process for creating one.

One possible way to resolve this dilemma would be for the federal government and the nine ROC provinces to create some kind of joint negotiating authority staffed by professional, nonpartisan negotiators. This authority would take its instructions from all the constituent governments but be formally independent of any particular one of them, including the government of Canada.[51] Aboriginal organizations and perhaps other interested groups and constituencies would undoubtedly have some role in directing and ratifying the authority's work.

Yet any such negotiating authority, assuming it could be created, would undoubtedly prove unwieldy. The various ROC governments would seek to keep the professional negotiators on a tight leash and insist on some kind of direct governmental participation in the discussions with Quebec. They would also insist that any agreements reached at the negotiating table remain subject to ratification in accordance with the existing constitutional amendment formula. This cumbersome arrangement would reduce the flexibility of the ROC negotiating team and increase the difficulty of making the kinds of difficult compromises that would be required in order to strike a deal with Quebec.

The Likelihood of Failed Negotiations

Suppose that the ROC was able to organize itself so as to begin negotiations before the date on which Quebec planned to declare independence. What would be the prospects for bringing these negotiations to a successful conclusion?

In my view, it is highly unlikely that such negotiations could be successful. I have several reasons for this pessimistic conclusion. The first is that obtaining the necessary pro-

vincial and aboriginal consent for the terms of any deal is unlikely. As noted above, the legal continuity scenario for secession of a province requires the consent of all the provinces, as well as aboriginal peoples living in Quebec. As both the Meech Lake and Charlottetown rounds demonstrated, securing unanimous provincial consent for a constitutional amendment is extremely difficult. The key to achieving governments' unanimous consent in both those cases was a formula whereby everything that Quebec got was also to be given to every other province. That could not occur in a separation scenario in which, *by definition*, Quebec was being treated differently from the other provinces.[52] Moreover, aboriginal leaders in Quebec have stated on numerous occasions that they would choose to remain in Canada if Quebec sought to secede.

A second difficulty in the negotiations would be the competing agendas present within the ROC delegation. As we have seen, that delegation would be very large, including, at a minimum, representatives of provincial governments, aboriginals, Quebec's linguistic minorities, and possibly other interest groups. A delegation of this size and diversity would obviously be extremely unwieldy. It would also be dogged by having two different agendas at work simultaneously. The first would be to negotiate the best possible deal for Canada (or, alternatively, the ROC) as a whole *vis-à-vis* Quebec. The second would be an internal renegotiation within the ROC itself as to the nature of the restructuring of Canadian (or ROC) institutions required by Quebec's exit. Alberta and British Columbia, for example, would want a Triple-E Senate;[53] aboriginal organizations would seek entrenchment of a right to self-government along the lines of that contemplated by the Charlottetown Accord; other groups would look for enhancement of their constitutional protection (even though their interests may not be directly implicated by Quebec's potential exit from the federation).

Within the ROC, many people would regard these issues as far more important than the issues under discussion with the province of Quebec and thus would resist settling the terms of Quebec's exit unless all of these other "internal" issues were also settled. As Gordon Gibson argues in a recent insightful book, Canada as it presently exists is a balanced and functioning whole. That balance would be fundamentally changed the moment that Quebec departed. In particular, Gibson points out, Quebec's departure would alter the balance between rich and poor regions, between centralists and decentralists, and between east and west. He concludes that the political dynamic set in motion by Quebec's departure would "sooner or later require major changes in ROC, or further separation"[54] and returns time and again to the possibility that other provinces, particularly British Columbia, might themselves seek to separate. Thus, he says, although the terms of separation with Quebec would be important,

> The far greater business of our own relationships within ROC is what should capture most of our attention....Once [Quebec] independence is decided upon, it will be time for the rest of us to rearrange our own lives, and put most of our energy there.[55]

Regardless of whether one accepts Gibson's priorities, his analysis makes plain that in any secession negotiations, the ROC delegation would be prone to internal division and controversy and just as preoccupied with the design of the ROC itself as with issues relating to Quebec's departure. This double focus would certainly weaken the ROC's negotiating position. The leaders would find it difficult to agree on and adhere to a common strategy. Closure of the Quebec negotiations would also be difficult since no one in the ROC would want to agree to Quebec's departure prior to resolving all of the issues relating to the potential restructuring of ROC political institutions.

A third difficulty with secession negotiations would be the complexity and divisiveness of the issues that would have to be resolved within a short time — prior to Quebec's seceding from Canada. Consider the difficulties that would arise, for example, in terms of dividing the Canadian debt.

The Problem of Dividing the Debt

Of all the complex and divisive issues that the negotiators for Canada and Quebec would have to confront, the problem of the division of the national debt would likely prove the most difficult. The points that would arise would include questions of responsibility, a division formula, and risk.

Determining Responsibility

The Canadian debt is currently the responsibility of the government of Canada; Quebec has no existing liability with respect to it. Would this situation change if Quebec were to secede?

The legal principles governing the effects of state succession on public debts are not well settled.[56] Through the mid-nineteenth century, the overwhelming majority of writers on the subject concluded that international law imposed an absolute binding legal obligation upon a successor state to assume the payment of a predecessor's public debt.[57] In the late nineteenth century, however, both the United States and Great Britain disputed the existence of that obligation.[58] The ensuing confusion on this issue has persisted throughout the twentieth century, with the result that it is very difficult to state that a customary rule of international law has emerged.[59] Nevertheless, most recent writing on this subject recognizes or argues for an obligation on a successor state to assume an "equitable" portion of the debt of the predecessor state, on the basis of a theory of unjust enrichment.[60] This view is consistent with the position taken in the 1983 *Vienna Convention on Succession of States in Respect of State Property, Archives and Debts*, which provides that debt must be divided between the predecessor state and the successor state "in an equitable proportion, taking into account, in particular, the property, rights and interests" transferred to the successor state (article 40).[61] Although the convention only applies to state debt, which is defined so as to exclude debt owed to private creditors, there is no basis in principle for distinguishing between money owed to public and private parties. (This is the position the Bélanger-Campeau Commission assumed in its analysis of the debt issue.[62])

Yet to say that a separate Quebec would have a binding obligation, based on both international law and domestic law principles,[63] to assume responsibility for an equitable proportion of the Canadian debt does not dispose of the matter. The government of Canada is the obligor in relation to the federal debt, and creditors cannot be deprived of their rights against it, absent their consent. Thus, they would have to approve any assignment of debt to Quebec. Creditors would likely demand a substantial premium to compensate them for the additional risk that they would take on following an assignment of debt from Canada to Quebec. Quebec would likely not be willing or able to pay such a premium, and Canada would certainly not wish to bear the cost of transferring or assigning debt to Quebec.

Thus, as a practical matter, it seems inevitable that Canada would remain liable to creditors for the entire Canadian debt following the secession of Quebec. Regardless of whether Canada had any right of recourse against Quebec and of whether creditors had any direct recourse against Quebec,[64] creditors would certainly continue to have recourse against Canada.[65] They would, in all likelihood, look to Canada as the principal obligor and expect it to pay interest and principal on the entire Canadian debt.

This discussion yields two conclusions. First, there may well be a sound legal basis for claiming that Quebec is obliged *vis-à-vis* Canada to assume an equitable proportion of the Canadian debt. Second, the assignment of debt from Canada to Quebec would require the consent of the creditors, which would not likely be forthcoming. Therefore, division of responsibility for the debt, if achieved, would likely involve some arrangement whereby Quebec agreed to compensate Canada for the payments that it would have to make on Quebec's behalf.

Allocating Responsibility

What principles or formula should be used to divide the debt? This issue has been discussed extensively elsewhere, so I will not treat it in detail here. It is sufficient to note that the estimates of what would constitute Quebec's "equitable" proportion of the debt vary wildly, ranging from about one-sixth to one-third.[66]

Debt division being a zero-sum proposition (every additional dollar assumed by Quebec would be a reduction in the liability of Canada, and vice-versa), this issue would be extremely difficult to resolve. One commentator suggests referring the question of an appropriate debt division formula to an independent arbitrator, with agreement from both sides to abide by the ruling.[67] Yet governments are notoriously loathe to grant third parties the right to take decisions with a significant fiscal impact. In this case, the decision could increase or decrease liability of one of the governments by more than $50 billion. It is difficult to imagine the two governments agreeing to hand a third party the power to make the decision on such a huge sum.

Accordingly, the question of the appropriate division formula would prove extremely contentious.

Ensuring Payment

What arrangements would Canada and Quebec use for handling the debt? This issue might prove the most difficult of all. Assume that Quebec's share of the debt was determined to be 25 percent of the total, or approximately $135–150 billion. Even if Quebec were willing to assume responsibility for this debt, it could not simply be assigned immediately from Canada to Quebec. As we have seen, any assignment of debt requires the authorization of the creditors, and they would almost certainly insist on the payment of a substantial premium as compensation for the additional risk they would be assuming. Quebec's tight fiscal position at the time of separation would mean that it would not be able to pay any such compensation. The alternative — Quebec's floating new debt in the capital markets so as to retire up to $150 billion of the existing Canadian debt — would also be impractical. Quebec simply could not raise this amount of money.

The reason would not be only economic uncertainty about the fiscal capacity of the new state. Even if Quebec were continuing as a Canadian province, it could not raise up to $150 billion in the capital markets immediately. It has taken Quebec 127 years to accumulate approximately $65 billion in outstanding debt. An additional $150 billion would triple its total indebtedness, bringing its debt to more than 100 percent of gross domestic product (GDP).

This analysis tells us that Canada would have to remain liable for the entire Canadian debt for some significant time. During this transitional period, Quebec would agree to make payments to Canada to service the "Quebec portion" of the Canadian debt.[68] It might also be agreed that that portion would be transferred to Quebec over a number of years; as existing Canadian debt matured, Quebec would issue new bonds in the capital markets and the funds raised would be used to retire the maturing issues.[69]

The basic problem for Canada would be that it would be assuming the risk of Quebec's defaulting during the transitional period. In effect, Canada would be interposed between Quebec and its creditors. If Quebec defaulted, Canada would still have to make good on the debt to the creditors.

Such an arrangement would diminish Canada's own creditworthiness during the transition period. Canada would remain liable for 100 percent of the former Canadian debt, but its taxation power would extend to only 77 percent of the former Canadian economic space. International investors would, therefore, see Canada as somewhat less creditworthy than it has been. Moreover, even if Quebec had agreed to make payments to Canada, the risk that it might default on that obligation is not trivial. Therefore, creditors would demand that Canada pay an additional premium *on its entire debt portfolio* in order to compensate them for this additional risk. A premium of "only" a

100 basis point rise in interest rates would translate into an additional payment of $1.7 billion in year 1, rising to $3.5 billion in year 4.[70]

Any arrangement under which Canada remained liable for Quebec debt following Quebec separation would prove massively unpopular within the ROC. "There is no doubt the rest of Canada will wish Quebec well," Gibson observes, "but such good wishes are unlikely to extend to this sort of agreement."[71]

In an effort to make continued Canadian liability for Quebec's portion of the federal debt more politically palatable, some commentators suggest that Quebec lodge with Canada marketable securities senior to all existing Quebec debt and identical in all other characteristics to marketable issues of outstanding Quebec debt.[72] Proponents claim this arrangement would protect Canada in two ways. First, it could market these securities to cover any default in Quebec's payment. Second, Quebec would live with the knowledge that any default would represent a default on issues that are held by other investors, which, like any other default on marketable debt, would lower its credit rating and raise interest rates on its subsequent issues.[73]

These arrangements would not, however, really resolve the underlying problem. It is not at all clear that Quebec would even be in a position to issue such securities. The issuance of securities that were senior to all existing Quebec debt might well be prohibited by the terms of that debt. Even if not explicitly prohibited, the issuance of new senior debt would significantly devalue all existing Quebec debt (including that held by Quebec institutions and individuals). It would also limit or perhaps even preclude Quebec's ability to issue any fresh debt in the future.

In any event, it is difficult to understand how Canada would be protected by such an arrangement. If Quebec were to default on the interest payments due to Canada, it would also undoubtedly refuse to honor any securities lodged with Canada. Moreover, a lower Quebec credit rating would prove of little comfort to Canada, which would be left holding Quebec paper that was significantly impaired in value. Of course, Canada would remain liable to creditors for the entire Quebec portion of the Canadian debt.

Rather than accept Quebec's bonds as security for its promise to make interest payments, Canada presumably would demand security in the form of a real (or hard) asset — for example, assignment of a stream of income payable to Quebec by some third party outside Quebec. Assuming that Quebec could not interfere with the payment of this money following the assignment and assuming that the amounts to be paid were certain and were from a creditworthy payer, this arrangement would minimize the risk of Quebec's defaulting on the moneys that were the subject of the assignment.

Alternatively, Canada could require that some portion of Quebec tax revenues be paid directly to Canada. This kind of arrangement would not, however, entirely eliminate the risk of default, since Quebec might be in a position to disrupt the tax payments.

Any of these possible arrangements would be extremely costly from Quebec's perspective and hence would likely be unacceptable to Quebec. It would argue that the risk of its defaulting on its obligations to make transfer payments to Canada was nil and, accordingly, refuse to agree to arrangements designed to reduce this risk.

The point is that it is difficult to see how any postseparation arrangements with respect to servicing the Canadian debt would be satisfactory to both sides. The basic problem arises from the fact that Canada would necessarily remain liable for the entire Canadian debt for a significant transition period. This situation would create additional risks and costs that would have to be paid for by either Quebec or Canada, yet neither would be willing (or perhaps able) to pay them.

The Problem of Ratification

Suppose that the preceding analysis is mistaken and that governments in the ROC and Quebec were able to come to an agreement on

the terms of Quebec separation. This agreement would not be sufficient to effect a constitutional amendment; rather, it would then be necessary for all the provincial legislatures to pass ratifying resolutions. As the Meech and Charlottetown rounds made plain, securing such legislative ratification would by no means be a foregone conclusion, particularly for a package that involved tradeoffs by both sides and that had been produced through closed-door negotiations between political leaders.

Any agreement between governments on the terms of Quebec separation would have been produced through precisely such a closed-door process. All of Canada's constitutional negotiations during the past 15 years have been conducted in this manner. Agreements can be produced only through closed-door negotiations involving the highest political decisionmakers.[74] The compromises implicit in such a deal would be open to attack in the ROC on grounds that this kind of closed-door process was illegitimate.

This consideration leads to the possibility of holding a pan-Canadian referendum to ratify or approve any Quebec-ROC agreement. The Charlottetown Accord process established the precedent of holding a national referendum in order to ratify proposed constitutional amendments. The case for holding a referendum would be particularly strong for an amendment permitting Quebec to secede from Canada. Given the magnitude of the stakes involved for all Canadians, the pressure to hold a pan-Canadian referendum would be overwhelming.

What are the chances that an amendment permitting Quebec to secede would be approved in a referendum? They appear to be very remote indeed. Like the Charlottetown Accord, the agreement would be presented to voters as a single package, which would have to pass in all ten provinces. The Charlottetown Accord referendum demonstrated how difficult it is to win a referendum in all ten provinces, particularly when the referendum deals with a complex package of amendments. When voters are asked to approve a package deal, their tendency is to focus on particular elements and to vote against the entire package on the basis of those that are unpopular. Any agreement with Quebec would be susceptible to this same political dynamic. A Quebec-ROC agreement would be extremely complicated and deal with a wide variety of issues. It would also be certain to contain some very unpopular elements. Any negotiated agreement is the product of compromise, and this one would contain at least some provisions that favored the interests of Quebec. The most likely outcome of a referendum on any such agreement is that the proposal would be defeated in one or more province.

For all of the above reasons, there is no realistic prospect that Quebec separation could be achieved in accordance with an amendment passed under the existing amending formula.

The Legal Discontinuity (UDI) Scenario

To this point, the analysis has focused on the various legal continuity options depicted on the left side of Figure 1 (on p. 6) — steps that might lead to a constitutional amendment authorizing the secession of Quebec from Canada. It remains to consider the options on the right side of Figure 1 — those involving legal discontinuity.

Such a scenario would flow naturally out of the failure of the legal continuity scenario. Once negotiations with Canada failed to produce agreement, it would then remain for the Quebec government to carry forward its previously announced plan by unilaterally declaring sovereignty.

It is by no means obvious that Quebec would, in fact, carry on with its original plans in the face of a breakdown in negotiations with Canada. It might well reconsider in light of the failure to achieve a negotiated agreement and postpone or table the pending declaration of independence. Suppose for a moment, however, that it decided to proceed and thus passed a law unilaterally declaring Quebec to be a sovereign state. As we have seen, the key

question at that point would be the nature of the response from the government of Canada.

If Canada simply acquiesced and did nothing to assert its rights, then the Quebec UDI would ultimately become legally effective. Quebec would have successfully sidestepped the existing Canadian constitutional rules and established a new political order based on a revolutionary break with the past. If, on the other hand, Canada refused to accept the validity of the Quebec UDI, then the political and legal outcome would ultimately turn on which state, Canada or Quebec, was able to establish effective control over the territory (or parts of the territory) of Quebec.

Canada's Response to a Quebec UDI

In assessing the manner in which Canada might respond to a Quebec UDI, it is important to recognize that Canada would not wait until the day of the Quebec declaration in order to signal its response. Just as Quebec would have given notice of its intention to declare sovereignty unilaterally, so too would Canada have served notice of its proposed response.

It would almost certainly have indicated its intention of challenging the validity of any unilateral action by Quebec. Noting that the Constitution prohibits unilateral secession, Canada would have insisted that the secession of Quebec could be accomplished only on a consensual basis. It would also have pointed out that unilateral secession would severely prejudice the rights of Canada, thus making such unilateralism politically and morally unacceptable.

Several considerations would be important in terms of persuading the Canadian government that it must oppose and challenge a UDI.

The Debt

Here again the issue of responsibility for the Canadian debt would play a key role. As I have already noted, if Quebec were to secede unilaterally without agreeing to assume responsibility for some portion of the debt, Canada would be left with the entire debt and a much-reduced capacity to service it since the taxation power of Parliament would no longer extend to the territory of Quebec. Nor would there be any agreement in place providing for payments from Quebec to service a portion of the debt. Net Canadian debt for the ROC would rise from approximately 75 percent to 97 percent of GDP, while public debt charges would rise from 5.5 percent to 7.2 percent of GDP (assuming that Canadian GDP would now be equal to the GDP of the nine ROC provinces and the territories). The provincial debts of the nine ROC provinces would bring total government debt in the ROC to more than 100 percent of GDP.

Canada could argue that Quebec has a responsibility, both under domestic law principles relating to unjust enrichment and according to international law principles, to assume an equitable proportion of the outstanding Canadian debt. This claim would be pressed most effectively *prior* to secession. If Canada acquiesced in the UDI and then attempted to obtain Quebec's agreement on debt sharing, its leverage would already have been impaired.

Moreover, in the interim, there would likely have been a substantial increase in Canadian interest rates and a devaluation of the Canadian dollar, in recognition of the fact that the value of Canadian securities had already been substantially impaired. At the moment of the UDI (assuming it to have been effective), the debt held by Canada's creditors would have been significantly devalued. Canadian debt has been issued on the basis that the government of Canada has the ability to tax directly the entire Canadian economic space in order to raise funds needed to service the debt. If Quebec were no longer a part of the federation, Canada's taxing power would henceforth be limited to the ROC. The value of the Canadian debt would accordingly be devalued, which would produce a market selloff of Canadian securities, until the point at which prices reach the new, devalued level.

Reaction in the ROC

A broader political dynamic would also be at work in the period leading up to any Quebec UDI. Citizens in the ROC would see Quebec's stated intention of proceeding by way of a UDI as drawing a line in the sand. This perception would probably produce a good deal of resentment and anger and bolster the case of those who were arguing for a hard-line stance against Quebec. It would become politically risky for the Canadian government even to undertake negotiations with Quebec over the terms of its separation and raise the specter of a high-stakes game of constitutional chicken.

In such a supercharged context, even if negotiations somehow began, political leaders in the ROC would be required, for their own political survival, to declare their intention of contesting the validity of any Quebec UDI. To acquiesce in a Quebec UDI would be seen as tantamount to giving in to blackmail. Political leaders in the ROC, including the prime minister of Canada, would have to insist that Quebec leave Canada only on terms satisfactory to both parties. Canadian leaders would make it clear that they would be forced to take whatever steps might be necessary to induce Quebec to withdraw the UDI and come back to the negotiating table.

Legitimacy of the Canadian Government

A third consideration that argues against the Canadian government's simply acquiescing in a Quebec UDI is the effect that such acquiescence would have on the existence of the Canadian government itself. As noted earlier, recognition by the Canadian government would allow Quebec to shortcircuit the existing amendment rules of the Canadian Constitution. Quebec's establishing itself as an independent state would automatically eliminate Quebec representation in the House of Commons, including the seats held by the current prime minister and a number of leading cabinet ministers. Presumably all Quebec MPs would be forced to resign. The pressure for elections in the ROC and the formation of a new ROC government would become overwhelming.

Canadian politicians, like politicians everywhere, have an instinct for their own survival. Acceptance of a Quebec UDI would effectively mean the end of the government of Canada. There would be little appetite within the government of Canada for recognizing the validity of a Quebec UDI when such recognition would be the final action of a government that would cease to exist from that point on.

Aboriginal Peoples in Quebec

As discussed above, section 35(1) of the *Constitution Act, 1982* requires the Canadian government to act as a "fiduciary" or a trustee on behalf of aboriginal peoples in Quebec. Before this trust relationship can be severed, the Canadian government must obtain the consent of the aboriginal peoples residing in the province, who would almost certainly oppose a Quebec UDI. This is because a Quebec UDI is a declaration by the government of Quebec that it does not require the consent of its Canadian partners — including aboriginal peoples — before it can secede from Canada.

Aboriginal opposition to Quebec's UDI would trigger the fiduciary obligations of the government of Canada. In fact, aboriginal groups in Quebec would be able to argue that section 35(1) obliges the Canadian government to oppose and contest a Quebec UDI made without their consent. If the Canadian government purported to recognize the validity of the Quebec UDI in the absence of appropriate aboriginal consent, aboriginal groups could seek a declaration from the courts that the act of recognition was unconstitutional.

Conclusion

For all of these reasons, it seems inconceivable that Canada would simply acquiesce in a Quebec UDI. Rather than accept Quebec's unilateral declaration as a *fait accompli*, Canadian leaders would contest its validity and attempt to force the Quebec government to back down.

This conclusion is reinforced by an examination of the international experience with secession: it is almost always resisted by the host state. One recent survey of international experience concluded:

> If there is one constant in history apart from the universality of death and taxes, it is the reluctance of states to part with territory....Whereas many new states were formed in the wake of the fragmentation of multinational empires (such as Austria-Hungary and the USSR) and in the wake of decolonialization, the key fact about secession is that it is among the rarest of major political outcomes. *Pure* secession, which occurs when a highly effective state permits a secessionist territory to withdraw from its embrace, has only occurred twice in the twentieth century: when Norway left Sweden in 1905 and when Ireland left the United Kingdom in 1922.[75]

A Disastrous Contest for Supremacy

If Canada contested the validity of a Quebec UDI, two rival governments would be competing for supremacy over the territory of Quebec. The outcome of this struggle would depend on which government was best able to assert its will in relation to the other. Quebec would ultimately attain the status of a sovereign state if it was able to exercise effective control over the territory of Quebec and succeed in ousting the jurisdiction of the Canadian government there. The burden in this regard would rest on Quebec since, as we have seen, it cannot claim to have any right under international law principles to secede from Canada. In the event that Quebec was unable to oust the jurisdiction of the Canadian government, the UDI would fail and Quebec would remain a part of Canada.

Even if Canada were to do nothing, it is not at all clear that Quebec would be able to exercise *de facto* control over all or even most of its territory. In significant areas of the province of Quebec, the majority of the local population may actively resist the attempt to secede. (The most obvious such areas would be the lands in northern Quebec with a majority aboriginal population and certain Indian reserves near Montreal.) Any defiance of the new regime would pose a problem for the leaders of the new Quebec state. They would face a choice between using force to suppress this challenge to their authority — such a response being certain to provoke further unrest or civil disorder — and allowing the challenge to go unmet. In the latter case, the defiance undoubtedly would spread to other areas of the province as it became obvious that the new regime was unwilling or unable to deal effectively with the situation. As the scenario unfolded, there would be a significant risk of some form of civil disorder and violence, which would lead to calls for military or police intervention to restore order.

Quebec has no military force capable of responding to this kind of challenge to its authority. Could Quebec call on the Canadian military to restore order in its name, relying on the aid-of-the-civil authority provisions in the *National Defence Act*?[76] Quebec could do so only if it were to recognize the authority of the Canadian government in relation to Quebec territory. The provisions of the act that permit the attorney-general to requisition the Canadian Forces require that the requisition be made in a prescribed form. That form provides, among other things, that the attorney-general state that the riot or disturbance has occurred in a province of Canada and that the Canadian Forces are being called out pursuant to powers conferred by Canadian law (sections 279 and 280). By signing such a requisition, in other words, the Quebec attorney-general would be recognizing the authority of the Parliament of Canada and effectively negating the validity of the UDI.

The potential defiance of the Quebec regime by significant segments of the Quebec population would not only pose the risk of civil disorder. It would also disrupt the smooth day-to-day functioning of both the Quebec and Canadian governments. Consider the matter of tax payments. Individuals and corporations in Quebec would face two contending regimes, each claiming exclusive jurisdiction over Que-

bec territory. To which government would taxes be directed? Until such time as one government or the other had clearly asserted its authority, both would surely experience significant losses of tax revenue.

What would also need to be factored into the equation is the nature of the response by the Canadian government to the Quebec UDI. It is a certainty that Canada would attempt to contest the authority of the new regime. What is not clear is what form that challenge would take. Military action to defend the country's physical integrity would not be prohibited under international law; it would also be permitted under the *National Defence Act.*[77] Yet military intervention seems extremely unlikely. Canada would probably attempt to force Quebec to rescind the UDI through some kind of economic pressure. Canada, as well as the ROC provinces, might suspend all transfer and other monetary payments to the Quebec government pending the resolution of the crisis. It might also attempt to seize Quebec government assets or put in place some other form of economic sanctions.

The constitutional crisis would affect the functioning of government operations at both the federal and provincial levels. It would also touch the daily lives of all Canadians. Given the extremely high proportion of Canadian government debt in foreign hands, Canada remains extremely vulnerable to the willingness of foreigners to hold its securities. The disorder and disruption from a Quebec UDI would prompt a massive selloff of Canadian bonds and treasury bills by foreign and domestic investors. The domestic holders of Canadian debt would see the value of their securities and their savings slashed dramatically.

The crisis would also produce a huge drop in the value of the Canadian dollar — certainly to an all-time low against the US dollar. At the same time, the Bank of Canada would be forced to raise interest rates very sharply in an attempt to support the dollar and prevent it from continuing in a freefall for an indefinite period.

Thus, it does not seem an overstatement to conclude that a Quebec UDI would provoke a constitutional, political, and economic crisis the likes of which Canadians have never seen. The economic dislocation in parts of the country would be far greater than that experienced in any recession or even in the Great Depression of the 1930s. The period of chaos would persist as long as two rival regimes were contending for power in the province of Quebec. Even if the crisis was resolved relatively quickly — in favor of Canada or of Quebec — the social and economic costs would be very high.

It is worth emphasizing that there would be no winners in such a scenario. Consider the "best case" outcomes. From the viewpoint of Canada, that would be one in which Quebec was forced to rescind the UDI and return to the negotiating table. Yet it is difficult to see how Canada could consider this result positive in any way. True, it would have succeeded in forcing the Quebec government to back down from the UDI — but only by forcing all Canadian citizens, in Quebec and elsewhere, to pay a huge economic price. Moreover, Canada would still be facing a Quebec government determined to take the province out of Canada. Indeed, the ordeal of the UDI would probably have strengthened Quebec's resolve to proceed with sovereignty. Thus, the withdrawal of the UDI would in no sense be a solution to the constitutional crisis and would likely lead to further confrontations in the not-too-distant future.

As for the government of Quebec, the best case scenario would be Canada's eventually acquiescing in the UDI and recognizing Quebec's claim to sovereignty. Yet the Quebec population would have to endure very large economic costs before Canada would back down. Moreover, it seems highly unlikely that the Quebec government would have proved able to assert effective control over all of the territory involved, particularly the northern half of the province, which has a majority aboriginal population. Thus, if Quebec attained sovereignty, it would probably be with borders much different from the existing borders of the province.

The huge costs imposed on all parts of the country would be unavoidable once the UDI had been initiated. It would inevitably provoke a struggle for supremacy between the Canadian and Quebec governments over Quebec territory. It is this struggle for supremacy that would result in political and economic chaos for all Canadians, regardless of which government "won" the contest. The decision to declare sovereignty unilaterally would put in motion a political dynamic from which both Canada and Quebec would emerge as losers.

Some may question the scenario described above, particularly my assumption that the Canadian government would challenge the validity of any Quebec UDI. It might be argued that Canada could avoid the large costs associated with Quebec independence by pursuing not a confrontational but a cooperative strategy, one in which it accepted the validity of Quebec's UDI and then sought to negotiate a postseparation agreement with Quebec.

What this argument ignores is that the choice between cooperation and confrontation at this stage in the process would be as much Quebec's as Canada's. If secession negotiations failed to produce an agreement, Quebec would be faced with the prospect of continuing to negotiate or else of precipitating a confrontation with Canada through a UDI. If Quebec proceeded to issue the UDI, then it would be Quebec, not Canada, that had chosen the path of confrontation.

In opposing the UDI, Canada would simply be acting in its own self-interest, seeking to avoid the negative consequences that would flow from an uncontested Quebec UDI. Canada would insist merely that secession of a province requires the agreement of both parties and cannot be accomplished on a unilateral basis. Far from being uncooperative or irrational, this insistence on a negotiated solution would reflect a desire to proceed on a consensual basis. It would also be a perfectly natural response to Quebec's decision to raise the stakes and attempt to proceed without Canadian consent.

Conclusion: Cooler Heads Shall Prevail

If the analysis presented in this *Commentary* is correct, it is difficult to see how those advocating the separation of Quebec from Canada can possibly succeed in their enterprise. Even if a majority of Quebecers support sovereignty in a referendum, Quebec secession would still require a formal constitutional amendment. Obtaining the consent of the federal government, the provinces, and aboriginal peoples in Quebec for such an amendment is a prospect that appears remote at best.

The alternative to an amendment permitting Quebec to secede is for it to jump outside the existing Constitution and unilaterally declare its sovereignty from Canada. Yet as we have just seen, a Quebec UDI would produce disastrous economic consequences for all Canadians, including Quebecers. The most likely outcome of a UDI is that, following a period of disruption and chaos, the Quebec government would withdraw the declaration and return to the bargaining table. But Quebec would continue to press its demands to secede, and the constitutional crisis would have been deepened and prolonged, rather than resolved.

In brief, either attempt to take Quebec out of Canada would lead to a deadend.

What Is the Alternative?

We are left with a further question: if Quebec secession cannot be accomplished except at a tremendous, unacceptable cost, what is the alternative? Even if Quebecers vote "no" in a sovereignty referendum in 1995, there seems to be widespread dissatisfaction in Quebec with the existing constitutional arrangements. (Those who would deny the existence of this dissatisfaction must have failed to notice the election of 54 members of the Bloc Québécois in the 1993 federal elections.)

The failed attempts to renew the Canadian Constitution over the past 25 years have produced a situation in which it has seemingly become impossible to enact even minor amend-

ments, such as those of the Meech Lake Accord.[78] As a result, a federalist as committed as Claude Castonguay laments,

> English-speaking Canada refuses to make a place for Quebec at the heart of Canada that it would find truly acceptable. As a Québécois proud of my language, my heritage and my culture, I find this humiliating and increasingly unacceptable.[79]

Is Canada capable of responding to such frustrations? The observation that the secession of Quebec would entail huge economic and social costs certainly does not represent such a response. A country cannot be held together through threats or through fear that the political alternatives are unknown. If the only thing that keeps Quebec in Canada is the fear that separation would be too costly, the result will be an increasing sense of malaise, drift, acrimony, and frustration. Federalists need something to believe in if Canada is to emerge a dynamic and vigorous country at the end of the process.

This is why the analysis presented in this paper, which focuses on the costs of Quebec separation, should be regarded as only one small piece in the puzzle that Canadians are presently struggling to solve. The economic costs of various alternatives are certainly an important factor to consider. Yet it is not sufficient simply to point out the negatives associated with any possible proposal. It is also necessary to present a viable political alternative that will inspire and unite the citizens of the country and, in Claude Castonguay's words, "revive the federalist flame."

Whether such a viable political alternative exists in the divided Canada of 1995 is not the subject of this paper. If it does exist, its location should by now no longer be a great mystery. There is clearly widespread sentiment within Quebec for greater provincial autonomy and a significant devolution of powers in the direction of the provincial government. It is equally clear that there is no support elsewhere in the country for special status for Quebec — for a situation in which the powers of the Quebec government would be, in law, greater than those of the other provinces. Thus, the only possible way of accommodating the demands of both Quebec and the other provinces within the existing constitutional framework must involve a decentralization of powers in favor of all the provinces. This would involve a disentanglement of federal and provincial programs, a reduction in the role of federal-provincial transfers, and an emphasis on the European principle of "subsidiarity" — the idea that the power to act should be as decentralized as possible. The principle of subsidiarity suggests that the role of the national government should be focused on guaranteeing equality of citizenship rights throughout the country, preserving the common market, and redistributing wealth across individuals and regions.[80]

Such a devolution of powers would obviously be controversial and highly contested in many areas of the country, particularly Ontario and the Atlantic provinces. At the same time, there is considerable evidence that many English-speaking Canadians, particularly in the western provinces, would support it. It is also worth observing that considerable decen-

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tralization of power could be accomplished without any formal constitutional amendment. Much of the current activity of the federal government, particularly its shared-cost programs in health, education, and welfare, is in areas that are under provincial jurisdiction. The current social policy review initiated by Human Resources Minister Lloyd Axworthy provides an opportunity for the federal government to reconsider the nature and extent of its role in the social policy field. It seems difficult to believe that, if cooler heads do prevail, Canadians will fail to embrace the promise and the possibilities presented by an area of common ground that beckons federalists in all parts of the country.

Notes

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1 See, for example, the reaction of the distinguished Quebec federalist Claude Castonguay, who observes, "Certainly it won't be threats of the sort made by premiers Michael Harcourt and Roy Romanow, or the incendiary remarks of someone like Diane Francis, that will win Quebeckers over to federalism." ("Why more Quebec voices aren't arguing for federalism," *Globe and Mail* [Toronto], July 25, 1994, p. A11; the article is an English translation of a piece that originally appeared in *Le Soleil* [Quebec], July 9, 1994.)

2 See Maurice Pinard, "The Dramatic Reemergence of the Quebec Independence Movement," *Journal of International Affairs* 45 (1992): 494.

3 See P. Hogg, *Constitutional Law of Canada*, 3rd ed. (Scarborough, Ont.: Carswell, 1992), pp. 55–59.

4 See, for example, *Rupert's Land and North-Western Territory Order*, June 23, 1870 (passed pursuant to section 146 of the *Constitution Act, 1867*) admitting Rupert's Land and the North-Western Territory into Canada.

5 José Woehrling, "Les aspects juridiques de la redéfinition du statut politique et constitutionnel du Québec," in *Éléments d'analyse institutionnelle, juridique et démolinguistique pertinents à la révision du statut politique et constitutionnel du Québec*, Commission sur l'avenir politique et constitutionnel du Québec, document de travail no. 2 (Quebec 1991), p. 56.

6 It should be noted that section 42 specifies a limited class of section 38 amendments for which opting out is not permitted, but they do not include provincial secession.

7 The possibility of the forcible expulsion of a province is not the only difficulty that would arise if the section 38 procedure governed provincial secession. Consider a situation in which seven provinces representing 50 percent of the Canadian population, including the province that wished to secede, voted in favor of a secession. The three provinces that had not passed resolutions could then attempt to dissent from the amendment, relying on section 38(3). In order for section 38(3) to apply, it is necessary for an amendment to derogate from "the legislative powers, the proprietary rights or any other rights or privileges of the legislature or government of a province" (section 38(2)). In terms of the kinds of rights or privileges that would be affected by Quebec's secession, reference might be made to section 121 of the *Constitution Act, 1867*, which guarantees that "All Articles of the Growth, Produce, or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other

Provinces." The secession of a province, unless it were accompanied by a guarantee of free access for goods, would derogate from the rights of the other provinces under section 121. If this analysis is correct, then we would again be thrown into a situation in which a province would have seceded from Canada according to the law of certain provinces but would remain in Canada according to the law of others. Such a situation is obviously untenable.

8 Section 58 of the *Constitution Act, 1867* provides that for each province there shall be "an Officer, styled the Lieutenant Governor, appointed by the Governor General in Council." The lieutenant-governor must sign all bills in order for them to become law and has the authority to "reserve" a bill for the approval of the governor general of Canada. Such a federally appointed officer would be inconsistent with Quebec's status as an independent state, so the office would have to be abolished upon the secession of Quebec.

9 See the judgment of the Privy Council in *Re Initiative and Referendum Act*, [1919] AC 935.

10 Sections 55, 57, and 90 of the *Constitution Act, 1867*.

11 It might be argued that section 41(d) is simply ineffective, since the *Supreme Court Act* is not included in the part VII definition of the "Constitution of Canada." On this view, the composition of the Supreme Court of Canada can still be changed by the ordinary legislative process of the Parliament of Canada. For a discussion of this argument, see Hogg, *Constitutional Law of Canada*, p. 82.

12 Woehrling, "Les aspects juridiques," pp. 56–57, my translation.

13 Ibid., pp. 46–47.

14 Nor does Woehrling explain how an amendment that eliminated the Quebec membership on the Supreme Court of Canada would not fall within section 41(d).

15 Hogg, *Constitutional Law of Canada*, p. 126.

16 A similar conclusion is reached by N. Finkelstein and G. Vegh, *The Separation of Quebec and the Constitution of Canada* (North York, Ont.: York University, Centre for Public Law and Public Policy, 1992), pp. 6–8.

17 A "constitutional convention" is a nonlegal rule of the Constitution that reflects a widely accepted understanding or norm as to how certain powers or authority ought to be exercised.

18 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), p. 104.

19 Lucien Bouchard's comment to this effect is reported in P. O'Neill, "Le Canada anglais n'a pas un mot à dire sur l'avenir du Québec, previent Lucien Bouchard," *Le Devoir* (Montreal), October 30, 1990, p. A-3.

20 See the judgment of the Supreme court of Canada in *Re Objection by Quebec to Resolution to Amend the Constitution* [1982] 2 S.C.R. 793.

21 See, for example, resolution 244 of the Progressive Conservative Party of Canada National Convention, August 9, 1991, which stated: "The right of Quebecers to self-determination must be recognized."

22 *R. v. Sparrow* [1990] 1 S.C.R. 1075.

23 See *Guerin v. R.* [1984] 2 S.C.R. 335.

24 *R. v. Sparrow* [1990] 1 S.C.R. 1075 at 1108.

25 See D.W.M. Waters, *The Law of Trusts*, 2nd ed. (Toronto: Carswell, 1984), p. 691.

26 The secession of a province would create a separate country, and the links between aboriginal peoples residing in that separate country and Her Majesty in Right of Canada would have been severed.

27 I leave open the question of the appropriate mechanism for determining whether, in the circumstances of a particular case, that consent had been obtained.

28 S.A. de Smith and Rodney Brazier, *Constitutional and Administrative Law*, 6th ed. (London: Penguin Books, 1989), p. 68.

29 Ibid.

30 Per Jackett J. in *Chateau-Gai Wines Ltd. v. Attorney General of Canada*, [1970] Ex.CR 366, p. 384.

31 A similar conclusion is reached by Finkelstein and Vegh, *The Separation of Quebec*, p. 45. I postpone to a later section the question whether aboriginal peoples living in Quebec could challenge recognition of Quebec by Canada on the basis that they had not consented to Quebec's secession.

32 See the recent case of *Old HW-GW Ltd. v. Canada (MNR)* (1993), 93 DTC, 5199, in which the Federal Court of Appeal raised the possibility of a Secretary of State's certificate not being regarded as conclusive on all matters.

33 The part of section 133 that refers to the use of the French language in Parliament or federal courts would, however, continue to operate since these institutions would continue to exist and remain within the territorial jurisdiction of Canadian courts.

34 Moreover, any appointee to the Senate must satisfy a number of constitutional requirements. Each of the 24 senators from Quebec must reside, or hold property in, one of its 24 electoral divisions. No senator may declare allegiance to a "Foreign Power" or do anything "whereby he becomes a Subject or Citizen, or entitled to the Rights or Privileges of a Subject or Citizen, of a Foreign Power" (section 31(2) of the *Constitution Act, 1867*). These requirements are entirely straightforward as long as Quebec is a part of Canada. If, however, Quebec became, in law, a sovereign state, senators from Quebec would now be required to reside in the territory of a foreign state. At the same time, they would have to avoid doing anything that might involve their declaring allegiance to the new Quebec state or becoming entitled to the rights of a Quebec citizen. This might well prove impossible.

35 J. Crawford, *The Creation of States in International Law* (Oxford: Oxford University Press, 1979), pp. 255–256.

36 Ibid., pp. 261–262.

37 Crawford, for example, concludes that territories that are part of an existing state have a right to self-determination only if the "inhabitants do not share in the government either of the region or of the State to which the region belongs, with the result that the territory becomes in effect, with respect to the remainder of the State, non-self-governing" (ibid., p. 101).

38 Sharon Williams, *International Legal Effects of Secession by Quebec* (North York, Ont.: York University, Centre for Public Law and Public Policy, 1992), p. 20. The majority of the writers who have considered this issue in the past number of years support this conclusion; they include Thomas Franck et al., "L'intégrité territoriale du Quebec 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; Geneviève Burdeau, "Avis du Professeur Geneviève Burdeau," in *Éléments d'analyse économique pertinents à la révision du statut politique et constitutionnel du Québec*, Commission sur l'avenir politique et constitutionnel du Québec, document de travail n. 1, annexe B-4 (Quebec, 1991), pp. 540–542. Woehrling is equivocal, noting that the issue of Quebec's right to self-determination is a matter of some controversy but claiming, in any event, that the issue will depend more on political considerations than on legal ones ("Les aspects juridiques," p. 9). For a dissenting view on this issue, see Turp, "Quebec's Democratic Right to Self-Determination," p. 114. It should be noted, however, that Turp concludes that aboriginal peoples living in Quebec also enjoy a right of self-determination, which could be exercised against a sovereign Quebec.

39 Crawford, *The Creation of States*, p. 266.

40 Woehrling reaches this conclusion in "Les aspects juridiques," p. 102.

41 See Franck et al., "L'intégrité territoriale du Québec."

42 The jurists also conclude that Quebec itself does not enjoy such a right to self-determination. (Ibid., paragraph 3.06.)

43 Section 3 of the *Constitution Act, 1871* states that the borders of a province cannot be altered without that province's consent.

44 For a discussion of this application of the principle *uti possidetis*, see Malcolm Shaw, *International Law*, 3rd ed. (Cambridge: Grotius, 1991), pp. 302–303.

45 See Franck et al., "L'intégrité territoriale de Québec," paragraphs 2.46–2.49.

46 Of course, it would be open to Canada to concede or grant some of this territory to Quebec voluntarily. The point is that Quebec would have no right to demand or claim the territory in question, absent the agreement of Canada.

47 At Confederation, Quebec included only the lower one-third of its current territory. The boundaries of the province were extended northward in 1898 and 1912, with Canada's granting to Quebec territory that was formerly within Rupert's Land.

48 The 1992 referendum legislation that authorized the referendum on the Charlottetown Accord also permits the federal government to hold a referendum in parts of the country (as opposed to nationally) and thus would allow a federally sponsored vote in Quebec alone. This might appear appropriate or desirable in the event that the question posed by the Quebec government in its referendum was regarded as vague or ambiguous.

49 See the admirable analysis of the Czechoslovak breakup, along with the lesson for Canada, in R. Young, *The Breakup of Czechoslovakia*, Research Paper 32 (Kingston, Ont.: Queen's University, Institute for Intergovernmental Relations, 1994).

50 Young makes particular mention of the small number of participants involved in the crucial talks. Even when officials were included, the critical decisions were taken by the prime ministers and their senior advisers. Ibid., pp. 50–51.

51 A group of York University scholars suggested such a negotiating authority in 1992. See Patrick Monahan and Lynda Covello, *An Agenda for Constitutional Reform* (North York, Ont.: York University, Centre for Public Law and Public Policy, 1992).

52 Unless Canada itself were to disintegrate, in which case all of the provinces would find themselves separating from Canada. Although such disintegration is a live possibility, it would occur only following Quebec's exit. Thus, any analysis of the implications of the fragmentation or dissolution of Canada can be set aside for purposes of the present discussion, which is directed at the period just prior to Quebec's secession from Canada.

53 This demand would be all the more pressing given that, absent further changes, Ontario would have 99 of the 220 seats in the House of Commons after Quebec's exit.

54 Gordon Gibson, *Plan B: The Future of the Rest of Canada* (Vancouver: Fraser Institute, 1994), p. 164.

55 Ibid., p. 129.

56 See James L. Foorman and Michael E. Jehle, "Effects of State and Government Succession on Commercial Bank Loans to Foreign Sovereign Borrowers," *University of Illinois Law Review* 1 (1982): 11.

57 See D.P. O'Connell, *State Succession in Municipal Law and International Law*, 2nd ed., vol. 1 (Cambridge: Cambridge University Press, 1967), p. 28.

58 Both countries were seeking to avoid assuming the debts of territories that they annexed or conquered. See M.H. Hoeflich, "Through a Glass Darkly: Reflections Upon the History of the International Law of Public Debt in Connection with State Succession," *University of Illinois Law Review* 1 (1982): 39.

59 See Williams, *International Legal Effects of Secession*, pp. 44–48.

60 See Malcolm Shaw, "Avis du Malcolm Shaw," in *Éléments d'analyse économique pertinents à la révision*

du statut politique et constitutionnel du Québec, Commission sur l'avenir politique et constitutionnel du Québec, document de travail no. 1, annexe B-2 (Quebec, 1991), paragraphs 12–20; Daniel Desjardins and Claude Gendron, "Legal Issues Concerning the Division of Assets and Debt in State Succession: The Canada-Quebec Debate," in Paul Boothe et al., *Closing the Books: Dividing Federal Assets and Debt If Canada Breaks Up*, The Canada Round 8 (Toronto: C.D. Howe Institute, 1991), p. 21; J.-Maurice Arbour, "Secession and International Law — Some Economic Problems in Relation to State Succession," *Cahiers de droit* 19 (1978): 285.

61 The Vienna Convention is not yet in force, and Canada has not yet agreed to it. Nevertheless, with the exception of certain controversial provisions relating to decolonization (which are not applicable to Quebec), many analysts view the Convention as representing the present state of international law in this matter. Desjardins and Gendron, cite various authorities to this effect in "Legal Issues," p. 3.

62 Secrétariat de la Commission sur l'avenir politique et constitutionnel du Québec, "Analyse pro forma des finances publiques dans l'hypothèse de la souveraineté du Québec," in *Éléments d'analyse économique pertinents à la révision du statut politique et constitutionnel du Québec*, document de travail no. 1 (Quebec, 1991), p. 393.

63 The domestic law principles are those relating to unjust enrichment, which have been developed primarily in the private law area. According to these principles, a party that has been unjustly enriched is deemed to hold the benefits that have been derived in trust for the other party. See, for example, *Pettkus v. Becker*, [1980] 2 SCR 834. In order for these principles to apply in the context of Quebec secession, it would be necessary to demonstrate that the Canadian debt had been contracted in part to provide identifiable benefits to Quebec. Quebec would accordingly be deemed to hold certain property or assets in trust for Canada.

64 The creditors might wish to claim that they had a right of recourse against both Canada and Quebec, based on international law principles and the domestic law principle of unjust enrichment. The latter principle, however, would seem to be more properly raised by Canada, not the creditors, since Quebec would have been enriched at the expense of Canada.

65 As this discussion makes plain, it is important to distinguish between the rights of Canada and the rights of creditors. Canada may well possess a right to claim compensation from Quebec for an equitable proportion of the Canadian debt. This position is logically distinct, however, from the position of creditors, both as against Canada and Quebec. For a discussion of the important distinction between the rights of the predecessor state versus the rights of creditors, see Arbour, "Secession and International Law."

66 The low figure is that of the Commission sur l'avenir politique et constitutionnel du Québec (Bélanger-Campeau Commission). For other amounts, see Paul Boothe, Barbara Johnston, and Karrin Powys-Lybbe, "Dismantling Confederation: The Divisive Question of the National Debt," in Boothe et al., *Closing the Books*; surveying four different methods for dividing the debt, the authors find that Quebec's shares range from 20 to 32 percent, depending on the formula adopted.

67 John Chant, "Dividing the Debt: Avoiding the Burden," in Boothe et al., *Closing the Books*, p. 89.

68 The Bélanger-Campeau Commission Secretariat advanced this proposal (see "Analyse pro forma").

69 See Paul Boothe and Richard Harris, "Alternative Divisions of Federal Assets and Liabilities," in Robin Boadway, Thomas Courchene, and Douglas Purvis, eds., *Economic Dimensions of Constitutional Change*, vol. 2 (Kingston, Ont.: Queen's University, John Deutsch Institute for the Study of Economic Policy, 1991), p. 453.

70 These calculations are based on Canada, Department of Finance, *The Budget Plan* (Ottawa, February 1994), p. 65, table 23.

71 Gibson, *Plan B*, p. 154.

72 Chant, "Dividing the Debt," p. 90.

73 Ibid.

74 For an argument to this effect, see Patrick J. Monahan, *Meech Lake: The Inside Story* (University of Toronto Press, 1991), chap. 10.

75 Michael Hechter, "The Dynamics of Secession," *Acta Sociologica* 35 (1992): 277.

76 Section 277 provides that the attorney-general of a province may require the Canadian Forces to be called out in aid of the civil power "where a riot or disturbance occurs or is considered as likely to occur."

77 Section 16 grants the cabinet power to form a "special force" to deal with an "emergency," which is defined as including war, riot, or insurrection.

78 As I argue at length elsewhere (Monahan, *Meech Lake*), had the Meech Lake Accord been ratified, there would have been no significant impact on the day-to-day functioning of the Canadian federation; at the same time, the forces that eventually led to the creation of the Bloc Québécois would have been stillborn.

79 Castonguay, "Why more Quebec voices aren't arguing for federalism," p. A11.

80 For an argument to this effect, based on considerations of accountability and participation, see Richard Simeon, *In Search of a Social Contract: Can We Make Hard Decisions as if Democracy Matters?* Benefactors Lecture, 1994 (Toronto: C.D. Howe Institute, 1994). For a competing viewpoint, one which proposes a mixture of greater centralization in some places and greater decentralization in others, see Thomas J. Courchene, *Social Canada in the Millennium: Reform Imperatives and Restructuring Principles*, The Social Policy Challenge 4 (Toronto: C.D. Howe Institute, 1994).

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