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REFERENCE RE SECESSION OF QUEBEC: SECESSION BY QUEBEC IS A NEARLY IMPOSSIBLE TASK

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I. INTRODUCTION

For nearly three hundred years, three distinct cultures have inhabited Canada: the English, the French, and the Aboriginal peoples.[1] Quebec is the only predominantly French-speaking province in Canada.[2] Although the Canadian Government recognizes French as the second official language of Canada and affords Quebec great latitude in maintaining its cultural identity, pro-secessionists maintain Quebec should be a distinct society.[3] This is primarily because French-Canadian separatists claim that their right to a distinct cultural identity and self-governance as a province have been breached repeatedly.[4] Another cause is that the Canadian Charter of Rights and Freedoms[5] does not address the concerns of French-Canadian citizens.[6] This Comment examines whether principals of self-determination and sovereignty of nations afford Quebec the right to unilaterally secede under Canadian constitutional law or international law. This Comment concludes, as did the Canadian Supreme Court, that Quebec does not have the right to secede unilaterally under Canadian or international law.

Citizens of Quebec opposed to secession espouse a different view. They maintain that French-Canadian separatists do not take into account that Quebec reaps more benefits from the federal government than any other province.[7] Also, they maintain that those in favor of secession do not consider that Canada has attempted to reach Constitutional accords with the citizens of Quebec on numerous key issues such as education and

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1. *See* Mary Janigan, *The Meat of the Matter*, MACLEANS, Feb. 1998, at 16.
2. *See id.*
3. *See id.*
4. *See id.*
5. Canadian Charter of Rights and Freedoms (1995) (Can.).
6. *See id.*
7. *See* Janigan, *supra* note 1, at 16.

parliamentary representation.[8] The separatists' far reaching demands have made it difficult for Quebec and the rest of Canada to coexist harmoniously.[9] Further, separatists ignore other international decisions concerning the issue of secession. The United States Supreme Court has held that once an indissoluble union is created it cannot be dissolved for any reason.[10] In addition, the recent dissolution of the Soviet Union indicates the extremely high threshold a state must meet to effect unilateral secession. As the Canadian Supreme Court concludes, this is not a threshold that the Quebec separatists can reach.[11]

It was against this political and social backdrop that the Parti Quebecois gained an election victory in September of 1994.[12] The Parti Quebecois campaigned on a promise to lead Quebec to sovereignty.[13] Subsequently, a referendum vote took place regarding Quebec's secession from Canada in October of 1995[14] in which the separatists were narrowly defeated.[15] The separatists efforts continue to be an issue at the forefront of political debate for all Canadians. The Governor in Council of Canada, acting pursuant to §53 of the Supreme Court Act,[16] referred questions to the Supreme Court of Canada concerning the secession issue.[17] The first question was whether Canadian constitutional law gives the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec unilaterally.[18] The second question is whether international law gives the National Assembly, legislature or government of Quebec the right to unilaterally secede.[19] The final question is whether there is a right to self-determination under international law that would give the National

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8. *See id.*

9. *See id.*

10. *Texas v. White*, 74 U.S. 700 (1868).

11. Reference Re Secession of Quebec, No. 25506, 1998 Can. Sup. Ct. LEXIS 39, at *4 (Can. Aug. 20, 1998).

12. *See* Janigan, *supra* note 1, at 16.

13. *See id.*

14. *See id.*

15. *See id.*

16. Supreme Court Act, § 53(1)(9)(1985)(Can.)

17. Reference Re Secession of Quebec, No. 25506, 1998 Can. Sup. Ct. LEXIS 39, at *2 (Can. Aug. 20, 1998).

18. *See id.*

19. *See id.*

Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally.[20]

This comment analyzes the reasoning of the Supreme Court of Canada to lend further support to the appropriate conclusion reached by the Court based upon analysis of Canadian and international law principles that Quebec does not have the right to secede unilaterally.

II. THE SUPREME COURT'S REFERENCE JURISDICTION

A. The Constitutionality of Section 53 of the Supreme Court Act

The French-Canadian separatists argued via an amicus curiae[21] brief that section 101 of the Constitution Act of 1867[22] does not permit the Canadian Parliament to grant reference jurisdiction pursuant to section 53 of the Supreme Court Act of 1985.[23] The separatists claim that because the question of whether Quebec can secede concerns only issues of international law, the court has no jurisdiction.[24] Further, the separatists argue that if reference jurisdiction is valid, the issues addressed by the Court are not within the Supreme Court Act because they are "political in nature."[25]

The court notes that section 53 of the Supreme Court Act establishes the Canadian Supreme Court as both a court of appeal and as an "additional court for the better administration of the laws of Canada."[26] It can scarcely be argued that these issues do not concern "the better administration of the laws of Canada,"[27] because the questions involve the possible dissolution of the Canadian union. French-Canadian separatists, however, argue that their secession has nothing to do with the laws of Canada. They claim that

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20. *See id.*

21. Reference Re Secession of Quebec, No. 25506, 1998 Can. Sup. Ct. LEXIS 39, (Can. Aug. 20, 1998). An amicus curiae brief is one given by a "friend of the court." In this Reference, the amicus curiae brief was submitted on behalf of the French-Canadian separatist movement. *Id.* at 10.

22. Can. Const. (Constitution Act, 1967), § 101.

23. Supreme Court Act, R.S.C., ch. S-26, § 53(1)(a), (d), (2) (1985) (Can.).

24. Reference Re Secession of Quebec, No. 25506, 1998 Can. Sup. Ct. LEXIS 39, at *10 (Can. Aug. 20, 1998).

25. *See id* at *10.

26. *See id* at *10-11. Section 53 of the Supreme Court Act is constitutionally valid if (1) "a general court of appeal can exercise original jurisdiction, and (2) a general court of appeal can render advisory opinions." *See id.*

27. *See id.* at *10.

section 101 of the Constitution Act states that the "laws of Canada" consist only of Federal law and statute.[28]

The Supreme Court found that the Constitution Act allows it to receive original jurisdiction under special circumstances.[29] The previous Canadian Supreme Court history clearly shows that the court has granted original jurisdiction regarding topics such as language, education, and human rights issues.[30] Thus, one could contend *a fortiori*, that a grant of original jurisdiction in this instance is even more appropriate.

The secession of Quebec, if it occurs, could have serious economic and political consequences for all Canadians. It is therefore paramount that issues concerning the legalities of a possible secession by Quebec are analyzed. Section 53 provides that the Governor in Council can refer important questions concerning fact or law to the court.[31] Therefore, a possible secession by Quebec definitely meets the threshold requirements for original jurisdiction because the possible dissolution of the Canadian union is certainly an important question.

Separatists argue that if the Supreme Court Act of 1985 does not expressly authorize the rendering of advisory opinions, the Court does not have the power to exercise it.[32] The Court noted that the Canadian Constitution does not have a strict separation of powers.[33] In fact, other branches of the Canadian government routinely request advisory opinions of the court. Therefore, there is no constitutional bar to the court rendering advisory opinions.[34]

B. The Supreme Court's Reference Jurisdiction Under Section 53

The separatists claim that the question of whether international law gives French-Canadian separatists the right to unilaterally secede is beyond the scope of section 53 jurisdiction granted to the Court.[35] An examination of section 53 of the Supreme Court Act reveals that the separatists' concerns lack merit. The answer as to whether Canadian constitutional law affords Quebec the right to unilaterally secede comes from section 53(1)(a) of the

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28. *See id.* at *10.
29. *See id.* at *11.
30. *See id.* at *12-13.
31. *See id.* at *12-13.
32. *See id.* at *11.
33. *See id.* at *12.
34. *See id.*
35. *See id.*

Supreme Court Act, which confers jurisdiction upon the court for the interpretation of Constitution Acts.[36] The court receives jurisdiction for both of the issues mentioned above from section 53(1)(d).[37] This section gives jurisdiction to the court for issues relating to the powers of the government of a particular province.[38] These interpretations of the Supreme Court Act comport with the plain meaning approach of statutory interpretation that the Canadian Supreme Court utilizes in exceptional cases.[39] Both questions also fall under section 53(2) because they are "important questions of law or fact concerning any matter."[40]

Separatists also argue that the Court would exceed its jurisdiction by acting as an international tribunal and performing beyond its competence because the Court must interpret international law.[41] The first contention, that the Court is acting as an international tribunal, does not merit much discussion because the Court is only rendering an advisory opinion.[42] The Court, in addressing issues of international law concerning a possible unilateral secession by Quebec, will not bind any other state or tribunal that may consider a similar question in the future.[43] The separatist's second contention is equally without merit because the Court has addressed issues of international law in other cases.[44] The question of whether international law affords Quebec the opportunity to secede under international law is not solely an issue of international law. Rather, this question seeks to determine the legal rights of Quebec's secession under international law as it relates to the Canadian Federation.[45]

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36. Supreme Court Act, ch. S-26, § 53(1)(a) (1985) (Can.).

37. Supreme Court Act, ch. S-26, § 53(1)(d) (1985) (Can.).

38. *See id.*

39. Manulife Bank of Canada v. Conlin [1996] 139 D.L.R. 4th 426 (Can.).

40. Supreme Court Act, ch. S-26, § 53(2) (1985) (Can.).

41. Reference Re Secession of Quebec, No. 25506, 1998 Can. Sup. Ct. LEXIS 39, at *13 (Can. Aug. 20, 1998).

42. *See id.*

43. *See id.*

44. *See, e.g.*, Reference re Ownership of Offshore Mineral Rights of British Columbia [1987] S.C.R. 792, 814 (Can.).

45. Reference Re Secession of Quebec, No. 25506, 1998 Can. Sup. Ct. LEXIS 39, at *14 (Can. Aug. 20, 1998).

C. Justiciability

The primary goal of the Court is to "retain its proper role within the Constitutional framework of our democratic form of government."[46] The Court agreed with this view and stated that it must determine whether the question is "purely political in nature,"[47] and whether the question has a "sufficient legal component to warrant intervention of the judicial branch."[48]

The issues here are limited to the legal framework that underlies any decision by Quebec to secede.[49] They do not, as amicus curiae for the separatists claims, usurp a democratic decision of the people of Quebec.[50]

There are two instances where the court has exercised its discretion not to provide an answer to a reference question. The first occurs when the question posed is too imprecise.[51] A second instance is when the parties have not provided the information necessary to give a complete answer.[52] The issues here do not satisfy either of these criteria. First, the issues could not be more clear. The Court is merely required to advise whether Quebec has the right to secession under international law or Canadian law. Second, the court has all the information it needs at its disposal. In this case, the necessary information would be documentation concerning Canadian and international law, which is readily available to the court. Further, the court stated that even if the issues are ambiguous on their face, they are not required to provide a "simple yes or no answer."[53] In cases of ambiguity, the court can qualify both the question and the answer rather than merely rejecting it.[54] Under this analysis, the grant of reference jurisdiction to the Supreme Court of Canada is constitutionally valid.

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46. Reference Re Canada Assistance Plan [1991] 2 S.C.R. 525, 545 (B.C.).

47. Reference Re Secession of Quebec, No. 25506, 1998 Can. Sup. Ct. LEXIS 39, at *14 (Can. Aug. 20, 1998).

48. *See id.* at 14.

49. *See id.* at 15.

50. *See id.*

51. McEvoy v. Attorney General for New Brunswick [1983] 1 S.C.R. 704, 708 (Can.).

52. Reference re Authority of Parliament in Relation to the Upper House [1980] 1 S.C.R. 54 at para. 257 (Can.).

53. Reference Re Secession of Quebec, No. 25506, 1998 Can. LEXIS 39, at *15-16 (Can. Aug. 20, 1998).

54. See *Id.* at 16.

III. THE ISSUE OF QUEBEC'S RIGHT TO SECEDE UNILATERALLY UNDER CANADIAN CONSTITUTIONAL LAW

A. Background

A constitution is more than a written text.[55] This statement embodies the major principle behind the opinion that the Canadian Constitution does not need to have specific provisions to prevent the secession of Quebec from Canada unilaterally. The principles of the Canadian Constitution firmly embrace the notion that Quebec does not have the right to secede unilaterally. The court states that the Constitution "embraces unwritten, as well as written rules."[56] The court gave a brief historical overview of the formulation of the Canadian Federation.[57] Next, the Court cited the major constitutional principles that are relevant to analyze this reference question.[58] These principles are federalism, democracy, constitutionalism and the rule of law, and protection of minorities[59].

When interpreting the Constitution, one should note that these key principles must work together to become effective. [60] The Court has stated that the observance of these principles is essential to the continuation of constitutional development.[61] The history of Supreme Court decisions shows that "Canadians have long recognized the existence and importance of unwritten constitutional principles in our system of government."[62]

A principal argument by secessionists is that there is no constitutional provision or judicial decision that could prevent the secession of Quebec.[63] However, the Canadian Supreme Court insists upon the primacy of its written constitution.[64] As the court correctly stated, a written constitution

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55. *See id.* This means the Canadian constitution may beyond the mere scope of its wording in order to effect decisions for the benefit of Canada and all Canadians.

56. Reference Re Secession of Quebec, No. 25506, 1998 Can. LEXIS 39, at *15-16 (Can. Aug. 20, 1998).

57. *See id.*

58. *See id.*

59. *See id.*

60. *See id.*

61. *See, e.g.*, New Brunswick Broadcasting Co. v. Nova Scotia [1993] 1 S.C.R. 319, 386 (Can.).

62. *Id.* at 387.

63. Reference Re Secession of Quebec, No. 25508,1998 Can. LEXIS 39, at *29 (Can. Aug. 20, 1998).

64. *See id.*

promotes "legal certainty and predictability,"[65] and it provides a foundation and a touchstone for the exercise of judicial review.[66] It is only through legal structure and the Supreme Court's power of judicial review that any decision regarding Quebec's future would hold any credence with the international community or the citizens of Canada.

B. Federalism

It is undisputed that Canada is a federal state much like the United States and Australia.[67] However, French-Canadian separatists claim that according to the 1867 Constitution Act, Canada's federal system is only a partial one.[68] If it were indeed correct that Canada's federal system of government is only partial, it would provide Quebec with the impetus necessary to perform a unilateral secession. However, one cannot look solely to the Constitution to determine the plausibility of this argument. How the government operates is just as important.[69] "A country may have a Federal Constitution, but in practice it may work that constitution in such a way that its government is not federal."[70] The same notion can be conveyed in the opposite manner. Canada's situation is illustrative of this axiom.[71] Canada's constitution is quasi-federal.[72] However, in practice the Constitution is predominantly federal.[73] The federal government must control the limits of the provinces.[74] Without this control, the provinces of Canada could defy the Constitution at will.

Federalism allows the provincial governments to govern their respective territories with autonomy. The Supreme Court noted that the goal of federalism should be to promote diversity.[75] French-Canadian separatists claim they lack diversity.[76] As the only predominantly French-speaking

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65. *Id.*

66. *See id.*

67. *See* K.C. WHEARE, FEDERAL GOVERNMENT 18–20 (1963).

68. *See id.* at 17–18.

69. *See id.* at 18–19.

70. *Id.* at 20.

71. *See id.*

72. *See* WHEARE, *supra* note 70, at 20.

73. *See id.*

74. Haig v. Canada, 2 S.C.R. 995, 1047 (1993).

75. Reference Re Secession of Quebec, No. 25506, 1998 Can.Sup.Ct. LEXIS 39, at 23 (Can. Sup. Ct. Aug. 20, 1998).

76. *See id.*

province in Canada, Quebec's very existence proves that Canadian federalism protects Canadian diversity. Further, the court has stated that the diversity of provinces "[is] a rational part of political reality in the Federal process."[77] This is illustrative of the goal of federalist principles because federalism looks to the pursuit of collective goals.[78] It was through the federalist structure that French-speaking persons in Quebec were able to promote their linguistic and cultural concerns.[79]

C. Democracy

French-Canadian separatists claim that the democratic principle would allow them to exercise their right to sovereignty if a clear majority of persons in Quebec were in favor of unilateral secession through the referral vote process.[80] Initially, the Court noted that the democratic principle is "a baseline against what the framers of our constitution, and subsequently, our elected representatives under it, have always operated."[81] They also note that it is a "system of majority rule."[82] However, the Court made it clear by stating that "democracy is not simply concerned with the process of government."[83] The Supreme Court of Canada has noted in prior cases that the democratic principle is most intimately connected with the promotion of self-government, meaning that "a sovereign people should exercise their right to self-government through the democratic process."[84] Further, the Court previously interpreted democracy to mean the right of the people to vote and be represented by a responsible government.[85] In this regard it would not be responsible for Quebec to attempt unilateral secession on the basis of a single referendum vote.

The court did concede that democracy would express a peoples' sovereign will.[86] However, democracy embraces other concepts such as federalism and the rule of law.[87] More specifically, the legal framework

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77. *Id.*
78. *See id.*
79. *See id.*
80. *See id.*
81. *Id.* at 24.
82. *See id.*
83. *See id.*
84. *Id.*
85. *See id.*
86. *Id.* at 25.
87. *See id.*

determines a people's sovereignty and how it should be implemented.[88] The Canadian political system would possess no inherent legitimacy if it is based solely on the democratic principle without any legal check.[89] The court said, "it would be a grave mistake to equate legitimacy with the 'sovereign will' or majority rule alone, to the exclusion of other constitutional values."[90]

Even if the referendum vote proved that a majority of the citizens of Quebec wanted to secede, the popular vote would have no constitutional significance on its own.[91] There is no historical or political basis to presume that the referendum vote would settle the policy of the federal government on the Quebec secession issue.[92] The federal government must give consideration to the other constitutional principles mentioned above as well.[93] In this instance, the federal government would have to consider issues such as the effect Quebec secession would have on the other provinces, the consequences for aboriginal peoples in Quebec, and whether Quebec's complaints could be remedied by a means other than secession.[94] Although there is no basis for unilateral secession, if the referendum shows a majority of the citizens of Quebec in favor of secession, the aforementioned constitutional principles may obligate the federal government to negotiate with Quebec in order to effect secession.[95] In this scenario, all Canadian provinces would have to agree to the plan.[96] This is so because no provisions can be made under the Canadian Constitution that would not benefit Canada as a whole.[97]

D. Constitutionalism and the Rule of Law

The concepts of constitutionalism and the rule of law refute the separatists' claim that no legal mandate is required for Quebec to secede from Canada. The Reference re Remuneration of Judges of the Provincial

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88. *See id.*

89. *See id.*

90. *Id.*

91. PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA 136-137 (1997).

92. *See id.*

93. *See id.*

94. *See id.*

95. Reference Re Secession of Quebec, No. 25506, 1998 Can. Sup. Ct. LEXIS 39 (Can. Sup. Ct. Aug. 20, 1998) at *30.

96. Constitution Act, sec. 25, 35, 52(1),(2),(1982) (Can.).

97. *See id.*

Court of Prince Edward Island says "the exercise of all public power must find its ultimate source in a legal rule."[98] The court further explained that the rule of law provides that the law is supreme over acts of private persons or groups of people.[99] To support this notion, the Manitoba Language Rights Reference states that "the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order."[100] In other words, if the rule of law is not supreme, the Canadian Constitution means nothing and what results is a disorderly society with no consistent legal principles upon which the people of Canada could rely.[101]

The court encapsulates these principles by stating, "the Constitutionalism principle requires that all government action must comply with the Constitution"[102] and that "the Rule of Law principle requires that all government action must comply with the law, including the Constitution."[103] In *Operation Dismantle v. The Queen*,[104] the court noted that the constitution binds all governments, federal and provincial.[105] These concepts are not trivial, as separatists would like us to believe, and they cannot be superseded by a simple majority vote. These principles provide additional safeguards for the protection of human rights.[106] Further, they ensure that minority groups receive the rights necessary to "maintain and promote their identities."[107] Finally, these constitutional principles also facilitate the allocation of governmental power.[108]

In *Texas v. White*, the proposed secession of Texas from the United States in 1868 demonstrated a more concrete application of constitutionalism

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98. Reference re Renenumeration of Judges of the Provincial Court of Prince Edward Island [1997] 3 S.C.R. 3 at para. 10.

99. *See* Reference Re Secession of Quebec, No. 25506, 1998 Can. Sup. Ct. LEXIS 39 (Can. Sup. Ct. Aug. 20, 1998) at *26.

100. Reference Re Manitoba Language Rights [1985] 1 S.C.R. 726 at 749.

101. Reference Re Secession of Quebec, No. 25506, 1998 Can. Sup. Ct. LEXIS 39 (Can. Sup. Ct. Aug. 20, 1998) at *26.

102. *See id.*

103. *See id.*

104. Operation Dismantle Inc. v. The Queen [1985] 1 S.C.R. 441 at 457.

105. Reference Re Secession of Quebec, No. 25506, 1998 Can. Sup. Ct. LEXIS 39 (Can. Sup. Ct. Aug. 20, 1998) at *26.

106. *Id.* at 27.

107. *Id.*

108. *See id.*

and the rule of law by the United States Supreme Court.[109] The U.S. Supreme Court rejected an attempt by Texas to secede by postulating that when Texas joined the union an indissoluble relationship was created.[110] It should be noted that Texas had recently become a member of the new United States union. In comparison, Quebec has also joined an indissoluble union.[111] But more importantly, Quebec has been a part of this union for over 200 years. The Canadian federation is now more sophisticated with regards to public policy and infrastructure.[112] Additionally, Canada covers a much larger territory.[113] Dissolving the union now would create tremendous hardships for numerous segments of Canadian Society. If the United States Supreme Court could not find legitimacy in a Texas secession effort in 1868, it is doubtful that French-Canadian separatists could justify their cause without the rule of law.[114]

The separatists' last claim is that constitutionalism is not compatible with democratic government.[115] This is another way of claiming that adherence to Canadian law is not needed to effect secession from Canada. The Court rejected this notion by noting that Constitutionalism and the Rule of Law are essential to the democratic principle.[116] This is because "the political will upon which the court states democratic decisions are taken would itself be undermined."[117]

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109. Texas V. White, 74 U.S. 700, 726. Chief Justice Chase stated, [When , therefore, Texas became one of the United States, she entered into an indissoluble relation. All of the obligations of perpetual union, and all of the guaranties of the republican government in the union, attached at once to the State. The act which consumated her admission to the Union was something more than a compact; it was the incorporation of a new member into a political body. And it was as complete, as perpetual, and as indissoluble as the union between the original States. There was no place for reconsideration, or revocation, except through revolution, or through consent of the States.]

110. *See id.*

111. *See id.*

112. H. Wade MacLauchlan, *Accounting for Democracy and The Rule of Law in the Quebec Secession Reference*. 76 CAN. BAR REV. 155 (1997) at 169.

113. *See id.*

114. *See id.*

115. Reference Re Secession of Quebec, No. 25506, 1998 Can. Sup. Ct. LEXIS 39 (Can. Sup. Ct. Aug. 20, 1998) at 27.

116. *Id.* at 28.

117. *Id.*

E. Protection of Minorities

French-Canadian separatists have long argued that the principle of protection of minorities could not stop the secession of Quebec unilaterally if the majority of Quebec's citizens are in favor of secession.[118] However, it is clear that the protection of minority peoples' religious, educational, and human rights were a primary consideration in talks leading to the formation of the Confederation of Canadian States.[119] The newly formed federal government did not want minority peoples to lack proper representation in the new Canadian Confederation.[120] The court notes that "the concern for minorities has been prominent in recent years."[121] In fact, the Constitution Act of 1982 explicitly protected the rights of minority peoples.[122]

Contrary to the presumption of French-Canadian separatists, minority and aboriginal peoples would be affected by secession. They would find themselves in a foreign country and any link to Canada would be severed irrevocably.[123] Aboriginal peoples must be included in any negotiations regarding secession by Quebec and the federal government must procure their consent.[124] Although the consent given would be indirect, via the federal government, this does not dilute its enforceability.[125] This is because Canada has a fiduciary obligation to minority and aboriginal peoples and this obligation requires Canada to get their consent.[126] Without such consent, members of parliament are required to oppose any Constitutional amendment concerning secession.[127] It is also possible that the Court could provide injunctive relief to minority and aboriginal peoples because secession of Quebec without their consent would be a constitutional violation.[128] Thus, the protection-of-minorities principle would not allow

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118. *See id.*

119. Reference Re Bill 30, An Act to Amend the Education Act. (Ont.) [1987] S.C.R. 1148 at 1173.

120. *See id.*

121. Reference Re Secession of Quebec, No. 25506, 1998 Can. Sup. Ct. LEXIS 39 (Can. Sup. Ct. Aug. 20, 1998) at 28.

122. *See* Constitution Act., Sec. 35, (1982) (Can.).

123. *See* Patrick J. Monahan, *The Law and Politics of Quebec Secession*, 33 OSG. HALL 1, 17.

124. *See id.*

125. *See id.*

126. *See id.*

127. *See id.*

128. *See id.*

Quebec to secede unilaterally without the minority peoples consent, and this principle would play a key role in any negotiations between Quebec and the federal government moving towards secession.

F. The Effectivity Principle

Another argument that has been placed at the forefront of the separatist claims revolves around the principle of effectivity.[129] The effectivity principle postulates that the people of Quebec inherently hold the right to secede unilaterally. It is up to the citizenry of Quebec whether or not they choose to exercise it.[130] However, the court drew a distinction between the right to act and the power to do so.[131] The court stated, "[a] right is recognized in law; mere physical ability is not necessarily given status as a right."[132]

Without any legal entitlement to secession, Quebec's success would depend upon the level of international recognition they receive. These are concerns which will be discussed through an analysis of the prospects for a unilateral secession under international law.[133]

The principle of effectivity does not provide any constitutional or legal basis for secession.[134] The court showed the absurdity of this principle by stating that "acceptance of a principle of effectivity would be tantamount to accepting that Quebec may act without regard to the law, simply because it asserts the power to do so."[135] The effectivity principle is an assertion of fact that has no place in the analysis of arguments concerning the legality of a unilateral secession by Quebec.[136]

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129. Reference Re Secession of Quebec, No. 25506, 1998 Can. Sup. Ct. LEXIS 39, at *35 (Can. Sup. Ct. Aug. 20, 1998).

130. *See id.*

131. *See id.*

132. *See id.*

133. Suzanne Lalonde, *Quebec and the Principle of Effectiveness*, 76 CAN. BAR REV. 258, 259.

134. Reference Re Secession of Quebec, No. 25506, 1998 Can. Sup. Ct. LEXIS 39, at *36 (Can. Sup. Ct. Aug. 20, 1998).

135. *See id.*

136. *See id.*

IV. WHETHER INTERNATIONAL LAW GIVES QUEBEC THE RIGHT TO SECEDE UNILATERALLY

A. Overview

The Supreme Court of Canada began its review of the application of international law to the secession of Quebec noting the Court was not attempting to produce binding authority that will affect the secession efforts of other states within the international community.[137] The Court was, however, rendering an advisory opinion that could potentially hold the future existence of the Canadian Federation of States in the balance.[138] Since international law is an issue that the court must address using reference jurisdiction, it follows from the jurisdictional power of the Court from Section II of this comment that the Court must analyze this issue.[139]

The principal argument of the separatists is that regardless of the existence of a right to unilateral secession, international law will eventually recognize the formation of a new political state.[140] A positive legal right to international recognition however, is drastically different from making a political prediction of how the international community will respond to a new state created against the wishes of the parent state.[141] The Supreme Court's focus was the legalities of unilateral secession under international law.[142] Although there are few cases that focus on secession specifically, there are various doctrines and concepts that show that unilateral secession under international law involves more that just the right of the people to do

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137. Reference Re Secession of Quebec, No. 25506, 1998 Can. Sup. Ct. LEXIS 39, at *36 (Can. Sup. Ct. Aug. 20, 1998). "In addressing this issue the court does not purport to act as an arbiter between sovereign states or more generally within the international community. The court is engaged in rendering an advisory opinion on certain legal aspects of the continued existence of the Canadian Federation. international law has been invoked as a consideration and it must therefore be discussed." *Id.*

138. *See id.*

139. *See id.*

140. Luzius Wildtaber, *Territorial Modifications and Breakups in Federal States*, (1995) 33 Canadian YBIL 41-74, at 41–42. "There are indications that self-determination may now go beyond decolonization, triggering claims to get rid of foreign occupations that flagrantly violate human rights and constitute an extreme repression both of the will of the majority and popular sovereignty. It remains questionable whether current international law goes over farther. Basically, international law does not yet grant minorities a right to secede and form a new state at their own will." *Id.*

141. Reference Re Secession of Quebec, No. 25506, 1998 Can. Sup. Ct. LEXIS 39, at 36 (Can. Sup. Ct. Aug. 20, 1998).

142. *See id.*

so.[143] Unilateral secession must be a judicial determination that has its basis in the concepts of self-determination and sovereignty of nations.[144]

B. Secession Under International Law

1. The Right of Self-Determination

It is a universally accepted principle that international law does not specifically grant the right of unilateral secession to the component parts of the parent state.[145] Since international law does not specifically grant unilateral secession, separatists base their argument on two broadly-based principles.[146] First, since the right to unilateral secession is not "specifically prohibited" it is "inferentially permitted."[147] Second, other states have a implied duty to recognize "the legitimacy of secession" that is manifested through the principle of self-determination of peoples.[148] The Court and the amicus curiae for those opposed to the secession effort agreed that the principle of self-determination did not apply to the Quebec situation.[149]

Although international law does not denote either an acceptance or a rejection of a state's right to unilateral secession, many commentators have noted that a denial of the right of unilateral secession may be implicit in international law because of the high threshold that a state must reach to properly exercise the right.[150] International law places heavy emphasis on the territorial integrity of states.[151] The creation of a new state is generally determined via the law of the existing parent state.[152] In Quebec's situation the mandate is clear. A unilateral secession by Quebec would be incompatible with Canadian domestic law.[153] Therefore, an international law determination as to whether Quebec has a right to unilateral secession

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143. *See id.*

144. *See id.*

145. Jeremy Webber, *The Legality of a Unilateral Secession of a Unilateral Declaration of Independence under Canadian Law*, 42 MCGILL L.J. 281, 291.

146. Reference Re Secession of Quebec, No. 25506, 1998 Can. Sup. Ct. LEXIS 39, at *37 (Can. Sup. Ct. Aug. 20, 1998).

147. *See id.*

148. *See id.*

149. *See id.*

150. *See id.*

151. *See id.*

152. *See id.*

153. *See id.*

will turn on the right of peoples to self-determination.[154] Moreover, the Declaration on Friendly Relations[155] demonstrates the high regard that the international community places on the territorial integrity of states. In an effort to turn away from the issues of territorial integrity, French-Canadian separatists claim that any secession effort would be judged by the principle of effectiveness in international law.[156] In this regard, Quebec must sustain "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 undisputed."[157] Under the effectivity principle, Quebec's right to its existing territorial boundaries would be severely impaired.[158]

The principle of self-determination is widely recognized[159] and is generally considered a fundamental principle of international law.[160] The United Nations Charter[161] embraces the principle of self-determination.[162] Self-determination is also recognized in other international legal documents. The Final Act of the Conference of Security and Co-operation in Europe states, "the participating states will respect the equal rights of peoples and their right to self-determination, acting at all times in conformity with the purposes and principles of the Charter of the United Nations and with the

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154. *See id.*

155. See generally U.N. GAOR, 6th Comm., 25th Sess., Supp. No. 18, 1833rd plen. mtg at 61-78, U.N. A/8018 (1970). "Nothing in the foregoing paragraphs shall be confirmed as authorizing or encouraging any action which would dismember or impair totally or in part, the territorial integrity or political unity of sovereign and independent states conducting themselves in compliance with the principles of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour." Suzanne Lalonde, *Quebec and the Principle of Effectiveness*, 76 CAN. BAR REV. 258.

156. Lalonde, *supra* note 164, at 259.

157. *See id.*

158. P.J. Monynihan, *Cooler Heads Should Prevail: Assessing the Costs and Consequences of Quebec Separation*, 65 C.D. HOWE HIST. COMM. 1, 14.

159. ANTONIO CASESSE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL, 171-72 (1995).

160. KARL DOEHRING, SELF-DETERMINATION, 65-67 (Bruno Simma et. al eds., 1994).

161. U.N. CHARTER art.1, para. 2. The Charter states one of its primary goals is "[T]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace." *Id.*

162. U.N. CHARTER art. 55. The charter again refers to the self-determination principle when it states, "[w]ith a view to the creation of conditions of stability and well being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples." *Id.*

relevant norms of international law, including those relating to territorial integrity of states."[163] The principle of self-determination does not afford French-Canadian separatists the right to unilaterally secede from Canada because the impetus for their secession effort does not reach the required threshold of severely egregious constitutional or human rights violations.

2. The Concept of "Peoples"

International law affords the privilege of self-determination to "peoples."[164] The concept of "peoples," however, has remained unclear even as the concept of self-determination has been refined over the years in international law.[165] The notion of "peoples" can be used in several different contexts.[166] "Peoples," as noted by Anna Michalarska[167] "can be related to a community which is organized in its own state; to 'people' of a colonial state; [or] to a community which does not have its own state and is not part of another state."[168] It would be simple to identify 'people' with the concept of nations.[169] It is, however, very difficult to constrain the meaning to one particular axiom because of the numerous research perspectives that have been taken.[170]

The Court noted this ambiguity by conceding that "peoples" may also be applicable to a portion of the population of an existing state.[171] The Court also conceded that the right to self-determination is a human right.[172]

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163. The Final Act of the Conference on Security and Co-operation in Europe, 14 I.L.M. 1292, (1975).

164. WILLIAM TWINING, ISSUES OF SELF-DETERMINATION 72–73 (Neil MacCormick and Fennon Bankowski et. al. eds., 1991).

165. *See id.*

166. *See id.*

167. ANNA MICHALARSKA, RIGHTS OF PEOPLES TO SELF-DETERMINATION IN INTERNATIONAL LAW, 72–78 (Neil MacCormick and Fennon Bankowski et. al. Eds., 1991). "The question of defining peoples is still not resolved. Should it include ethnic minorities, linguistic minorities, or religious minorities, etc., it has to be accepted that the notion of people denotes different meanings. It is also worth mentioning that the notion 'people' conveys different meanings in legal terms in national and international law. And it cannot always be explicitly taken from a legal context." *Id.*

168. *Id.*

169. *See id.*

170. *See id.*

171. Reference Re Secession of Quebec, No. 25506, 1998 Can. Sup. Ct. LEXIS 39 (Can. Sup. Ct. Aug. 20, 1998) at *39.

172. *See id.*

This human right is seen in documents "that refer simultaneously to 'nation' and 'state.'"[173] The Court conceded that the people of Quebec are within the definition of "peoples" under international law. But as the next section makes clear, regardless of the definition of "peoples" used, the concept of self-determination cannot be used by French-Canadian separatists as the foundation for a unilateral secession effort.[174]

3. Quebec's Right to Self-Determination

To determine whether French-Canadian separatists have a right to unilateral secession via self-determination, the Court begins its analysis by noting that self-determination is achieved through "a people's pursuit of its political, economical, social and cultural development within the framework of an existing state."[175] French-Canadian separatists claim they have this right because the Canadian government has repeatedly hampered their development in the above-mentioned areas.[176] However, the Court and most authorities[177] on this subject agree that the right to unilateral secession under international law can only be utilized under "extreme cases, and even then, under carefully defined circumstances."[178] These extreme cases are generally where there have been egregious human rights abuses and where the secession effort is moving towards the decolonization process.[179]

Some commentators, however, have suggested that the recent dissolution of the Soviet Union and the Republic of Yugoslavia indicate that International law may be moving toward the recognition of a secession right rooted in self-determination under any circumstances.[180] This shows the willingness of the international community to recognize the independence of the Baltic Republics, Slovenia, Croatia, and Bosnia.[181]

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173. *See id.*

174. *See id.*

175. *See id.*

176. *See* Janigan, *supra* note 1,at 16.

177. Patrick J. Moynihan, *The Law and Politics of Quebec Secession*, 33 OSG. HALL L.J. 1, 21 (1995).

178. Reference Re Secession of Quebec, No. 25506, 1998 Can. Sup. Ct. LEXIS 39 (Can. Sup. Ct. Aug. 20, 1998) at *40.

179. Karl Doehring, Self-Determination 65-67 (Bruno Simma et. al eds., 1994).

180. L. Eastwood Jr., *Secession: State Practice and International Law After the Dissolution of the Soviet Union and Yugoslavia*, 3 DUKE J. COMP. OF INTERNATIONAL L. 299, 342 (1993).

181. Patrick J. Moynihan, *The Law and Politics of Quebec Secession*, 33 OSG. HALL. L.J. 1, 22 (1995).

These examples, however, do not denote a shift to a new principle regarding unilateral secession rights.[182] The Baltic states' sovereignty was not recognized until President Boris Yeltsin of Russia officially recognized Latvian and Estonian independence in 1991.[183] The international community did not recognize the new Baltic States as independent sovereigns until they were endorsed by Russia.[184] Importantly, the Baltic states were sovereign before they were illegally annexed by the Soviet union in 1941.[185] Therefore, "even if the response of the international community suggests some acceptance of secession, such support may mark only the beginning of international recognition of a limited secession right applicable to illegally annexed territories rather that a general right of secession."[186]

The newly independent states of the former Yugoslavia did not result from secession.[187] Rather, they resulted from the dissolution of an existing state.[188] The European Community's arbitration committee agreed with this sentiment.[189] And as Patrick Monahan notes the dissolution of a state means that it no longer has legal personality.[190] International bodies such as the European Commission could recognize the new states because there was no difficulty regarding the states' territorial integrity.[191] Thus, Slovenia and Croatia were quickly recognized as independent states.[192]

In contrast, Quebec was not illegally annexed by Canada.[193] Unlike the situation in the former republic of Yugoslavia, Canada would continue to exist if there were a secession by Quebec.[194] Therefore, the Soviet and

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182. *See id.*

183. L. Eastwood Jr., *Secession: State Practice and International Law After the Dissolution of the Soviet Union and Yugoslavia*, 3 Duke J. COMP. OF INTERNATIONAL L. 299, 316–321 (1993). The aforementioned pages give the historical overview of the break up of the former Soviet Union.

184. *See id.*

185. *See id.*

186. *Id.*

187. *See* Patrick J. Monahan, *The Law and Politics of Quebec Secession*, 33 Osg. Hall. L.J. 1, 22 (1995).

188. *See* Conference on Yugoslavia, Arbitration Committee: Opinion No. 1, 31 I.L.M. 1494, 1496–1497 (1991).

189. *See id.*

190. Patrick J. Monahan, *The Law and Politics of Quebec Secession*, 33 OSG. HALL. L.J. 1, 23 (1995).

191. *See id.*

192. *See id.*

193. *See id.*

194. *See id.*

Yugoslavian examples do not denote a shift towards the recognition of a right to unilateral secession.[195]

The Court noted that "the general state of international law with respect to the right to self-determination is that the right operates within the overriding protection granted to the territorial integrity of parent states."[196] There are, however limited circumstances under which self-determination can be exercised to effect secession.[197] The right to self-determination under these circumstances would be exercised externally, which means restoring independence.[198] Those circumstances are for those under colonial rule or those peoples suffering from "domination or exploitation outside a colonial context."[199] Despite the views of French-Canadian separatists on this issue, the Quebec situation simply does not meet this threshold. The statements of the amicus curiae for those opposed to a Quebec secession effort, which are endorsed by the Court regarding this issue, encapsulates the Court's reasoning: "The Quebec people is not the victim of attacks on its physical existence or integrity, or of a massive violation of its fundamental rights. The Quebec people is manifestly not an oppressive people."[200]

French-Canadians have held prestigious positions within the Canadian government.[201] The current Prime Minister of Canada is a citizen of Quebec.[202] The citizens of Quebec have been able to make choices concerning the future of the province of Quebec without intervention from the Federal Government.[203] French-Canadian separatists, however, maintain that the inability of the federal government to agree to constitutional accords with Quebec amounts to a denial of their self-determination.[204] The Court rejects this notion by correctly concluding that the constitutional provisions in effect do not "place Quebecers in a disadvantaged position within the scope of the international law rule."[205]

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195. *See id.*

196. Reference Re Secession of Quebec, No. 25506, 1998 Can. Sup. Ct. LEXIS 39, at *10 (Can. Aug. 20, 1998).

197. *See id.*

198. *See id.*

199. *See id.*

200. *See id.* at 42.

201. *See id.*

202. *See id.*

203. *See id.*

204. *See id.*

205. *See id.*

4. The 'Effectivity' Principle

The amicus curiae for the separatists also advances the argument that international law does not prohibit secession, and that separatists would gain international recognition from a secession effort as long as they gained effective control of the territory that comprises Quebec.[206] Separatists fail to note, however, that the process of international recognition is guided by legal norms.[207] This thinking is further advanced by James Crawford, who says secession is "neither legal nor illegal in international law, but a legally neutral act the consequences of which are, or may be, regulated internationally."[208]

The principle of effectivity proclaims that an illegal secession attempt could attain a legal status if, it is recognized internationally.[209] But, as the court correctly notes, the principle of effectivity does not provide for subsequent approval of an initially illegal act which retroactively creates a legal right to engage in the act in the first place.[210]

V. CONCLUSION

The principles of effectivity, self-determination, and sovereignty of nations do not afford Quebec the right to secede unilaterally under Canadian or international law. Quebec does not reach the threshold for consideration of a secession effort. The people of Quebec are not emerging from colonial rule nor have they been subject to egregious human rights violations. Therefore, the only hope for French-Canadian separatists is to have a clear majority of Quebec's citizens vote for secession in a popular referendum vote. Even then Quebec would be required to negotiate with the federal

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206. *See id.* at 43.

207. H.W.R. Wade, *The Basis of Legal Sovereignty*, CAMB. L.J. 172, 196 (1955).

208. JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 268 (1979).

209. Reference Re Secession of Quebec, No. 25506, 1998 Can. Sup. Ct. LEXIS 39, at *10 (Can. Aug. 20, 1998).

210. *See id.* The court further elaborates "it may be that a unilateral secession by Quebec would eventually be accorded legal status by Canada and other states, and thus give rise to legal consequences; but this does not support the more radical contention that subsequent recognition of a declaration of independence could be taken to mean that secession was achieved under colour of a legal right."

government and the other Canadian provinces. Given all of the hurdles that French-Canadian separatists face to effect secession, it is highly unlikely that Quebec will gain independence from Canada at any point in the near future.

Charles Whites