

12-1-1979

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Recommended Citation

Marc A. Thibodeau, *The Legality of an Independent Quebec: Canadian Constitutional Law and Self-Determination in International Law*, 3 B.C. Int'l & Comp. L. Rev. 99 (1979), <http://lawdigitalcommons.bc.edu/iclr/vol3/iss1/6>

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The Legality of an Independent Quebec: Canadian Constitutional Law and Self- Determination in International Law

I. INTRODUCTION

Since the signing of the Treaty of Paris (Treaty) on February 10, 1763,¹ which formalized the British position in Canada and in other lands on the North American continent,² members of the French-Canadian community,

1. Definitive Treaty of Peace Between France, Great Britain and Spain, Feb. 10, 1763, Great Britain-France-Spain, 42 Parry's T.S. 320. The Treaty settled various territorial disputes at the conclusion of the War of 1756-63 (Seven Year's War). As part of the settlements, the King of France ceded to Great Britain all of its possessions in Canada. *Id.* art. IV. By granting dominion to Britain over Canada and other North American lands, the Treaty "added at one stroke to the colonial field of the British Empire an area far greater than that of all its previous American colonies together." R. COUPLAND, *THE QUEBEC ACT* 4 (1925).

As a practical matter however, "the governance of the country by England really began about three years before this date. The capitulation of Quebec City took place on the 18th of September, 1759; that of Montreal followed on the 8th of September, 1760." A. HASSARD, *CANADIAN CONSTITUTIONAL HISTORY AND LAW* 23 (1900) [hereinafter cited as HASSARD]. See generally A. SHORTT & A. DOUGHTY, *DOCUMENTS RELATING TO CONSTITUTIONAL HISTORY OF CANADA, 1759-1791* (1918) [hereinafter cited as SHORTT & DOUGHTY]. See also Articles of Capitulation, Quebec, Sept. 18, 1759, reprinted in 1 SHORTT & DOUGHTY, *supra*, at 5; Articles of Capitulation, Montreal, Sept. 8, 1760, reprinted in 1 SHORTT & DOUGHTY, *supra*, at 25. During the years 1759-1764, Quebec was ruled by a military government. See W. KENNEDY, *THE CONSTITUTION OF CANADA* 25-31 (1922) [hereinafter cited as KENNEDY]; Proclamation of Governor Murray, Establishing Military Courts, reprinted in 1 SHORTT & DOUGHTY, *supra*, at 44.

After the Treaty was signed, the British Government moved quickly to solidify its control over the territory by granting large tracts of land to British soldiers and citizens. See The Royal Proclamation, Oct. 7, 1763, *CAN. REV. STAT.* app. at 123, doc. 1, para. X (1970) [hereinafter cited as Royal Proclamation]. Thus, economic domination by the English, one of the focal points of the present struggle, was established at an early stage. See notes 12, 18 *infra*.

However, because French-Canadians were given eighteen months to leave the country if they so desired, *id.* art. IV, civil government did not commence until August, 1764. See Ordinance of Sept. 17, 1764, Establishing Civil Courts, reprinted in 1 SHORTT & DOUGHTY, *supra*, at 205.

2. Great Britain previously had formal control over the peninsula of Acadia (Nova Scotia) by authority of the Treaty of Peace and Friendship between France and Great Britain, Apr. 11, 1713, Great Britain — France, art. X, 27 Parry's T.S. 477, 484. See A. DOUGHTY, *THE ACADIAN EXILES* 17-27 (1918). Acadians were given one year in which to move to another location. Many

centered in Quebec,³ have endeavored to erect independent political institutions in order to be free from the *de facto* domination of English-Canadians with whom they have little in common.⁴ During the first century following the enactment of the Treaty, that struggle was manifested in the provisions of the

did so, and settled in New England. See generally J. HANNAY, HISTORY OF ACADIA (1879); H. KIRKE, THE FIRST ENGLISH CONQUEST OF CANADA (2d ed. 1908). Some of the inhabitants who did not leave were forcibly expelled. See generally F. TRACY, TERCENTENARY HISTORY OF CANADA 383-405 (1908); C. CAMPBELL, A HISTORY OF NOVA SCOTIA 120-31 (1948); E. MCINNIS, CANADA: A POLITICAL AND SOCIAL HISTORY 26-27, 106-14 (1947); F. PARKMAN, A HALF-CENTURY OF CONFLICT 110-212 (1897); G. WOODCOCK, CANADA AND THE CANADIANS 75-79 (1970).

For the history and conduct of British colonial policy in North America and Canada, see A. B. KEITH, SELECTED SPEECHES AND DOCUMENTS ON BRITISH COLONIAL POLICY, 1763-1917 (1918); E. PORRITT, THE FISCAL AND DIPLOMATIC FREEDOM OF THE BRITISH OVERSEAS DOMINIONS (1922); D. FARR, THE COLONIAL OFFICE AND CANADA (1955); H. D. HALL, THE BRITISH COMMONWEALTH OF NATIONS: A STUDY OF ITS PAST AND FUTURE DEVELOPMENT (1920); 1-3 L. KNOWLES & C. KNOWLES, THE ECONOMIC DEVELOPMENT OF THE BRITISH OVERSEAS EMPIRE (1924-1936); J. HANNAY, HOW CANADA WAS HELD FOR THE EMPIRE (1905); BUILDERS OF THE CANADIAN COMMONWEALTH (G. Locke ed. 1923); Plumtree, *The Nature of the Political and Economic Development in the British Dominions*, 3 CAN. J. ECON. & POL. SCI. 489 (1937); IMPERIAL CONSTITUTIONAL DOCUMENTS, 1765-1952, A SUPPLEMENT (F. Madden ed. 1953); BRITISH COLONIALISM AND CONFEDERATION (W. Shelton ed. 1967).

3. The cultural and emotional heart of French-Canada has been centered solely in Quebec Province in this century. The Provinces of Manitoba, New Brunswick, and Ontario have had the percentage of their French-speaking population substantially reduced due to assimilation with the English. See note 82 *infra*. See also THE TASK FORCE ON CANADIAN UNITY: A FUTURE TOGETHER 23-25 (1979) [hereinafter cited as TASK FORCE] for a brief analysis of the French people's transformation from Canadians to French-Canadians to Quebecers, the result of their perception of a lack of common purpose and 'oneness' with English-speaking Canadians. For thorough historical treatments of the French in Canada, see M. WADE, THE FRENCH-CANADIANS 1760-1967 (1968) [hereinafter cited as WADE]; R. RUMILLY, HISTOIRE DE LA PROVINCE DE QUÉBEC (1941) [hereinafter cited as RUMILLY].

4. The differences between French and English Canadians include history, language, law, origins, and feelings about Confederation and politics. TASK FORCE, *supra* note 3, at 23. As to the latter difference, see P. TRUDEAU, FEDERALISM AND THE FRENCH-CANADIANS (1968) [hereinafter cited as TRUDEAU], wherein the former Prime Minister of Canada explains that "[h]istorically, French Canadians have not really believed in democracy for themselves; and English Canadians have not really wanted it for others. Such are the foundations upon which our two ethnic groups have absurdly pretended to be building democratic forms of government." *Id.* at 103. See also Maheux, *French Canadians and Democracy*, 27 U. TORONTO Q. 341 (1958).

The sense of being a distinct people is strong among Quebec's inhabitants. For example, a recent poll indicates that 70% of those surveyed regard themselves first as *Québécois* or French-Canadians. *Quebeckers as Equals*, Boston Globe, Oct. 8, 1979, at 68, col. 1 (editorial). See note 36 *infra*.

The major English-French similarity appears to be the fact that "both groups had to contend with the rigors of North American existence and undergo the consequences of imperial rule exercised from overseas." G. STANLEY, THE UNEQUAL UNION 6 (1968) [hereinafter cited as STANLEY]. See also W. SANDERS, A SCIENTIFIC APPROACH TO THE STUDY OF FRENCH AND NON-FRENCH THOUGHT IN CANADA (1943); J. FALARDEAU, ROOTS AND VALUES IN CANADIAN LIVES (1961); H. MCCLELLAN, TWO SOLITUDES (1945); Bailey, *On the Nature of the Distinction Between the French and English in Canada: An Anthropological Inquiry*, 28 CAN. HIST. ANN. REV. 63 (1947).

Royal Proclamation of 1763,⁵ the Quebec Act of 1774,⁶ the Constitutional Act

5. Royal Proclamation, *supra* note 1. Aside from the land grant that has been alluded to, the Proclamation affirmed that all criminal and civil causes were to be decided according to English Laws, *id.* para. VIII, and mandated the creation of representative assemblies for all its newly acquired territories: Quebec, East and West Florida and Granada. *Id.* para. I. As for erecting democratic institutions in Quebec however, practice diverged from theory. "Although provision was made for the calling of a Representative Assembly in the Province, no Assembly ever met. The nature of the test oath . . . , practically operated as an exclusion of all French-Canadians . . . , Protestants did not number over 300 or 400; the French-Canadian population was about 70,000 to 80,000." HASSARD, *supra* note 1, at 27. The test oath required that the individual declare his loyalty to the King and by implication to the Church of England. As Roman Catholics, they would not renounce their faith and pledge allegiance to the Anglican Church, founded as it was after King Henry the VIII split with the Church of Rome.

In addition, due to the fact that a long legal tradition had been developed under a civil code, there was confusion as to which law to apply to disputes which arose before and after the issuance of the Royal Proclamation. *Id.* See also KENNEDY, *supra* note 1, at 32-38; D. ALFORD, GENESIS OF THE PROCLAMATION OF 1763 (1908); Commission Appointing James Murray, Captain General and Governor-in-Chief of the Province of Quebec, Nov. 21, 1763, *reprinted in* 1 SHORRT & DOUGHTY, *supra* note 1, at 173; Instructions to Governor Murray, Dec. 7, 1763, *reprinted in* 1 SHORRT & DOUGHTY, *supra* note 1, at 210.

6. The Quebec Act, 1774, 14 Geo. 3, c. 83. The Act altered policy on various issues addressed by the Royal Proclamation, *supra* note 1. These issues included the question of religious freedom for the French and the resolution of choice-of-law problems.

As to the former, the document provided that the inhabitants of the "Province of Quebec, may have, hold and enjoy, the free exercise of the Religion of the Church of Rome." *Id.* art. V. However, the test oath was retained for representatives. *Id.* art. VI. See note 5 *supra*. No restrictions were placed upon the practices of the clergy. *Id.* art. V. See Report of Attorney-General & Solicitor-General re. Status of Roman Catholic Subjects, June 10, 1765, *reprinted in* 1 SHORRT & DOUGHTY, *supra* note 1, at 236. The choice-of-law question was complex. Originally, both civil and criminal causes were to be settled as nearly as possible with the Laws of England. See note 5 *supra*. However, it was found that so deciding in civil matters visited hardship upon the French inhabitants. Thus, that part of the Royal Proclamation, *supra* note 1, which required the application of the common law of England on questions of property, civil rights and so forth was declared to be null and void. The Quebec Act, 1774, 14 Geo. 3, c. 83. Citizens of the Province could seek redress of their grievances under the Laws of Canada. *Id.* art. VIII. However, the Laws of England were retained for criminal cases. *Id.* art. XI. See J. BOURINOT, CONSTITUTIONAL HISTORY OF CANADA 12-16 (1888) [hereinafter cited as BOURINOT]; HASSARD, *supra* note 1, at 28-33; L. BAUDOIN, LE DROIT CIVIL DE LA PROVINCE DE QUÉBEC. MODÈLE VIVANT DE DROIT COMPARÉ (1953).

This meant that the *Coutume de Paris*, as modified during the period of its application to New France, was to govern, not only land tenure, but also marriage, inheritance, and trade and commerce . . . , [t]he French Civil Law was not to apply to lands granted in common socage, nor to prevent the execution of wills according to English law.

G. STANLEY, A SHORT HISTORY OF THE CANADIAN CONSTITUTION, 31-32 (1969) [hereinafter cited as STANLEY, HISTORY]. See Plan of a Code of Laws for the Province of Quebec, 1774, *reprinted in* 1 SHORRT & DOUGHTY, *supra* note 1, at 440. For sources on the development of the *Coutume de Paris*, see KENNEDY, *supra* note 1, at 54 n. 3. Though a distinction was set-up between English criminal and French civil law, in practice there was much overlap. See generally H. M. NEATBY, THE ADMINISTRATION OF JUSTICE UNDER THE QUEBEC ACT (1937). Strong evidence suggests that the Quebec Act was prompted by British concern over the American Revolution. See KENNEDY, *supra* note 1, at 50-70; J. SMITH, OUR STRUGGLE FOR THE FOURTEENTH COLONY: CANADA AND THE AMERICAN REVOLUTION (1908).

of 1791,⁷ the Act of Union of 1840⁸ and the British North America Act of 1867 (BNA Act).⁹ Subsequent to the passage of the latter act, which established the

7. The Constitutional Act, 1791, 31 Geo. 3, c. 31. This document served two main purposes. First, it allowed for the Province of Quebec to be separated into Upper and Lower Canada, *id.* art. II, "ostensibly to give limited recognition to the French-Canadian identity in the area." STANLEY, *supra* note 4, at 141. See also Order-in-Council Dividing the Province of Quebec into Upper and Lower Canada, reprinted in 1 A. DOUGHTY & D. MACARTHUR, DOCUMENTS RELATING TO CONSTITUTIONAL HISTORY OF CANADA, 1791-1818, at 3 (1914). Second, as a serious attempt at representative government, the document set out a plan for the establishment and conduct of a legislature and assembly in both provinces. The Constitutional Act, 1791, 31 Geo. 3, c. 31, arts. II-XXXII.

In general, the plan did not allow the French a greater political voice. TRUDEAU, *supra* note 4, at 116. See also Brun, *La Constitution de 1791*, 10 *Recherches Sociographiques* 37 (1969); GOUVERNEMENT DE QUÉBEC, QUÉBEC-CANADA: A NEW DEAL 5 (1979) [hereinafter cited as NEW DEAL]. The latter book, issued in November, 1979, contains the Quebec Government's proposal for sovereignty-association as well as historical and economic evidence in support of a call for independent status. See note 18 *infra*.

The impetus for The Constitutional Act, 1791, 31 Geo. 3, c. 31, grew out of an English migration towards the upper part of Canada. This migration was stimulated by the Definitive Treaty of Peace between His Britannic Majesty and the United States of America, Sept. 3, 1783, Great Britain-United States, 48 Parry's T.S. 487. One section of the Treaty, titled "Additional Instructions to Haldimand," provided that any British subject, now living in the United States of America, could migrate to Canada and claim a certain amount of acreage based on their military rank or civilian status. *Id.* paras. 1-6. See Royal Proclamation, *supra* note 1, for a similar provision. Many English took up the offer and the concentration of their population prompted them to seek their own legislative representatives and system of laws to confirm their land interests. STANLEY, HISTORY, *supra* note 6, at 36-37; KENNEDY, *supra* note 1, at 74-76.

8. Act of Union, 1840, 3 & 4 Vict., c. 35. The Act repealed The Constitutional Act, 1791, 31 Geo. 3, c. 31, and re-united the two Canadas. Act of Union, 1840, 3 & 4 Vict., c. 35, arts. I-II. This was done primarily to facilitate the assimilation of the French and to guarantee legislative supremacy for the English minority. See STANLEY, UNION, *supra* note 4, at 138-52; TRUDEAU, *supra* note 4, at 117. A series of riots, which occurred in Lower Canada (Quebec) in the late 1830's, and the belief of English-Canadians that the French were over-represented in the Legislature, precipitated the Act. See HASSARD, *supra* note 1, at 53-64; NEW DEAL, *supra* note 4, at 5. For two excellent period pieces, see LORD DURHAM, REPORT ON THE AFFAIRS OF BRITISH NORTH AMERICA (Sir Charles Lucas ed. 1912), a report commissioned in 1840 after the uprisings referred to above, discussed at KENNEDY, *supra* note 1, at 167-81; Sir Francis Bond Head, ADDRESS AGAINST THE BILL FOR THE UNION OF THE CANADAS (Pamphlet 1840). Even though they were reunited, their equality was affirmed, Act of Union, 1840, 3 & 4 Vict., c. 35, art. XII, and their separate laws and courts were maintained. *Id.* arts. XLVI, XLCII.

The history of the Province of Lower Canada is a rich one, and the period is notable for the insight it provides on the nature and development of a distinct French-Canadian society in North America. See generally 1-6 R. CHRISTIE, HISTORY OF THE LATE PROVINCE OF LOWER CANADA, 1791-1841, (1848-55); J. MONET, THE LAST CANNON SHOT: A STUDY OF FRENCH-CANADIAN NATIONALISM, 1837-1850 (1969); H. MANNING, THE REVOLT OF FRENCH CANADA, 1800-1835: A CHAPTER IN THE HISTORY OF THE BRITISH COMMONWEALTH (1962); CONSTITUTIONALISM AND NATIONALISM IN LOWER CANADA (R. Cook ed. 1969); D. VAUGEOIS, L'UNION DES DEUX CANADAS, 1791-1840 (1962); F. OUELLET, LE BAS-CANADA, 1791-1840 (1976).

9. British North America Act [BNA Act], 1867, 30 & 31 Vict., c. 3. The BNA Act forms part of the fundamental constitutional law of Canada, see note 21 *infra*, and formally established the Confederation of Canada. *Id.* art. I(3). At that time, Canada was organized into the provinces of Quebec, Ontario, Nova Scotia and New Brunswick. The "Canadas" were again split in two, with Lower Canada constituting the Province of Quebec and Upper Canada the Province of Ontario. *Id.* art. I(6).

Many of the documents of the organizing conference (convened in 1864) were lost and remain-

Canadian Confederation, a slow and uneven evolutionary process,¹⁰ fueled by issues of language rights,¹¹ unequal treatment,¹² religion and nationalism has

ed missing until they were uncovered some years later quite by accident. See J. POPE, CONFEDERATION: BEING A SERIES OF HITHERTO UNPUBLISHED DOCUMENTS BEARING ON THE BRITISH NORTH AMERICA ACT (1893). See generally D. CREIGHTON, THE ROAD TO CONFEDERATION, THE EMERGENCE OF CANADA: 1863-1867 (1964); W. MORTON, THE CRITICAL YEARS: THE UNION OF BRITISH NORTH AMERICA, 1857-1873 (1964); Beauschesne, *Events which Led to Confederation*, 10 CAN. BAR REV. 101 (1932); L.A. GROULX, LA CONFÉDÉRATION CANADIENNE, SES ORIGINES (1918); Doughty, *Notes on the Quebec Conference, 1864*, 1 CAN. HIST. REV. 26 (1920); 1 RUMILLY, *supra* note 3, at 9-94.

10. Separatist or pro-independence elements have always been present in Quebec, a natural reaction perhaps for a conquered people. In fact, in 1865, only twenty-six of the forty-eight deputies from Quebec to the founding conference voted in favor of the Union. J. BROSSARD, L'ACCESSION À LA SOUVERAINETÉ: LE CAS DE QUÉBEC 212 (1976) [hereinafter cited as BROSSARD] (author's translation). The significance of this fact is discussed in note 193 *infra*.

Resistance to British domination has not always been consistently forceful, but rather has been motivated by a response to specific issues.

It is important to underline that the idea of independence is far from being a new one in Quebec: on the contrary, the independence movement has been present for nearly two centuries and constitutes one of the permanent themes of its history . . . it has witnessed many revivals of its vigor and continuity; this was particularly the case at the beginning of the 19th century and the 1830's, at the end of the 19th century after Quebec entered the Canadian federation on the occasion of the First World War and the conscription crisis of 1917; during the economic crisis of the 1930's and on the occurrence of the second conscription crisis; and finally — for the first time in a positive and not solely defensive fashion — since 1960 and since the creation of the first independence parties.

Id. at 194-95 (author's translation).

The conscription crises merit further discussion. In both World Wars, the majority of English-Canadians believed they should assist Britain in the war effort. However, French-Canadians were not enthusiastic about the idea of rallying to defend the mother country. See J. LAXER & R. LAXER, THE LIBERAL IDEA OF CANADA 163 (1977) [hereinafter cited as LAXER & LAXER]. The result in both crises was that, despite the clear opposition of Quebec's elected officials, mandatory conscription was ordered. See note 13 *infra*. See also Robin, *Registration, Conscription and Independent Labour Politics, 1916-1917*, 47 CAN. HIST. REV. 101 (1966); NEW DEAL, *supra* note 7, at 11.

11. For a survey of the genesis of language rights in Canada and Quebec, see COMMISSION OF INQUIRY, THE POSITION OF THE FRENCH LANGUAGE AND OF FRENCH LANGUAGE RIGHTS IN QUEBEC: REPORT (Éditeur officiel de Québec 1972); 1-4 ROYAL COMMISSION OF BI-CULTURALISM AND BI-LINGUALISM (Government of Canada 1969) [hereinafter cited as BI-BI REPORT]; 1-10 C. SHEPPARD, INVENTAIRE CRITIQUES DES DROITS LINGUISTIQUES AU QUÉBEC (Éditeur officiel de Québec 1972-74). See also note 82 *infra*.

12. Not to be discounted in the present crisis is the impact of the French-Quebeckers belief that they have been treated as second-class citizens. See MacNeil-Lehrer Report, The René Lévesque Interview, Transcript #4149 at 3 (Jan. 25, 1979) (copy available from WNET Channel 13, New York, N.Y.) [hereinafter cited as Lévesque Interview].

The economic standing of French-Quebeckers provides some support for a charge of second-class citizenship. For example, in Quebec, three times as many English speakers earn more than \$10,000 per year than French speakers earning at that level. However, the English constitute less than 20% of the Province's population. See Astrachan, *An Obsession with Unity*, THE NEW REPUBLIC, Aug. 20, 1977, at 14. "The standard of living in Quebec is 7% less than that of Canada as a whole and 20% less than the rest of Ontario (1973 base)." BROSSARD, *supra* note 10, at 228. Moreover, out of fourteen ethnic groups in the Province, the French rank twelfth in labour income, nearly 9% lower than the provincial mean. 3 BI-BI REPORT, *supra* note 11, at 23. Recently, there have been indications that the imbalance is being redressed somewhat. See TASK FORCE, *supra* note 3, at 74-75. See also R. LOVE, RÉPARTITION ET INÉGALITÉ DES REVENUS AU CANADA Tableau 3.1 (1979), where it is noted that the average family income for Quebec ranks behind only two of the other nine provinces, though an ethnic breakdown is not provided.

taken root in Quebec under the rubric of a call for separate rule for the Province. This desire was most significantly expressed in the provincial election of November 1976, in which the Parti Québécois (P.Q.), headed by the party's founder, M. René Lévesque, was elected to a majority position in the provincial assembly.¹³

The new government ascended to power primarily on the issue of strong and effective rule,¹⁴ but in the background was the P. Q.'s decade-long call for an independent Quebec. As a result "[F]or the first time since it was created in 1867, the Canadian political union faced the genuine possibility of the secession of one of its largest provinces."¹⁵ That possibility is no less real to-

13. The party, originally called *Le Mouvement Souveraineté-Association*, was begun by René Lévesque in 1966 after he broke from the Liberal Party because of its electoral loss in that year. The P. Q. is not the first to espouse a separatist solution, though it is by far the strongest and most well-organized group. During WW II, an anti-compulsory service party won 15% of the vote. See P. DESBERATS, RENÉ: A CANADIAN IN SEARCH OF A COUNTRY 142 (1976) [hereinafter cited as DESBERATS]. In 1957, *l'Alliance Laurentienne* was formed with Raymond Barbeau, a strongly pro-separatist figure, as president. In 1960, Marcel Chaput founded *Le Rassemblement pour l'Indépendance Nationale* (RIN), dedicated to a sovereign Quebec. See M. CHAPUT, POURQUOI JE SUIS SÉPARATISTE (1961). In 1966, the RIN received less than 9% of the popular vote in the provincial elections. See D. CAMERON, NATIONALISM, SELF-DETERMINATION AND THE QUEBEC QUESTION 134 (1974) [hereinafter cited as CAMERON]. Other parties that espoused an independence/separatist doctrine included *l'Action Socialiste pour l'Indépendance du Québec*, *Le Parti Républicain de Québec* and *Le Front Républicain pour l'Indépendance*. For a discussion of these groups, see *id.* at 135-36.

None of these parties showed tendencies as radical as those displayed by *Le Front pour la Libération de Québec* (FLQ). The rash of terrorist bombings carried out by members of the FLQ were in sharp contrast to the 'Quiet Revolution' (signifying an increased desire on the part of Quebecers to play a major role in the decision-making process) begun with the provincial election of Premier Lesage and his Liberal Party in 1960. See L. DION, QUEBEC: THE UNFINISHED REVOLUTION (1976). In October, 1970, British Trade Commissioner James R. Cross and Quebec Labour Minister Pierre LaPorte were kidnapped by FLQ members. LaPorte was later found dead. See J. SAYWELL, QUEBEC 70 (1972) [hereinafter cited as SAYWELL]; M. LEVIN & C. SYLVESTER, CRISIS IN QUEBEC (1973); G. PELLETIER, LA CRISE D'OCTOBRE (1971). For a radical interpretation of the history of the French-Canadians in Quebec, see P. VALLIÈRES, WHITE NIGGERS OF AMERICA (1971).

14. "In the 1976 election campaign the party played down the independence issue and emphasized specific social and economic reforms along with effective leadership." Smiley, *The Canadian Federation and the challenge of Quebec Independence*, 8 PUBLIUS 203 (1978) [hereinafter cited as Smiley]. See also Mans, *Canada's Constitutional Crisis: Separatism and Subversion*, 98 Conflict Studies 1, 6 (1978).

15. TASK FORCE, *supra* note 3, at 11. This statement is somewhat misleading because Nova Scotia has threatened to secede twice since 1867. The first instance occurred in 1868 and stemmed from the alleged lack of consent by the people and the legislature to the Union. See P. GÉRIN-LAJOIE, CONSTITUTIONAL AMENDMENT IN CANADA 139 (1950) [hereinafter cited as GÉRIN-LAJOIE]. The Provincial Assembly appealed to the Queen, through the channels of the Lieutenant-Governor and the Governor-General, alleging that a fraud had been visited upon the Queen. See 9 DOMINION OF CANADA, SESSIONAL PAPERS No. 66, 31 Vict. (1867-68). The petition was refused and Nova Scotia was told to look to Ottawa "to relax or modify any arrangements in those subjects which may prejudice the peculiar interests of Nova Scotia." Maxwell, *Petitions to London by Provincial Governments*, 14 CAN. BAR REV. 738, 739 (1936) [hereinafter cited as Maxwell].

Finally, in 1886, Nova Scotia vented its economic dissatisfaction with Confederation through the election of a government which advocated secession. TASK FORCE, *supra* note 3, at 65.

That the secessionist threat is perceived as real by the Canadian people is not questioned. See

day. A referendum question, asking Quebeckers¹⁶ if they wish the provincial government to proceed with negotiations to form a politically independent Quebec,¹⁷ which would be linked economically with the rest of Canada,¹⁸ will

generally MUST CANADA FAIL? (R. Simeon ed. 1977) [hereinafter cited as MUST CANADA FAIL]. See also Fletcher, *Public Attitudes and Alternative Futures*, in MUST CANADA FAIL, *supra*, at 29. This perception is not a new one. In 1968, then Prime Minister of Canada Lester Pearson offered that "dissatisfaction is a fact and . . . , if it is allowed to continue without remedy, it could lead to separation and the end of Confederation. [W]hat is at stake in my opinion is no less than Canada's survival as a nation." 1 GOVERNMENT OF CANADA, THE DOMINION/PROVINCIAL CONSTITUTIONAL CONFERENCE, 1968-1969, at 10 (1969) [hereinafter cited as CONFERENCE 1968-1969].

16. There is dispute as to which bloc of voters is the appropriate one to cast ballots on an independence referendum question; is it to be by all voters in Quebec Province or only French-speakers to the exclusion of the English? For the recommendation that it be by all voters in the Province, see BROSSARD, *supra* note 10, at 183-85; TASK FORCE, *supra* note 3, at 114.

17. Former Prime Minister Trudeau has maintained consistently that the issue of a politically independent Quebec is not a negotiable one. Giniger, *Trudeau Says Re-Election Aim is Unity of Canada*, N.Y. Times, Mar. 28, 1979, § A, at 9, col. 1 [hereinafter cited as Giniger]. Some commentators believe this strategy could backfire and lead Quebeckers to declare unilaterally their independence rather than negotiate it. Milner, *Quebec Sovereignty and the Canadian Interest*, CANADIAN FORUM, May 1978, at 14. *But see* note 46 *infra*.

18. The concept of sovereignty-association was first proposed by René Lévesque in 1964. For a summary of its principles, see R. Lévesque, AN OPTION FOR QUEBEC 35-46, 94-108 (1968) [hereinafter cited as OPTION FOR QUEBEC]; NEW DEAL, *supra* note 7, at 48-65. Ostensibly, the P. Q. desires political sovereignty for Quebec with an economic association with the rest of Canada. Examples of economic association models include the European Economic Community and the Association of South-East Asian Nations, among others. *Id.* at 48-49.

Under the Quebec Government proposal, Quebec would be sovereign, and have its own international personality. *Id.* at 54. Federal laws now in effect that apply to the Province will remain so unless repealed or replaced by the Quebec National Assembly. *Id.* at 55. Canadians would be accorded the same rights in Quebec, as Quebeckers would enjoy in the rest of Canada. *Id.* at 56. Quebec will remain bound by treaties Canada has signed unless the need for withdrawal arises, *id.*, and the Province will seek membership in the United Nations. *Id.* at 57.

Economic association will vary according to the degree of integration desired. The Quebec Government wishes to negotiate a treaty of association. *Id.* At this point in time, the Province proposes that goods circulate freely and that a single common tariff be agreed upon. *Id.* at 58. A common currency would be maintained. *Id.*

In order to administer the association, the Quebec Government suggests that four Quebec-Canada agencies be established: a community council, a commission of experts, a court of justice, and a monetary authority. The first agency would decide questions of common concern and the second agency would serve as liaison with the international community. The court of justice would be empowered to interpret the treaty of association. Finally, the monetary authority would be responsible for running a central bank. *Id.* at 61-64. A community parliament is viewed favorably. *Id.* at 64.

The Government's plan has been rejected by five provincial premiers and the present head of the central government. See Giniger, *Clark Rejects Proposal for Separate Quebec, Rules Out Negotiation*, N.Y. Times, Nov. 3, 1979, at 5, col. 4; Lévesque *Faces Opposition*, Boston Globe, Nov. 8, 1979, at 17, col. 2.

The preservation of a tariff in any economic association is important to Quebec, as her industries are of the type that require heavy financial support. See *The Cost of being Quebecois*, THE ECONOMIST, Nov. 17, 1979, at 91-92 [hereinafter cited as THE ECONOMIST]. Others, however, find that the present tariff structure disfavors Quebec because it narrows the available export market. See R. TREMBLAY, INDÉPENDANCE ET MARCHÉ COMMUN QUÉBEC ET ETATS-UNIS 46-64 (1970). See also H. MILNER, THE DECOLONIZATION OF QUEBEC 32-40 (1973) [hereinafter cited as MILNER].

In any case, the major benefits of tariff protection flow to Quebec and Ontario, and some have

most likely be placed before the voters prior to June 1980.¹⁹ This relationship has been labelled a sovereignty-association.

This Comment will examine the legitimacy of Quebec's claim to political sovereignty. It will include a discussion of particular aspects of Canadian constitutional law, the principle of self-determination as developed by the United Nations and several doctrines of customary international law which bear on the topic. What will emerge is an understanding of where the sources of decision-making power lie as Canada and Quebec attempt to resolve their crisis of confederation.²⁰

suggested that Ontario would be unable to maintain the present tariff structure in the face of opposition from other provinces. *THE ECONOMIST*, *supra*, at 92-94. However, various studies seem to bear out the Quebec Government's claim that the rest of Canada would suffer economic hardship if the other provinces refused to negotiate an economic association. See *NEW DEAL*, *supra* note 7, at 73-75. Others have suggested that both the English and French would lose in a tariff war as an independent Quebec Government could utilize a full-range of protective devices which would dry up the Quebec market for goods manufactured in other parts of Canada. Pentland, *Association after Sovereignty*, in *MUST CANADA FAIL*, *supra* note 15, at 232. Curiously, it is alleged that the pressures of harmonization, integration and redistribution, which would necessarily flow from any trading agreements, would place greater restraints on Quebec's freedom of action, making it more economically dependent after independence. *Id.* at 241-42. See also notes 74-75 *infra*.

19. *NEW DEAL*, *supra* note 7, at 69-82. As now proposed, there will be two referendums. The first will seek the voters approval to negotiate with Canada on the basis of equality of nations, the second, a later referendum, will have voters express their opinion on a change in Quebec's political status. See Ernhofer, *Canada's Language Decision and the Quebec Referendum*, *Boston Globe*, Dec. 24, 1979, at 6, col. 4. The text of the first question was recently released. It reads:

The Government of Quebec has made public its proposal to negotiate a new agreement with the rest of Canada based on the equality of nations:

This agreement would enable Quebec to acquire the exclusive power to make its laws, administer its taxes and establish relations abroad—in other words, sovereignty—and at the same time to maintain with Canada an economic association including a common currency;

Any change in political status resulting from these negotiations will be submitted to the people through a referendum;

On these terms, do you agree to give the Government of Quebec the mandate to negotiate the proposed agreement between Quebec and Canada?

Best, *Referendum Question for Quebec is Denounced as 'Fraud'*, *London Times*, Dec. 22, 1979, at 5, col. 2.

20. Many different theories as to the nature of the Canadian Confederation have been in vogue at various times: the centralist concept (1867-1960), administrative federalism (1920-present), the co-ordinate concept (1880-1940, 1960 to present), the compact theory (1880-1940) and the dualist concept (1950-1970). For a survey discussion of these concepts, see E. BLACK, *DIVIDED LOYALTIES: CANADIAN CONCEPTS OF FEDERALISM* 21-202 (1975) [hereinafter cited as BLACK]. Of the five, the compact theory was especially important to French-Canadians, who advanced the position that since the BNA Act, 1867, 30 & 31 Vict., c. 3, was a compact (contract), it required the unanimous consent of the provinces and/or the traditional historical communities of Canada before it could be amended. See GÉRIN-LAJOIE, *supra* note 15, at 39-40. LAXER & LAXER, *supra* note 10, at 161. Valuable as a political rallying point for a period, the compact theory has been severely discredited. See Rodgers, *The Compact Theory of Confederation*, 9 *CAN. BAR REV.* 395 (1931). One author has recently tried to resurrect the theory. STANLEY, HISTORY, *supra* note 6, at 94-98. On the history and political significance of the compact theory, see Fitzgerald, *The Compact Theory and the Consent of the Province to Amendments*, 13 *REVUE DE L'UNIVERSITÉ D'ONTARIO* (1943); Mallory, *The Compact Theory of Confederation*, 21 *DALHOUSIE REV.* 342 (1941); D. CREIGTON, *THE ROAD TO CONFEDERATION* (1964).

The author contends that under Canadian constitutional law, the separation of Quebec can be effected, though it is unlikely that the broad measure of trans-Canadian support necessary for the procedures involved will be forthcoming. An analysis of United Nations' pronouncements reveals a limited right allowing secession. As a practical matter, however, this right can be only exercised if the Province can foster the belief among members of the international community that French-Quebeckers require sovereign rule in order to survive as a distinct people. Whether Quebec can marshal such support presents a question which is more political than legal in nature.

II. CANADIAN CONSTITUTIONAL LAW

A. *Components of Fundamental Law*

The body of Canadian constitutional law is based primarily on the British North America Act of 1867 and subsequent amendments.²¹ The BNA Act is

21. See British North America Act [BNA Act], 1871, 34 & 35 Vict., c. 28; Parliament of Canada Act, 1875, 38 & 39 Vict., c. 38; British North America Act [BNA Act], 1886, 49 & 50 Vict., c. 35; British North America Act [BNA Act], 1915, 5 & 6 Geo. 5, c. 45; British North America Act [BNA Act], 1916, 6 & 7 Geo. 5, c. 19; British North America Act [BNA Act], 1930, 20 & 21 Geo. 5, c. 26; British North America Act [BNA Act], 1940, 3 & 4 Geo. 6, c. 36; British North America Act [BNA Act], 1943, 6 & 7 Geo. 6, c. 30; British North America [BNA Act], 1946, 9 & 10 Geo. 6, c. 63; British North America Act [BNA Act], 1949, 12 & 13 Geo. 6 c. 22; British North America Act [BNA Act] (No. 2), 1949, 13 Geo. 6, c. 81; British North America Act [BNA Act], 1951, 14 & 15 Geo. 6, c. 32; British North America Act [BNA Act], 1952, 1 Eliz. 2, c. 15 (Can.); British North America Act [BNA Act], 1960, 9 Eliz. 2, c. 2; British North America Act [BNA Act], 1964, 12 & 13 Eliz. c. 73; British North America Act [BNA Act], 1965, 14 Eliz. 2, c. 4 (Can.).

BROSSARD, *supra* note 10, provides a summary of these amendments:

Between 1867-1967, the Canadian Constitution was amended 15 times: twice solely by direct order of the federal government in 1871 and 1875, and thirteen times since then by way of joint address of the Senate and the House of Commons. Seven of the amendments thus obtained involved only federal institutions, the other eight applied more or less directly to the provinces, as they operated on the division of powers (three times), federal subsidies (one time), national resources (one time), the creation of new provinces (two times) and judges of the superior courts in the provinces (one time).

Id. at 259 (author's translation).

In addition to the above amendments, GÉRIN-LAJOIE, *supra* note 15, lists three other amendments to the BNA Act, 1867, 30 & 31 Vict., c. 3; Canada (Ontario Boundary) Act, 1889, 52 & 53 Vict., c. 28; Canadian Speaker (Appointment of Deputy) Act, 1895, 59 Vict., c. 3; BNA Act, 1907, 7 Edw. 7, c. 11. *But see* K. C. WHEARE, *THE STATUTE OF WESTMINSTER AND DOMINION STATUS 188 (1938)* [hereinafter cited as WHEARE, *STATUTE*], where he specifically excludes the Parliament of Canada Act, 1875, and the BNA Act, 1907. The discrepancy arises over differing interpretations placed on the operative language of the Statute of Westminster, 1931, 22 Geo. 5, c. 4. See note 29 *infra*. See generally 1-2 GOVERNMENT OF ONTARIO, ONTARIO ADVISORY COMMITTEE ON CONFEDERATION (1967-68) [hereinafter cited as ADVISORY COMMITTEE]. See also Lederman, *The Process of Constitutional Amendment in Canada*, in ADVISORY COMMITTEE, *supra*, at 77. Though the Canada (Ontario Boundary) Act, 1889, 52 & 53 Vict., c. 28, and the Canadian Speaker (Appointment of Deputy) Act, 1895, 59 Vict., c. 3, are technically amendments to the BNA Act, 1867, 30 & 31 Vict., c. 3, they represented matters of routine statute revision and had little lasting importance. B. LASKIN, *CANADIAN CONSTITUTIONAL LAW* 32 (3d ed. 1966)

the world's eighth oldest written constitutional document and the third oldest of a federal nature.²² However, it would be an error to consider the document as 'the Constitution,' comprising the sum and substance of Canadian constitutional law. Paul Gérin-Lajoie, one of Canada's foremost constitutional experts, notes:

In Canada, some writers refer to the British North America Act, 1867, as amended from time to time, as being "the Constitution" (sometimes written with a small "c"). Others insist on referring to it only as "the written part of the constitution." The lack of uniformity is easily explained. Most students of constitutional law in Canada were instructed first in English constitutional law and many of them have thus been accustomed to use the word "constitution" in its broad meaning as it is used in Great Britain. Furthermore, Canada does not possess any constitutional document called "the Constitution" or "the Constitutional Act."²³

In addition to the amended BNA Act, the 'Constitution' includes British and Canadian acts of Parliament,²⁴ British orders-in-council,²⁵ conventions of

[hereinafter cited as LASKIN]; Scott, *Forgotten Amendments to the Canadian Constitution*, 20 CAN. BAR REV. 339 (1942).

22. The United States' federal constitution was adopted in 1787, that of Switzerland in 1848, making the Dominion of Canada the third oldest federal system. CAMERON, *supra* note 13, at 108. Cf. K.C. WHEARE, *FEDERAL GOVERNMENT* 23 (1946) [hereinafter cited as WHEARE, FEDERAL], where he suggests that the Argentine Constitution of 1853 is a federal constitution. See also G. CODDING, *THE FEDERAL GOVERNMENT OF SWITZERLAND* (1961).

For studies on the history and workings of the constitutional law in Canada, see B. BISSONETTE, *ESSAI SUR LA CONSTITUTION DU CANADA* (1963); R. ARÈS, *OPTIONS POUR UNE NOUVELLE CONSTITUTION* (1967); R. HOPKINS, *CONFEDERATION AT THE CROSSROADS: THE CANADIAN CONSTITUTION* (1967); P. GÉRIN-LAJOIE, *RÉFLEXIONS SUR LA CONSTITUTION CANADIENNE* (1952); N. DORION, *LA CONSTITUTION CANADIENNE* (1955); K.C. WHEARE, *THE CONSTITUTIONAL STRUCTURE OF THE COMMONWEALTH* (1960) [hereinafter cited as WHEARE]; Rand, *Some Aspects of Canadian Constitutionalism*, 38 CAN. BAR REV. 135 (1960); Johnson, *The Dynamics of Federalism in Canada*, 1 CAN. J. POL. SCI. 18 (1968); Jennings, *Constitutional Interpretation — The Experience of Canada*, 51 HARV. L. REV. 1 (1937); FEDERALISM IN THE COMMONWEALTH (W. Livingston ed. 1963); P. HOGG, *CONSTITUTIONAL LAW OF CANADA* (1977).

23. GÉRIN-LAJOIE, *supra* note 15, at 5.

24. Most important among the session laws passed by the Canadian Parliament have been those creating and admitting additional provinces. See *The Manitoba Act of 1870*, 33 Vict., c. 3 (Can.); *The Alberta Act of 1905*, 4 & 5 Edw. 7, c. 3 (Can.); *The Saskatchewan Act of 1905*, 4 & 5 Edw. 7, c. 42 (Can.).

In 1912, part of the North-western Territories were added to existing provinces by the Ontario Boundaries Extension Act, 1912, 2 Geo. 5, c. 40 (Can.), the Quebec Boundaries Extension Act, 1912, 2 Geo. 5, c. 45 (Can.), and the Manitoba Boundaries Extension Act, 1912, 2 Geo. 5, c. 32 (Can.). Manitoba received additional territory under the Manitoba Boundaries Extension Act, 1930, 20 & 21 Geo. 5, c. 28 (Can.). The North-western Territory was also divided by the Yukon Territory Act, 1898, 61 Vict., c. 6 (Can.), as amended by the Yukon Territory Act, 1899, 62 & 63 Vict., c. 11 (Can.).

The British Parliament, under Rupert's Land Act, 1868, 31 & 32 Vict., c. 105, provided that the territories covered under the Act could be considered for admission into the Dominion of Canada. See note 25 *infra*. The BNA Act, 1867, 30 & 31 Vict., c. 3, which made the four provinces part of the Union, was enacted by the British Parliament. See note 9 *supra*. The BNA Act, 1949, 12 & 13 Geo. 6, c. 22, which admitted Newfoundland as a province in the Union, was enacted by the British Parliament.

25. The most important orders-in-council have also concerned the admission of lands into the

procedure imported from Britain or developed at home²⁶ and judicial decisions.²⁷ Additionally, two pieces of British colonial legislation, the Colonial Laws Validity Act, 1865,²⁸ and the Statute of Westminster, 1931,²⁹ are rele-

Union. *See* Order of Her Majesty In Council Admitting Rupert's Land and the North-western Territory Into the Union, Court of Windsor, June 23rd, 1870, in CAN. REV. STAT. app., at 257, doc. 9 (1970); Order of Her Majesty In Council Admitting British Columbia Into the Union, Court of Windsor, May 16th, 1871, in CAN. REV. STAT. app., at 279, doc. 10 (1970); Order of Her Majesty In Council Admitting Prince Edward Island Into the Union, Court of Windsor, June 26th, 1873, in CAN. REV. STAT. app., at 291, doc. 12 (1970).

26. *See* notes 63, 65-66 *infra*.

27. *See generally* J. BROSSARD, LA COUR SUPRÊME ET LA CONSTITUTION: LE FORUM CONSTITUTIONNEL AU CANADA (1968); MacDonald, *Judicial Interpretation of the Canadian Constitution*, 1 U. TORONTO L. J. 260 (1936); Clokie, *Judicial Review, Federalism and the Canadian Constitution*, 8 CAN. J. ECON. & POL. SCI. 537 (1942); STANLEY, HISTORY, *supra* note 6, at 111-43.

28. The Colonial Laws Validity Act, 1865, 28 & 29 Vict., c. 63. The Act was designed to remove doubts as to the validity of laws passed by the legislatures of the colonies. It declared that any colonial law which was repugnant to an English Law extending to the colonies was null and void. *Id.* § II. However, mere repugnancy to any law of England would not render the law inoperative unless the English law was intended to have an effect in the colonies. *Id.* § III.

Before it could be claimed therefore, that a colonial law was void on the grounds of repugnancy to a British act, it must be shown that the British act did really extend to the colony, and in order to show this it must be possible to demonstrate that the 'express words' or the 'necessary intendment' of the act required this interpretation.

WHEARE, FEDERAL, *supra* note 22, at 22.

The reach of the Colonial Laws Validity Act, 1865, 28 & 29 Vict., c. 63, has been restricted in this century. *See* note 29 *infra*. *See also* note 35 *infra*.

29. The Statute of Westminster, 1931, 22 Geo. 5, c. 4. The Statute repealed the Colonial Laws Validity Act, 1865, 28 & 29 Vict., c. 63, insofar as it applied to Canada (subject to exceptions), Australia, South Africa, New Zealand, the Irish Free State and Newfoundland. The latter did not become a member of Canada until 1949. *See* note 24 *supra*. These members of the Commonwealth could now pass legislation repugnant to the Laws of England and could amend any existing or future law of the Parliament of the United Kingdom which applied or would apply to them. Statute of Westminster, 1931, 22 Geo. 5, c. 4, § 2(2). In addition, acts of the Parliaments of the Dominions would now have extra-territorial effect. *Id.* § 3. Finally, the Parliament of the United Kingdom could not pass a law, intended to extend to any Dominion, "unless it is expressly declared in that Act that the Dominion has requested, and consented to, enactment thereof." *Id.* § 4.

Several members of the Commonwealth did not find the safeguard in Section 4 adequate, and did not sign the Statute of Westminster. For example, India required that any act of the Parliament of the United Kingdom which was to extend to India be specifically approved by an act of its own legislature after the British act was enacted by the British Parliament. *See* The Indian Independence Act of 1947, 10 & 11 Geo. 6, c. 30, § 6(4). The same solution was followed by the Union of South Africa through the Status of the Union Act, 1934, No. 69, § 2. (S. Africa). For a discussion of these two countries, *see* WHEARE, FEDERAL, *supra* note 22, at 30-35.

In 1931, Canada had not yet settled on a proper means through which constitutional amendment could be effected, and they have still not done so today. *See* text accompanying note 50 *infra*. Thus, as a means for protecting certain laws as 'fundamental', an exception to the repeal of the Colonial Laws Validity Act, 1865, 28 & 29 Vict., c. 63, was written into the Statute of Westminster. The Validity Act was held to still be in force with respect to the BNA Acts of 1867-1930 and to any rule or regulation made thereunder. Statute of Westminster, 1931, 22 Geo. 5, c. 4, § 7(1). The import of this provision was to preserve a set of documents and place their alteration,

beyond the ordinary competence of any legislative body in Canada . . . [t]he competence of the several legislative bodies in Canada is not only exclusive of the power of

vant to the question of whether the Parliaments of the respective Member-Countries of the British Commonwealth may pass legislation unencumbered by restrictions placed upon those bodies by the British Parliament. Finally, various imperial decrees and other acts and declarations including the Imperial Conference Decree of 1926,³⁰ the Seals Act of 1939,³¹ and the Letters Patent of 1947,³² have defined Canada's legal status in the area of foreign relations with Great Britain and the international community.

formal repeal, amendment, or alteration of certain acts or orders, but exclusive of the power to pass any law or any provision of law incompatible with any of them.

GÉRIN-LAJOIE, *supra* note 15, at 6, 8. The difficulty this provision creates for efforts aimed at amending the Constitution will be discussed in Section II (2) *infra*.

Through the Statute of Westminster, 1931, 22 Geo. 5, c. 4, § 7(2), Canadian federal and provincial legislation was exempted from the operation of the Colonial Laws Validity Act, 1865, 28 & 29 Vict., c. 63, subject, of course, to the request or the consent by the federal legislature provided for in Section 4 of the Statute of Westminster, 1931, 22 Geo. 5, c. 4, § 4. "That is to say, British acts ceased to be fundamental law in Canada." GÉRIN-LAJOIE, *supra* note 15, at 7.

It is obvious from the foregoing discussion that the Colonial Laws Validity Act, 1865, 28 & 29 Vict., c. 63 (with respect to the BNA Acts of 1867-1930 or any rule stemming therefrom) and the Statute of Westminster, 1931, 22 Geo. 5, c. 4 (with respect to any subsequent BNA Act or act of the federal provincial legislatures) are documents of prime importance to Canada's constitutional scheme. One must not fail to observe especially, the test for 'protected documents' provided under the Statute of Westminster, 1931, 22 Geo. 5, c. 4, § 7(1).

It is also submitted that the Constitution contains an unwritten component including "all the great landmarks in British history insofar as they are working principles — the Magna Carta, the Petition of Right, the Bill of Rights, the Habeus Corpus Acts [and] the Act of Settlement . . ." KENNEDY, *supra* note 1, at 378.

As one might expect, legal literature on the two acts is thorough. *See generally*, Kennedy, *Some Recent Aspects of Imperial Constitutional Law*, 12 CAN. HIST. REV. 295 (1931); Ewart, *The Statute of Westminster, 1931, as a Climax in its Relation to Canada*, 10 CAN. BAR REV. 111 (1932); Driedger, *Statute of Westminster and Constitutional Amendment*, 11 CAN. BAR REV. 348 (1968); Goldenberg, *The Problem of Constitutional Amendment in Canada*, 6 CAN. POL. SCI. PROC. 238 (1934); Bastedo, *Amending the British North America Act*, 12 CAN. BAR REV. 209 (1934); WHEARE, *STATUTE*, *supra* note 21. *See also* note 22 *supra*, and note 34 *infra*.

30. THE IMPERIAL CONFERENCE DECREE OF 1926, CMD. No. 2768 (Gr. Britain 1926) [hereinafter cited as IMPERIAL CONFERENCE DECREE OF 1926]. The decree spoke to several important matters. First, it declared that Great Britain and other members of the Commonwealth were "autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown and freely associated as members of the British Commonwealth of Nations." *Id.* at 14. Second, with respect to amendment of the constitutions of Member Countries, the Conference disclosed that "the constitutional practice is that legislation by the Parliament of Westminster applying to a Dominion would only be passed with the consent of the Dominion concerned." *Id.* at 18. *See* notes 65-6, *infra*. This latter concept was incorporated and expanded in the Statute of Westminster, 1931, 22 Geo. 5, c. 4. *See also* THE IMPERIAL CONFERENCE DECREE OF 1930, CMD. No. 3717 (Gr. Britain 1930). *See generally* WHEARE, *STATUTE*, *supra* note 21, at 21-99, 122-38.

31. Seals Act, 1939, 3 Geo. 6, c. 22. The Act established an official seal for Canada and decided questions of protocol regulating the conduct of Canadian foreign relations officials and British officials involved in Canadian affairs. *Id.*

32. Letters Patent Constituting the Office of Governor General of Canada, Oct. 1, 1947, reprinted in CAN. REV. STAT. app., at 445, doc. 35 (1970). The Letters Patent defined the power of

Unfortunately, the constitutional framework has proved to be inadequate. The insufficiency is evidenced in part by the numerous attempts undertaken in Canada to amend certain provisions of the BNA Act, and in part by the many proposals that have been advanced for an entirely new Canadian Constitution.³³ Of importance to the subject matter of this Comment is the absence of effective amendment procedures within the BNA Act,³⁴ the fact

the Governor-General of Canada, the chief representative of the British Crown, providing that he could exercise all powers belonging to England. *Id.* art. II.

Consider that through efforts culminating in the Letters Patent of 1947, "the royal prerogative to conclude treaties was progressively transferred by Britain to Canada [Since that time] there has been no serious doubt . . . , as to Canada's status as a fully independent, sovereign member of the international community." Morris, *The Treaty-Making Power: A Canadian Dilemma*, 45 CAN. BAR REV. 482, 484 (1967). See also notes 95-100 and accompanying text *infra*. See generally R. STEWART, TREATY RELATIONS OF THE BRITISH COMMONWEALTH OF NATIONS (1939); N. MANSERGH, SURVEY OF BRITISH COMMONWEALTH AFFAIRS: PROBLEMS OF EXTERNAL POLICY (1955); P. NOEL-BAKER, THE PRESENT JURIDICAL STATUS OF THE BRITISH DOMINIONS IN INTERNATIONAL LAW (1929).

33. Within the last fifteen years, three federally-appointed commissions, convened in 1964-67, 1968-69 and 1978-79, have come forward with various solutions to Canada's constitutional problems. See 1-4 ROYAL COMMISSION ON BI-LINGUALISM AND BI-CULTURALISM: REPORT (Government of Canada ed. 1964-67) (the recommendations of the Royal Commission in Volume I of this work led to the passage of the Official Languages Act, CAN. REV. STAT., c. 0-2 (1970) which is discussed at note 82 *infra*); CONFERENCE OF 1968-1969, *supra* note 15; TASK FORCE, *supra* note 3.

In addition, former Canadian Premier Trudeau has proposed two different constitutions for Canada. See GOVERNMENT OF CANADA, THE CONSTITUTION AND THE PEOPLE OF CANADA: AN APPROACH TO THE OBJECTIVES OF CONFEDERATION, THE RIGHTS OF PEOPLE, AND THE INSTITUTIONS OF GOVERNMENT (1969); GOVERNMENT OF CANADA, THE CONSTITUTIONAL AMENDMENT BILL: TEXT AND EXPLANATORY NOTES (1978).

34. Alone among federal states — indeed, among all self-governing countries — Canada has a Constitution without any comprehensive scheme for its amendment. The only method of amending this Constitution embodied in acts of Parliament of the United Kingdom or in documents depending on such acts is a new act of Parliament.

GÉRIN-LAJOIE, *supra* note 15, at 33.

Under the BNA Act, 1867, 30 & 31 Vict., c. 3, a limited provision for amendment of the Constitution, is found at § 92(1):

The Amendment from Time to Time, notwithstanding anything in this Act, of the Constitution of the Province, except as regards the Office of the Lieutenant Governor. *Id.* § 92(1).

Obviously, the ability of the Provincial legislatures to amend the Constitution of the Province can have but a peripheral effect on the Federal Constitution.

Since that time, the BNA Act (No. 2) 1949, 13 Geo. 6, c. 81, has added § 91(1) to the BNA Act, 1867, 30 & 31 Vict., c. 3. This section gave the federal government the power to amend the Canadian Constitution with the exception of any provincial legislative prerogatives and numerous other matters. *Id.* Thus, the power applies only to matters of a strictly federal nature. See Scott, *The British North America Act* (No. 2) 1949, 7 U. TORONTO L. J. 352 (1950); Finkelman, *Recent Amendments to Canada's Constitution*, 7 U. TORONTO L. J. 201 (1950). See also note 53 *infra*.

Strong evidence suggests that the absence of a procedure for amendment was intentional as the founders believed that as the Union developed, the Federal Parliament would eventually assume the exclusive power to amend. Rogers, *The Constitutional Impasse*, 41 QUEEN'S QUAR. 482 (1934); GÉRIN-LAJOIE, *supra* note 15, at 35-40.

On the topic of constitutional amendment in Canada, see generally Driedger, *Constitutional*

that the Constitution is not yet fully patriated,³⁵ and the status of provincial versus federal power.³⁶

B. *Quebec's Ability to Secede*

1. Provisions of the BNA Act

The 'federal' nature of the BNA Act (and hence the Canadian Confedera-

Amendment in Canada, 5 CAN. BAR REV. 52 (1962); Donnelly, *Constitutional Amendment in Canada*, 4 PARL. AFF. 443 (1951); Gérin-Lajoie, *Du Pouvoir d'Amendement Constitutionnel au Canada*, 29 CAN. BAR REV. 1136 (1951); Livingston, *The Amending Power of the Canadian Parliament*, 45 AM. POL. SCI. REV. 437 (1951); See notes 22, 29 *supra*.

35. "Formal steps to incorporate a domestic amending procedure into the BNA Act may be said to date from the discussions at the Dominion-Provincial Conference of 1927 . . ." LASKIN, *supra* note 21, at 35. Attempts were also made to patriate the Constitution in 1931, 1935, 1950, 1960, 1964, and 1968-71. For discussion of the two most recent attempts, see notes 51-52 *infra*.

The patriation problem results from the following set of events. Canada can pass a law repugnant to an act of the British Parliament only when that Parliament passes an act allowing Canada to do so. Colonial Laws Validity Act, 1865, 28 & 29 Vict., c. 63. The Statute of Westminster, 22 Geo. 5, c. 4, preserved the applicability of the Validity Act to the BNA Acts of 1867-1930 and other acts made thereunder. *Id.* § 7(1). The BNA Act, 1867, 30 & 31 Vict., c. 3, is an act of the British Parliament, and any amendment to it would require the approval of that Parliament. See generally CANADIAN HOUSE OF COMMONS, SPECIAL COMMITTEE ON THE BRITISH NORTH AMERICA ACT: PROCEEDINGS, EVIDENCE AND REPORT (1935).

36. The federal structure of the Canadian Union has been marked by numerous problems concerning the appropriate distribution of legislative power consonant with §§ 91 (detailing the powers of the Federal Parliament) and 92 (outlining the exclusive powers of the Provincial Legislatures) of the BNA Act, 1867, 30 & 31 Vict., c. 3 §§ 91-92. Many attempts have been made to resolve the difficulties inherent in Canada's Constitution. See generally GOVERNMENT OF CANADA, PRÉCIS OF DISCUSSIONS: DOMINION-PROVINCIAL CONFERENCE OF 1927 (1928); GOVERNMENT OF CANADA, DOMINION, PROVINCIAL AND INTERPROVINCIAL CONFERENCES FROM 1887 TO 1926 (1951); GOVERNMENT OF CANADA, DOMINION-PROVINCIAL CONFERENCE 1935: PROCEEDINGS (1936); GOVERNMENT OF CANADA, ROYAL COMMISSION ON DOMINION-PROVINCIAL RELATIONS: REPORT (1940); GOVERNMENT OF CANADA, DOMINION-PROVINCIAL CONFERENCE OF 1941 (1941); GOVERNMENT OF CANADA, DOMINION-PROVINCIAL CONFERENCE OF 1945 (1946); GOVERNMENT OF CANADA, CONSTITUTIONAL CONFERENCE OF THE FEDERAL AND PROVINCIAL GOVERNMENTS: PROCEEDINGS (1951); GOVERNMENT OF CANADA, REPORT OF THE ROYAL COMMISSION ON FEDERAL-PROVINCIAL RELATIONS (1963); GOVERNMENT OF CANADA, FEDERAL-PROVINCIAL CONFERENCE OF 1964: REPORT (1964) [hereinafter cited as 1964 CONFERENCE]. See also note 33 *supra*.

Note that since 1950 the Conferences have been billed as 'Federal-Provincial' ones and not 'Dominion-Provincial.' The terminology was changed out of respect for the opinion of French-Canadians that the word 'dominion' implied that the federal government was superior to the Provinces, a situation at odds with the operation of a true confederation. WHEARE, FEDERAL, *supra* note 22, at 13-14. This insistence on a shift of terminology reflects an essential difference between the English and French. See note 4 *supra*. Consider that

[t]he difference is rooted in the history of the Confederation and the place of the French Canadians in the Canadian federal state . . . Québécois regard Quebec as "the national patrimony" of a unique people. This conception of the Quebec government predates the modern crisis of Quebec-Ottawa relations and has been assumed by all Quebec provincial regimes of whatever political label.

LAXER & LAXER, *supra* note 10, at 200. See also NEW DEAL, *supra* note 7, at 17.

tion) is referred to only at three points within the text of the Act.³⁷ "Secession is not a concept recognized in the BNA Act or in any other form of constitutional norm or convention."³⁸ The Act addresses only the admission,³⁹ not the secession of provinces.

There is some dispute as to the significance that should be attached to this silence concerning the possibility of the secession of one of Canada's member-states. On the one hand, it is argued that the absence of an express recognition of a right to secede does not necessarily imply that such a power could not be exercised under any circumstances.⁴⁰ Furthermore, the BNA Act did not prohibit expressly the secession of one of its constituent units thereby retaining the possibility of secession. This is the situation in the constitution of at least one other member of the British Commonwealth of Nations, Australia.⁴¹ Since the passage of the BNA Act, there has not been any judicial decision, as has been the case in the United States,⁴² precisely forbidding such an action. On the other hand, it is argued that the very decision to form a federal union

37. The title of the BNA Act, 1867, 30 & 31 Vict., c. 3, discloses that it is an "Act for the Union of Canada, Nova Scotia and New Brunswick, and the Government thereof; and for Purposes connected therewith." *Id.* In the preamble, reference is made to the desire of the four provinces to federate as a dominion. *Id.* Preamble. In the third article of preliminary remarks, it is mentioned that from the date of the Act's signing, the provinces will constitute a dominion under the name of Canada. *Id.* art. II, § 3.

38. Claydon & Whyte, *Legal Aspects of Quebec's Claim*, in *MUST CANADA FAIL*, *supra* note 15, at 274 [hereinafter cited as Claydon & Whyte].

39. *See* The BNA Act, 1867, 30 & 31 Vict., c. 3, art. 146. Note that under this section it is for the Queen, with the advice of the Privy Council (now abolished) and the appropriate legislative bodies, to decide whether new colonies were to be admitted. *Id.* Under the BNA Act, 1871, 34 & 35 Vict., c. 28, the Parliament of Canada was given the power to establish and make provision for new provinces to be created out of the territories, that is, the North-western Territories and Rupert's Land. *Id.* § II. This section, however, was not incorporated into § 146 of the BNA Act, 1867, 30 & 31 Vict., c. 3. *See* note 25 *supra*.

40. *See, e.g.*, BROSSARD, *supra* note 10, at 96-97, 252-53.

41. The preamble to the Australian Constitution states that the colonies "have agreed to unite into one indissoluble Federal Commonwealth". Commonwealth of Australia Constitution Act, 1900, 63 & 64 Vict., c. 12. Presumably, the British Parliament included these words at the request of Australia herself. BROSSARD, *supra* note 10, at 253. The Constitution contains a comprehensive amending procedure, but secession "could not be achieved through the process of constitutional amendment . . ." GÉRIN-LAJOIE, *supra* note 15, at 144. *See also id.* at 35; WHEARE, FEDERAL, *supra* note 22, at 59-63, 65-68; Mayer, *Legal Aspects of Secession*, 3 MANITOBA L. J. 61 (1968) [hereinafter cited as Mayer]. *See also* note 61 *infra*.

42. *Texas v. White*, 74 U.S. (7 Wall.) 700 (1868). The case arose out of Texas' attempt to secede from the Union. The questions settled by the Court dealt with the competency of revolutionary authorities to sue in court, the status of the State after a declaration of withdrawal, the position of alienated property seized by a rebellious government to wage war and the marketability of bonds taken by the insurgents. In the course of its discussions, the Court noted:

The Union of States never was a purely artificial and arbitrary relation . . . It was confirmed and strengthened by the necessities of war, and received definite form, and character, and sanction from the Articles of Confederation . . . [W]hen these Articles were found to be inadequate to the exigencies of the country, the Constitution was or-

engenders expectations of stability and longevity which make the notion of secession, unless expressly reserved within the text of a constitution, incompatible with the theory of federalism.⁴³ Indeed,

It is certainly questionable whether the "right" of secession is compatible with federal government itself. The creation of a federal state includes a permanent commitment to collaborate according to the terms set forth in the constitution. That the terms include the right not to collaborate is self-contradictory . . . States cannot be made to judge the legitimacy of federal law if, in fact, there is to be a federal government.⁴⁴

The experience of other Commonwealth countries suggests that Quebec could not legally repudiate the BNA Act and declare itself independent.⁴⁵ Assuming, *arguendo*, the propriety of this view,⁴⁶ the Province of Quebec would be forced to proceed with an attempt to amend the Canadian Constitution to allow it to secede from the Confederation.⁴⁷ However, substantial problems face Quebec in any attempt to alter the terms of the BNA Act.

dained "to form a more perfect Union." It is difficult to convey the idea of indissoluble unity more clearly than by these words

The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.

Id. at 724-25.

As for members of the British Commonwealth, "although the Privy Council has confirmed the provinces in a wide range of powers, it has never said anything to support the right of the Provinces to withdraw from confederation." J. CORRY & J. HODGETTS, *DEMOCRATIC GOVERNMENT AND POLITICS* 559 (1959).

Consider also that "some of the states which ratified the American and Australian Constitutions assumed that the right of withdrawal remained intact. The states of Virginia, Rhode Island and New York all reserved such a right in their ratification resolutions." C. Friedrich, *Studies in Federalism: The Admission of New States, Secession and Territorial Adjustments* 8 (1952) (unpublished thesis in Harvard Legal Studies Library) [hereinafter cited as Friedrich].

43. The coming together as a federal state creates expectations about what values may be enhanced and what values may be pursued at the national level. When one province seeks to leave the union, the pattern of union is fundamentally altered and the expectations about the country must undergo change.

Claydon & Whyte, *supra* note 38, at 275.

44. Friedrich, *supra* note 42, at 12. Some of the disadvantages Professor Friedrich lists include allowing an ultimate veto power for each state and discouraging united economic activity. *Id.* But see WHEARE, *FEDERAL*, *supra* note 22, at 91.

45. One example is the case of Rhodesia. Prime Minister Ian Smith wished to repudiate the Rhodesian Constitution and declare his party to be the legally appropriate government. The Rhodesian Supreme Court declared his actions to be illegal in *Madzimbamuto v. Lardner-Burke*, [1969] 1 A.C. 645. One commentator has concluded that "the Rhodesian case is valid precedent for a decision that Quebec has no legal right to repudiate the BNA Act and declare itself to be an independent state." Mayer, *supra* note 41, at 70. See also note 47 *infra*.

46. This is a view which finds general concurrence. See E. FORSEY, *SEPARATION OF QUEBEC: THE CONSTITUTIONAL QUESTION* 6 (1976); TASK FORCE, *supra* note 3, at 113. This is true for at least one other member of the British Commonwealth — Australia. See WHEARE, *FEDERAL*, *supra* note 22, at 86. See also note 34 *supra*.

47. See note 170 *infra*.

2. The Procedure for Constitutional Amendment

There are two paths that Quebec could follow in seeking to amend the Constitution, i.e., the BNA Act, to authorize political sovereignty for the Province. First, the provincial government, presumably after receiving some type of mandate in a referendum, could unilaterally render an appeal to the British Parliament requesting relief from that body.⁴⁸ Second, the British Parliament could entertain a motion from the Parliament of Canada requesting permission to amend the Constitution.⁴⁹ It is important to note that either procedure would require that a final, although purely formal, decision be rendered by Westminster since "Canada has not yet taken possession of full domestic authority to amend the BNA Act, in particular, that part dealing with the distribution of powers between provincial and federal governments remains with the United Kingdom Parliament which acts at Canada's request."⁵⁰

Within the last fifteen years, two major efforts which were undertaken to fully patriate the Constitution resulted in the Fulton-Favreau Formula of 1964⁵¹ and the Victoria Charter Plan of 1971.⁵² Both proposals were ultimately vetoed by Quebec after disagreements arose as to certain features of the plans.⁵³ Between 1968-1979, the former Prime Minister of Canada, M.

48. See notes 56-64 *infra*.

49. BLACK, *supra* note 20, at 13.

50. GÉRIN-LAJOIE, *supra* note 15, at 136.

51. The plan, originally called the Fulton Formula, came out of a Conference of Attorney-Generals convened in 1960-61. See GOVERNMENT OF CANADA, CONFERENCE OF ATTORNEY-GENERALS (1961). It was rejected by two provinces at that point. See note 53 *infra*. At the Federal-Provincial Conference of 1964, *supra* note 36, the plan was reconsidered. It resulted in the Fulton-Favreau Formula, the contents of which have been summarized as follows:

- 1) no law relating to the legislative powers of the provinces, to provincial assets or property, to the use of the French and English languages, to provincial representation in Parliament or to the amendment procedure should go into effect without the unanimous consent of the provinces of Canada;
- 2) no law affecting one or more provinces, but not all of them, should go into effect without the assent of the provinces concerned, . . .
- 3) no law relating to any other provision of the constitution should go into effect without the consent of two-thirds of the provinces of Canada embodying fifty percent of the population.

STANLEY, HISTORY, *supra* note 6, at 169. See also Brady, *Constitutional Amendment and the Federation*, 29 CAN. J. ECON. & POL. 486 (1963); Alexander, *A Constitutional Strait Jacket for Canada*, 43 CAN. BAR REV. 262 (1965); Laskin, *Amendment of the Constitution: Applying the Fulton-Favreau Formula*, 11 MCGILL L. J. 1 (1965).

52. GOVERNMENT OF CANADA, CANADIAN CONSTITUTIONAL CHARTER, 1971 (1971) [hereinafter cited VICTORIA CHARTER]. This proposal for a new Constitution was the product of several years of negotiations between provincial and federal leaders. See CONFERENCE OF 1968-1969, *supra* note 15.

Arts. 49-57 of the Charter laid out a complicate scheme for provincial approval of constitutional amendments. VICTORIA CHARTER, *supra*, arts. 49-57. See R. SIMEON, FEDERAL-PROVINCIAL DIPLOMACY 119 (1972) [hereinafter cited as SIMEON]. Quebec did not approve the Charter. See note 53 *infra*.

53. When the Fulton Plan was first proposed in 1961, the Province of Saskatchewan was op-

Pierre Trudeau, dedicated himself to altering the present constitution to fulfill his party's promise of unity for Canada; yet, during that period, not one word of the original BNA Act was changed.⁵⁴ Prior attempts to alter the Constitution and/or the amending process were similarly unsuccessful, although Quebec did not always oppose them.⁵⁵

There is precedent to support a direct appeal by a provincial legislature to London. Nova Scotia made such an appeal in 1868 to allege a lack of consent to the terms of the Union.⁵⁶ Other instances include: 1) the address to the Queen made by the Province of Ontario in 1868;⁵⁷ 2) the addresses made by the Province of Prince Edward Island in 1877⁵⁸ and 1882;⁵⁹ 3) the appeals made to London by British Columbia in 1874⁶⁰ and 1908;⁶¹ 4) the appeal of

posed to the loss of provincial powers and Quebec was opposed to the continued vitality of the BNA Act (No. 2), 1949, 13 Geo. 6, c. 81. See LASKIN, *supra* note 21, at 36. For a discussion of the BNA Act (No. 2), 1949, 13 Geo. 6, c. 81, see note 34 *supra*.

At the 1964 CONFERENCE, *supra* note 36, a version of the plan, altering policy with respect to § 91(1) of the BNA Act, 1867, 30 & 31 Vict., c. 3 was presented, and received the approval of all the provincial premiers. However, nationalist opposition in Quebec, concerned about the distribution of powers, prevented the Lesage Liberal government from seeking provincial legislative approval of the plan. See [1965] CANADA ANNUAL REVIEW, 47-53 (J. Saywell ed. 1966).

Opposition in Quebec to the VICTORIA CHARTER, *supra* note 52, was widespread and cut across party lines. Quebeckers were most upset about provisions in the Charter which frustrated their desire to exercise greater control over social policy programs. See SIMEON, *supra* note 52, at 120-22. See also NEW DEAL, *supra* note 7, at 39-40.

54. *Talking a Good Game*, MACLEANS, Feb. 19, 1979, at 15.

55. The problem often was the inability of conferees to develop any amendment proposals at all. See LASKIN, *supra* note 21, at 35-36.

56. See note 14 *supra*.

57. The Province of Ontario, through the Governor-General, appealed to London because it felt that the increased monies given to Nova Scotia by the Ottawa Government contravened § 118 of the BNA Act, 1867, 30 & 31 Vict., c. 3. The Colonial Office responded:

The British North America Act (1867) embodied the terms of Confederation agreed upon through their Representatives by the different Provinces of the Union, and Her Majesty's Government would not feel justified in proposing to the Imperial Parliament to deprive the Parliament of Canada of any power which the Act has assigned to them.

Granville to the Governor-General, February 19, 1870, 1870 CAN. SESS. PAPERS No. 25, at 14, *reprinted in relevant part* in GÉRIN-LAJOIE, *supra* note 15, at 141.

58. In that year, Prince Edward Island addressed the Queen as result of a fishing dispute, but London would not intercede. See BROSSARD, *supra* note 10, at 278.

59. In this instance, Prince Edward Island again appealed to the Queen, through the Governor-General, over a dispute involving the building of a transcontinental railway in the Province. The Islanders claimed that the federal government failed to adhere to its contractual obligations for the project. The Province was informed by the Secretary of State for the Colonies "that the Queen had no power either by statute or otherwise, under the constitution of Canada, to give any direction in the matter . . ." Maxwell, *supra* note 15, at 745.

60. This petition to London also involved the building of a transcontinental railway. It was turned down due to lack of support from Ottawa. See Mayer, *supra* note 41, at 64.

61. This appeal to London involved British Columbia's opposition to an amendment to the tax-sharing provisions in the BNA Act under which the Province felt its share would be insufficient. For a discussion of the complexities of this case, see Maxwell, *supra* note 15, at 748-49.

the State of Western Australia in 1935;⁶² 5) the request made by the Province of Quebec through the Governor-General (the Crown's chief representative in Canada) in 1965.⁶³ All of these requests were denied, except the request by Quebec, which was ignored.⁶⁴

Thus, it is unlikely that Westminster would ever accept this manner of appeal to establish an independent Quebec. Such a request would involve a fundamental reordering of the Canadian Confederation and would occur without any direct support from the central government in Ottawa. History has shown that Britain would not impair the Confederation's power balance.⁶⁵

A second, more practical method of amending the Constitution, would be for Ottawa to petition London directly. This would occur if the Federal Government, having decided to accede to the demands of the *indépendantistes*,

62. In 1935, the State of Western Australia appealed to both houses of Parliament asking that the Australian Constitution Act, 1900, 63 & 64 Vict., c. 12, be amended so as to allow the State to secede. See REPORT BY THE JOINT COMMITTEE OF PARLIAMENT ON THE PETITION OF THE STATE OF WESTERN AUSTRALIA (1935), (Hse. Lds. Doc. 75, Hse. Cmns. Doc. 88) [hereinafter cited as JOINT COMMITTEE REPORT]. "The petition had passed through both Houses of the State Legislature and was signed by the leaders of all political parties. In addition, the petition was backed up by a referendum in which two-thirds of the state's voters had expressed a desire to separate." Mayer, *supra* note 41, at 63. The petition arose subsequent to referendums held under the Secession Referendum Act, 1932, 23 Geo. 5, No. 47 (Aus.), and the Secession Act, 1934, 25 Geo. 5, No. 2 (Aus.). See GOVERNMENT OF WESTERN AUSTRALIA, CASE OF THE PROVINCE OF WESTERN AUSTRALIA, iii-iv (1934). A committee of members of the House of Lords and Commons refused to hear the petition because the State had no *locus standi* to ask that the Constitution of Australia be altered. JOINT COMMITTEE REPORT, *supra*, at ix. The Committee went on to say that "interference should only take place at the request of such Dominion . . . speaking with the voice which represents it as a whole and not merely the request of a minority. That rule was well established before 1900, and has consistently been acted upon as an undoubted Constitutional Convention." *Id.* at viii. One author comments:

The result was somewhat paradoxical. The Commonwealth Parliament does not possess the power to enable a state to secede because the Australian Constitution created "an indissoluble Federal Commonwealth." Secession can only be affected by an Imperial Act. Yet the Imperial Parliament will exercise its power only at the request of the Commonwealth.

Maxwell, *supra* note 15, at 738.

63. "In 1965, the Lesage Government decided to abolish the Legislative Council of Quebec, given that its existence and composition was predetermined by articles 71 and 79 of the BNA Act of 1867." BOSSARD, *supra* note 10, at 281 (author's translation). After numerous discussions with federal officials, the Governor-General transmitted the Quebec proposal to the Queen, underlining that the Ottawa Cabinet felt that Quebec's desires should be respected. See Lederman, *The Process of Constitutional Amendment in Canada*, 12 MCGILL L. J. 336, 371 (1966). London did nothing with the proposal and the Council was later abolished. An Act respecting the Legislative Council, Que. Stat., c. 9 (1968).

64. See notes 15, 57-63 *supra*.

65. GOVERNMENT OF CANADA, FEDERATION AND THE FUTURE: THE AMENDMENT OF THE CONSTITUTION IN CANADA 11 (1965) [hereinafter cited as WHITE PAPER]; accord, Forsy, *supra* note 46, at 8-9. That provinces may not unilaterally appeal is a matter of constitutional convention. See GERIN-LAJOIE, *supra* note 15, at 138.

secured the approval of the other provinces for such a petition.⁶⁶ Ottawa has not always sought the blessing of the provinces before petitioning London.⁶⁷ However, given the present political climate, it is doubtful that a petition for the establishment of an independent Quebec could gain the support of other provincial leaders or of the Canadian population. Public opinion in Canada currently is against such a course of action.⁶⁸

There remains the question of whether Canada should accede to a strong demand, evidenced by a legitimate referendum of the voters of Quebec, mandating that the provincial government proceed with negotiations to attain the sovereignty of Quebec. Most of the federally-appointed constitutional commissions convened within the last twenty-five years have recommended that the express desire of the people of Quebec be respected.⁶⁹ Nevertheless, the

66. WHITE PAPER, *supra* note 65, at 11. There are three basic reasons for the need for provincial approval. First, under the BNA Act, 1867, 30 & 31 Vict., c. 3 the Provincial Legislatures were given the power to amend the Constitution of the Province. *Id.* § 92(1). By the specific terms of § 92, Provinces retained the exclusive right to make laws on a whole range of concerns. *Id.* § 92. See note 36 *supra*. Thus, the federal government cannot endeavor to amend the constitution on a matter that would infringe upon provincial concerns without the approval of the provinces. See GÉRIN-LAJOIE, *supra* note 15, at 158-60. Note, however, that the central government is able to disallow or reserve provincial acts. BNA Act, 1867, 30 & 31 Vict., c. 3, arts. 56-57. See CANADA: DEPARTMENT OF JUSTICE, DISALLOWANCE AND RESERVATION OF PROVINCIAL LEGISLATION (1955).

Second, the IMPERIAL CONFERENCE DECREE OF 1926, *supra* note 30, affirmed that Westminster would not interfere with the powers of the respective legislative bodies of Canada. *Id.* at 14. Thus, an attempt by the Ottawa Parliament to amend the Constitution, outside of those areas delimited by the provisions of § 91(1) of the BNA Act, 1867, 30 & 31, Vict., c. 3 as altered by the BNA Act (No. 2), 1949, 13 Geo. 6, c. 81, would not be approved. See note 34 *supra*. The principle of 'exclusive powers' embodied in the BNA Act was reaffirmed by the Statute of Westminster, 1931, 22 Geo. 5, c. 44 § 7(3).

Finally, as a matter of convention, Westminster has heeded the appeals of provinces in several situations where the provinces objected to unilateral federal attempts at amendment. GÉRIN-LAJOIE, *supra* note 15, at 193-94. *Cf.* note 67 *infra*.

67. LASKIN, *supra* note 22, lists eight amendments that were enacted by the United Kingdom Parliament even though provinces were not consulted. The last three amendments to the BNA Act, 1867, 30 & 31 Vict., c. 3, have received the unanimous approval of the provinces. *Id.* at 35-36. See also BROSSARD, *supra* note 10, at 260-61. It is submitted that a question of provincial separation so involves the federal-provincial relationship, that Ottawa could never proceed absent unanimous provincial consent.

68. For example, a Gallup poll has found that only 15% of the Canadians outside of Quebec favor complete independence while 76% are opposed to such a move. Moreover only 20% of these same people favor the sovereignty-association option with 67% opposed. *The Quebec Question*, Montreal Gazette, Jan. 31, 1979, § A, at 2, col. 2. As for voters within the Province of Quebec, the most recent poll, conducted after the P. Q. announced its referendum question, (see note 19 *supra*), indicates that the party's initiative may fail. See 47.2 p.c. *des Québécois répondraient par un non lors du referendum*, La Presse, Montréal, Dec. 26, 1979, § A, at 2, col. 3.

69. See, e.g., TASK FORCE, *supra* note 3:

[I]t is for the people of Quebec to declare themselves on their political and constitutional preferences, and not the country as a whole; it is important, therefore, that whatever process is employed to determine the will of the people of Quebec is accepted as legitimate by both governments.

Id. at 114.

prevailing opinion among Canada's political leaders, both past and present, is reflected in the view held by former Prime Minister Trudeau, that there is "only one set of formulae which we are not willing to discuss (in terms of constitutional reform): those which commence with the premise that Canada is — or could be — anything other than one unified country."⁷⁰ Beyond such philosophical barriers to separation,⁷¹ there also is strong opposition to independence based upon economics, national survival, and the impact of separation upon French-Canadians residing outside the Province of Quebec.

As has been seen,⁷² resistance to the concept of a sovereign Quebec with an economic association to the rest of Canada has developed due to the perception that the benefits of interprovincial tariff protection would continue to flow to Quebec without its sharing in the costs of that protection through the maintenance of the Confederation.⁷³ The response of the P. Q. to such a position is that an economic association is inevitable and that it unquestionably would benefit both Quebec and Canada.⁷⁴ The political posturing is clear. The P. Q. must convince the rest of the country that its plan of sovereignty-association provides the sole means through which the rift in the Canadian political union can be conclusively resolved. However, Ottawa must convince Quebecers that the Province could not survive without tariff protection and the federal program of equalization and transfer payments. The Government asserts that Quebec receives more benefits under these programs than any other province.⁷⁵

70. Costello, *Quebec's Separatism*, 11 EDITORIAL RESEARCH REP. 845 (1977).

71. The maintenance of the Union has always been uppermost in the minds of many Canadian political leaders, including Quebec Prime Ministers Lesage (1960-65), Johnson (1966-68), and Bourassa (1970-76). See *Opening Statement by M. Pearson*, in CONFERENCE 1968-1969, *supra* note 15, at 11; *Opening Statement by M. Trudeau*, in CONFERENCE 1968-1969, *id.* at 31; *Opening Statement by M. Johnson*, in CONFERENCE 1968-1969, *id.* at 69. See also TASK FORCE *supra* note 3, where the Committee indicates that any new constitution should reinforce federalism. *Id.* at 81.

72. See note 18 *supra*.

73. If Quebec separated, "there would be no economic reason for the Canadian provinces — particularly those in the Western and Atlantic regions — to accept a higher level of external tariffs than their export-based economies need and higher prices for goods from Quebec than from other countries." Smiley, *supra* note 14, at 218. See also THE ECONOMIST, *supra* note 18, at 92 n. 1.

74. Premier Lévesque has remarked that sovereignty-association "will not only be acceptable but even desirable because of the alternative prospect of a special status that would be grabbed by Quebec, bit by bit, until the federal state became kind of a constitutional freak in perpetual danger of disintegration." OPTION FOR QUEBEC, *supra* note 18, at 35. See also Lévesque, *For an Independent Quebec*, 54 FOREIGN AFF. 734, 741-42 (1976) [hereinafter cited as Lévesque, *Independent Quebec*].

75. By far the most important of the explicitly redistributive programs is the revenue equalization scheme by which Ottawa makes direct payments to the governments of the poor provinces in order to bring their revenues up to the national average. In 1976, equalization payments transferred almost \$1 billion to Quebec, about half the total sum involved.

Leslie & Simeon, *The Battle of the Balance Sheets*, in MUST CANADA FAIL, *supra* note 15, at 247, 249.

That Quebec does benefit from this program is a matter of considerable disagreement. It has been maintained that funds to finance projects in the rest of Canada are being taken out of

In addition, many English-Canadians believe that their Union would fall apart if Quebec were permitted to secede. This fear is rooted in the inability of the central government to exercise effective control over the provinces. Perhaps this constitutes an appropriate shortcoming in a true confederation.⁷⁶ The Atlantic provinces, which include Nova Scotia, Prince Edward Island, New Brunswick and Newfoundland, appear to be particularly susceptible if Quebec is able to secede from Canada. This is because of their traditional dissatisfaction with the Confederation and because they will be physically separated from the rest of the country.⁷⁷ Conversely, the P. Q. believes that only through resolution of the problem of Quebec (by a declaration of its sovereignty) can Canada begin to construct a truly unified country which is distinct and economically independent of the United States.⁷⁸

It has also been argued that "secession might have the consequence of leaving those members of a minority (French) living in other areas of the country without their traditional protection they had previously enjoyed as part of a powerful minority."⁷⁹ If Quebec seceded, French-speakers in Canada would constitute about 5% of the population, as opposed to 27% at present.⁸⁰ Thus, federalists urge that, absent Quebec, the impetus for federal and provincial programs guaranteeing language rights for the French in other parts of Canada would disappear.⁸¹ However, the separatists consider present guarantees to be so lacking in security that any loss of federal initiatives would not result in substantial injury to the remaining French-Canadian populace.⁸²

Quebec. *Id.* at 247-48. Ottawa has responded by noting that many factors left out of the formula, such as the balance of merchandise trade, and the flows of interests and dividends between Quebec and the outside, skewed the estimate. *Id.* In any event, the P.Q.'s position is that its burden of contributions to the federal government will be reduced in many areas such as defense, foreign aid and so forth, which will more than make up for any loss. OPTION FOR QUEBEC, *supra* note 18, at 49-50. For background to the early development of transfer payment programs in Canada, see Brady, THE MODERN FEDERATION: SOME TRENDS AND PROBLEMS, in 3 ADVISORY COMMITTEE, *supra* note 21, at 24. See also notes 18, 73 *supra*.

76. Murchland, *Quebec's Politics of Vengeance*, WORLDVIEW 17, 18 (Jan.-Feb. 1978).

77. See Rawlyk, *Quebec's Separation and the Atlantic Provinces*, in MUST CANADA FAIL, *supra* note 15, at 85-92. Consider that it is the Western and Maritime Provinces that are suffering the most due to the Quebec-Ontario split. See D. BERCUSON, CANADA AND THE BURDEN OF UNITY 3 (1977). The P.Q. has indicated that they will allow free passage of goods across their borders. See note 18 *supra*.

78. See OPTION FOR QUEBEC, *supra* note 18, at 28; LÉVESQUE, *Independent Quebec*, *supra* note 74, at 743.

79. L. BUCHHEIT, SECESSION: THE LEGITIMACY OF SELF-DETERMINATION 30 (1978) [hereinafter cited as BUCHHEIT].

80. See GOVERNMENT OF CANADA, 1976 CENSUS OF CANADA, CAT. No. 92-822, BULL. 2:2, Table 8-1 (1978).

81. As for French minorities in other provinces, they can only have a future if Quebec establishes itself as a strong, progressive force within Confederation; if Quebec withdraws into itself or secedes, these French minorities will have approximately the same rights and the same influence as cultural groups of German origin in Canada. TRUDEAU, *supra* note 3, at 34.

82. Quebec has two main objections to the Union in the area of language rights. First, many

It is apparent that, absent a shift in attitudes in favor of a sovereign Quebec, the support necessary for Ottawa to appeal to London so as to allow Quebec to secede will not be forthcoming. What remains, however, is the question of

Quebeckers believe that other provinces have not respected the rights of French-speakers within their territory. Two chief examples are offered, those of Manitoba and Ontario.

When the Province of Manitoba entered the Union in 1870, Francophones were in a slight majority. See *NEW DEAL*, *supra* note 7, at 10. Language guarantees in the Manitoba Act, 1870, 33 Vict., c. 3 at § 23 (Can.), providing that French and English were the official languages of the Courts and the Legislatures, were modeled after those in the BNA Act, 1867, 30 & 31 Vict., c. 3, at § 133. However, in 1890, English was declared to be the Province's sole official language. See *An Act to Provide that the English Language shall be the Official Language of the Province of Manitoba* [Manitoba Language Act], 1890 (Man.), c. 14 (current version at MAN. REV. STAT. c. 0-10 (1970)). In that same year, the long-established system of Protestant (attended primarily by the English) and Catholic (attended primarily by the French) denominational schools was scrapped and a public school system was established. See *Public Schools Act*, 1890 (Man.), c. 38. A challenge to the constitutionality of the Act failed, as it was held that no rights of the groups had been prejudiced. See *City of Winnipeg v. Barrett*, [1892] A.C. 445. See also *Brophy v. Attorney-General of Manitoba*, [1895] A.C. 202. A recent challenge to the Manitoba Language Act, 1890 (Man.) c. 14 (current version at MAN. REV. STAT. c. 0-10 (1970)), resulted in a declaration of its unconstitutionality. See *R. v. Forest*, — D.L.R. 3d — (1979). See also *Re Forest and Registrar of the Court of Appeal of Manitoba*, 77 D.L.R. 3d 445 (1977); Giniger, *Canada Language Rights Upheld*, N.Y. Times, Dec. 14, 1979, § A, at 10, col. 3 [hereinafter cited as *Giniger, Language*].

In Ontario, a dispute arose in 1913 over the issuance of Provincial Department of Education Regulation No. 17, which forbade the use of French in the classroom beyond Grade (Form) 1. Courts, in various challenges to Regulation 17, held it to be an appropriate exercise of provincial power in the field of education, guaranteed by the BNA Act, 1867, 30 & 31 Vict., c. 3, § 93. See *McDonald v. Lancaster Separate Schools Trustees*, 26 D.L.R. 731 (1916) (teachers fined for teaching catechism in French); *McDonald v. Lancaster Separate Schools Trustees*, 24 D.L.R. 868 (1915) (injunction against using French in a Catholic school); *Ottawa Separate Schools Trustees v. Mackell*, [1917] A.C. 62 (province has power to issue regulations in area of education, unless rights are prejudiced). Ottawa's policy was abandoned in 1927, with many exceptions to the "no French" rule coming before that date. See J. HOPE, *REPORT OF THE ROYAL COMMISSION ON EDUCATION IN ONTARIO* 260-61 (1950). See also F. MERCHANT, *REPORT OF THE COMMISSION APPOINTED TO ENQUIRE INTO THE CONDITIONS OF THE SCHOOLS ATTENDED BY FRENCH-SPEAKING PUPILS* (1927).

In all challenges to a province's control of the language of schools, "[c]ourts have distinguished between language and faith, . . . never did they interpret the British North America Act, 1867, as an instrument for the protection of the language or the culture of a particular group." *Protestant School Board of Montreal v. Minister of Education*, 83 D.L.R. 3d 645, 672. (1976). For a review of New Brunswick's language law, see Kerr, *The Official Languages of New Brunswick Act*, 20 U. TORONTO L. J. 478 (1970). See generally Mestral & Frailberg, *Language guarantees and the Power to Amend the Canadian Constitution*, 12 MCGILL L. J. 502 (1966).

Quebec's second major objection is that the French language is not adequately supported. This lack of support for the French language is reflected in the rapid rate of assimilation by the French with the English. Assimilation is having a marked effect outside of Quebec. Whereas in 1951, 82% of all French-speakers lived in Quebec, by 1976 that proportion had risen to 85% and is expected to rise to 95% by the year 2001. See *TASK FORCE*, *supra* note 3, at 46-47. Moreover, it is predicted by one demographer, that by 1991, 73% of all people of French origin living outside the Province of Quebec will have stopped using the French language. *NEW DEAL*, *supra* note 7, at 28-29. Finally, as to immigrants settling in the Province, a great majority of them choose English and not French as their primary language. *TASK FORCE*, *supra* note 3, at 47.

In response to these trends, Quebec's legislature passed two language acts during the 1970's. The first, the *Official Languages Act* [Bill 22], Que. Stat. c. 6 (1974), was replaced by the

whether the central government could transfer sufficient power to satisfy the desire of the Province for greater autonomy without the need to withdraw from the Confederation. The effect of this shift of power would be to give the Province a 'special status' within the Confederation.

C. *Special Status (Statut Particulier): The 'Third Option'*

1. Overview of the 'Third Option'

The distinct nature of the Province of Quebec in matters affecting language rights,⁸³ education,⁸⁴ and legislation,⁸⁵ is acknowledged within the BNA Act. An option which has found favor among supporters of a united Canada involves amending the BNA to enable Quebec to exercise increased legislative

Charter of the French Language Act [Bill 101], Que. Stat. c. 5 (1977), when the P. Q. came to power.

The latter bill was of far-reaching scope as it makes French the language of work, instruction, communication, commerce and business. *Id.* Preamble, para. 2. In addition, it declared French to be the official language of Quebec, *id.* art. 1, and required that French be the language of the Legislature, *id.* arts. 7-10, and of the Courts, *id.* arts. 11-13. The articles concerning the legislatures and the courts have recently been declared unconstitutional, in violation of the BNA Act, 1867, 30 & 31 Vict., c. 3 § 133, as the Province was held impotent to amend that section. *See Blaikie v. Attorney-General of Quebec*, 85 D.L.R. 3d 252 (1978), *aff'd*, — D.L.R. 3d — (1979). This decision is expected to give support to the separatist cause. *See Giniger, Language, supra. See generally Comment, Language Rights and Quebec Bill 101*, 10 CASE W. RES. J. INT'L L. 543 (1978); GENDRON COMMISSION OF INQUIRY, THE CONSTITUTIONAL-LEGAL COMPETENCE AS TO ESTABLISHMENT OF OFFICIAL LANGUAGE OR LANGUAGES IN QUEBEC (Éditeur officiel de Québec 1972). *See also* note 11.

In 1969, the Federal Government, in an attempt to bolster bilingualism, passed the Official Languages Act, CAN. REV. STAT. c. 0-2 (1970). This Act extended the provisions of the BNA Act, 1867, 30 & 31 Vict., c. 3 § 133 to all institutions of the federal government. The constitutionality of the legislation was upheld in *Jones v. Attorney-General of Canada*, 45 D.L.R. 3d 583 (1974). In its implementation, however, the Act has been inadequate. *See TASK FORCE, supra* note 3, at 49-50; *NEW DEAL, supra* note 7, at 12. *See generally Bujold, Language Rights in the Canadian Constitution*, 26 U. NEW BRUNS. L. J. 47 (1977).

83. Section 133 of the BNA Act, 1867, 30 & 31 Vict., c. 3 states in pertinent part:

Either the English or the French Language may be used by any Person in the Debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Quebec; and both those Languages shall be used in the respective Records and Journals of those Houses; and either of those Languages may be used by any Person or in any Pleading or Process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec

Id. *See also* note 82 *supra*.

84. Section 93(2) of the BNA Act, 1867, 30 & 31 Vict., c. 3, extended equality of status to the Roman Catholic Separate schools in Quebec. *Id.*

85. Section 94 of the BNA Act, 1867, 30 & 31 Vict., c. 3, provided that the Parliament of Canada could make uniform the laws respecting property and civil rights in Ontario, New Brunswick and Nova Scotia but only if the legislatures of those provinces approved of the uniform change. *Id.* The Province of Quebec was excluded from this uniformity out of respect for its distinct legal system, the Civil Code. *See* notes 5-8 *supra*.

prerogatives. This could be effected in two ways. First, in contentious areas such as language policy,⁸⁶ foreign relations,⁸⁷ and social policy,⁸⁸ Quebec could be given exclusive legislative powers. Second, certain powers could be placed under the concurrent jurisdiction of the federal and provincial governments to give the provinces the option to legislate in fields involving their particular interests.

It is clear that the first alternative is a compromise position.⁸⁹ Special status has the strong support of Quebec's official opposition party, the Liberals, headed by M. Claude Ryan.⁹⁰ Despite the fact that a Liberal government has been in power at the federal level during most of this decade, that Government, led by M. Trudeau, consistently rejected the notion of a special status for Quebec.⁹¹ The second alternative finds some favor in those provinces, which, like Quebec, desire greater provincial autonomy.⁹²

2. Delegation of Powers in Canada

Among all the provinces, Quebec has historically supported greater political autonomy. This is a function of its desire to preserve both its heritage and the terms under which it entered the Confederation.⁹³ As a result, Quebec has

86. See notes 11, 82 *supra*.

87. See notes 95-100 *infra*.

88. The Federal Parliament proceeded, in 1944, to introduce a scheme of family allowances, to extend the scope of the unemployment insurance program and to provide old age security (1951). At the same time the Federal Government undertook to grant financial assistance on a shared-cost basis, including help to the blind (1951) and disabled (1954) and hospital insurance to all Canadians (1958). These measures were followed in 1965 by the Canadian Pension Plan, and in 1968, by a countrywide Medicare scheme. All such social welfare measures . . . , were an invasion of fields constitutionally and traditionally the responsibility of the Canadian provinces. STANLEY, HISTORY, *supra* note 7, at 161-62. Many of the shared-cost programs allowed the provinces the option of assuming the full burden of administering and financing the efforts. Only Quebec has done so. See note 94 *infra*.

89. Consider that, when first proposed, special status "provided an acceptable option for nationalists who otherwise might become separatists." Brady, *The Distribution of Legislative Power*, in 2 ADVISORY COMMITTEE, *supra* note 21, at 101-02 [hereinafter cited as Brady].

90. As head of the Liberal Party in Quebec, Mr. Ryan inherits a long tradition of support for the idea of special status. See Brady, *supra* note 89, at 100-03. Mr. Ryan has long been a supporter of this option. See Ryan, *The Possible Contents of a Special Status for Quebec*, in QUEBEC IN THE CANADA OF TOMORROW, § E-1 (1967). He envisions a transfer of powers to the provinces in the areas of social welfare, education, foreign relations, communications, immigration, and economic development. *Id.*

91. M. Trudeau believed that special status would weaken the French position in Canada, *see* note 81 *supra*, lead to its alienation rather than unification with the rest of Canada, and cause it to have less effective representation at the federal level. See LAXER & LAXER, *supra* note 10, at 313-16; D. SMILEY, CANADA IN QUESTION 163 (1972).

92. Nova Scotia and Saskatchewan may support efforts for delegation of powers. See Brady, *supra* note 89, at 102.

93. See § 1 *supra*.

taken the lead in establishing provincial programs when the central government has allowed the provinces to opt out of co-operative programs.⁹⁴

An area that exemplifies Quebec's inclination towards greater autonomy is that of foreign relations, especially in Quebec's relationship with its 'home' country, France. Beginning with the Privy Council's decision in the *Labour Conventions* case⁹⁵ which upheld the right of the provinces to participate in the treaty process when the substance of a treaty involved a matter of concern to the provinces, Quebec has sought a degree of independence in foreign relations. One example of this is the educational exchange agreement (referred to as a *procès verbal*) concluded with France in 1964.⁹⁶ That relationship was formalized in 1965, when the Canadian Government signed a cultural agreement with the Government of France.⁹⁷ The agreement allowed the Province of Quebec to enter into cultural and educational exchanges with France under the general authority of the Canada-France agreement which was thus labelled an "umbrella agreement" or "*loi cadre*." Quebec subsequently signed various agreements with France, but did not always recognize the supremacy inherent in the 1965 Canada-France agreement.⁹⁸ The tension arose over differing conceptions of the treaty-making implementing provisions of the BNA Act and

94. "Through the ongoing process of federal-provincial relations, Quebec has come to wield wider powers than the other provinces, because only Quebec has accepted options equally available under federal law to all provinces." Smiley, *supra* note 14, at 208. See also note 88 *supra*.

95. Attorney-General for Canada v. Attorney-General for Ontario, [1937] A.C. 326, noted in 8 I. L. R. 41 (1935-37).

The case dealt with the ability of the Federal Government to pass the Weekly Rest in Industrial Undertakings Act, 1935, Can. Stat., c. 14, the Minimum Wages Act, 1935, Can. Stat., c. 44 and the Limitations of Hours of Works Act, 1935, Can. Stat., c. 63. These acts reflected Canada's acceptance of the International Labour Conventions. The Privy Council, per Lord Atkin, held that under Section 132 of the BNA Act, 1867, 30 & 31 Vict., c. 3, the provinces must play a part in the treaty implementation process where matters of provincial concern were at hand. Section 132 of the BNA Act, 1867, 30 & 31 Vict., c. 3, rested exclusivity of implementation of treaty obligations in the Parliament of Canada only when those duties were undertaken as part of the British Empire, and not in situations which did not involve relations with foreign countries.

For cases affirming that provinces are autonomous within their areas of delegated concern, see *Liquidators of the Maritime Bank of Canada v. Receiver General of New Brunswick*, [1892] A.C. 437; *Bonanza Creek Gold Mining Co. v. The King*, [1916] A.C. 566; and *In re Regulation and Control of Radio Communications*, [1932] A.C. 304, noted in I. L. R. 45 (1931-32).

96. Atkey, *Provincial Transnational Activity: Approach to a Current Issue in Canadian Federalism*, in 2 ADVISORY COMMITTEE, *supra* note 21, at 162 [hereinafter cited as Atkey].

97. CANADA: DEPARTMENT OF EXTERNAL AFFAIRS, *Franco-Canadian Cultural Agreement*, 17 EXTERNAL AFF. 513 (1965); *Text of Cultural Agreement Between the Government of Canada and the Government of the French Republic*, *id.* at 514.

98. CANADA: DEPARTMENT OF EXTERNAL AFFAIRS, *Entente on Cultural Cooperation Between France and Quebec*, 17 EXTERNAL AFF. 520 (1965); *Text of Entente on Cultural Cooperation Between the Government of the French Republic and the Government of Quebec*, *id.* at 521. The *Entente* was not approved by the central government until after its execution. See Atkey, *supra* note 96, at 162. For a survey of Quebec's agreements with other French-speaking countries, see *Government of Quebec, Working Paper on Foreign Relations*, reprinted in CONFERENCE OF 1968-1969, *supra* note 15. See also note 100 *infra*.

the general limitations of the treaty power.⁹⁹ The federal government has always maintained that the treaty power is exclusive and has resisted attempts by Quebec to make agreements or substantial contacts with other French-speaking countries.¹⁰⁰

There are two major barriers that would have to be overcome before a delegation of powers could be effected. First, within the present constitutional framework, the Supreme Court of Canada has ruled that a delegation of the legislative and plenary powers reserved to the federal government under Section 91 of the BNA Act and the provincial governments under Section 92 is unconstitutional.¹⁰¹ Nevertheless, the redistribution of powers requires a constitutional amendment. Delegation of those powers could be effected if all the

99. Supporters of Quebec's autonomy in foreign relations point to the fact that Section 132 of the BNA Act, 1867, 30 & 31 Vict., c. 3, does not vest the Federal Government with exclusive treaty authority. *Id.* § 132. Moreover, the rule announced in *Attorney-General for Canada v. Attorney-General for Ontario*, [1937] A. C. 326, supports provincial participation in those treaties that affect their delegated powers. Finally, recent opinion indicates that Quebec does possess some treaty-making authority. See generally Morin, *International Law-Treaty Making Power: Constitutional Law Position of the Government of Quebec*, 45 CAN. BAR REV. 160 (1967); Morin, *La Conclusion d'Accords Internationaux par les Provinces Canadiennes à la Lumière du Droit Comparé*, 3 CAN. Y. B. INT'L L. 127 (1965); Morin, *La Politique Extérieure du Québec*, 9 ETUDES INTERNATIONALES 281 (1978). For a criticism of this position, see Morris, *The Treaty-Making Power: A Canadian Dilemma*, 45 CAN. BAR REV. 478 (1967).

The Federal Government's position is founded on the fact that under Section 9 of the BNA Act, 1867, 30 & 31 Vict., c. 3, power to conclude treaties was vested in the British Crown and since that time that power has been progressively transferred to the Parliament of Canada. *Id.* § 9. See notes 29-32 *supra*. See generally Delisle, *Treaty-Making Power in Canada*, in 1 ADVISORY COMMITTEE, *supra* note 21, at 117; Laskin, *The Provinces and International Agreements*, in *id.* at 103; Rand, *International Agreements Between Canadian Provinces and Foreign States*, 25 U. TORONTO FOR. L. REV. 75 (1967); McWhinney, *The Constitutional Competence Within Federal Systems for International Agreements*, in 2 ADVISORY COMMITTEE, *supra* note 21, at 121 [hereinafter cited as McWhinney]; CANADA: DEPARTMENT OF EXTERNAL AFFAIRS, *The Provinces and Treaty-Making Powers*, 19 EXTERNAL AFF. 306 (1967).

100. For a review of Quebec's efforts at treaty-making with Gabon, Tunisia, Nigeria and France, see McWhinney, *supra* note 99, at 125-32, 142-52.

101. See *Attorney-General of Nova Scotia v. Attorney-General of Canada*, [1950] 4 D. L. R. 369. The case dealt with the constitutionality of Bill No. 136, "An Act respecting the delegation of jurisdiction from the Parliament of Canada to the Legislature of Nova Scotia and vice versa." The Bill would have allowed the Parliament of Canada to pass certain regulations dealing with employment practices which would have conflicted with the exclusive powers of provincial legislatures under Section 92 of the BNA Act, 1867, 30 & 31 Vict., c. 3. Nova Scotia would have had certain powers of the Parliament of Canada delegated to it in the same field. C. J. C. Rinfret, writing for the majority, declared:

[N]o power of delegation is expressed either in Section 91 or Section 92, nor indeed, is there to be found the power of accepting delegation from one body to the other . . . [n]either legislative bodies, federal or provincial, possess any portion of the powers respectively vested in the other and they cannot receive it by delegation. In that connection the word "exclusively" used both in Section 91 and Section 92 indicates a settled line of demarcation and it does not belong to either Parliament, or the Provinces to confer powers upon the other.

4 D. L. R. at 372. See also *Re Initiative and Referendum Act*, [1919] A. C. 935.

provinces agreed to satisfy Quebec's demand for greater autonomy. A delegation of powers amendment could also be drafted to permit other provinces greater autonomy. In the alternative, the central government could effect a transfer of some of its legislative powers to the executive rather than the legislative branch of government in Quebec.¹⁰² This would succeed in circumventing both the inherent anti-delegation provisions of the BNA Act and the need for a formal constitutional amendment. Whichever method is chosen, delegation is not an easy task, as evidenced by the experience of Australia.¹⁰³

The second barrier to a delegation of powers defies resolution at this time: opposition to the plan by supporters of Quebec's independence. The P. Q. has never considered a form of special status to be a viable option. This is predicated upon the inherent inconsistency of a proposal that would allow for two sovereign governments to operate within the same political union.¹⁰⁴ It is clear that the separatists desire to form their own government on their own terms. Although the idea could be revived if the P. Q. falls from power, special status is not a practical solution given the party's present political strength.

III. THE RIGHT OF SELF-DETERMINATION AND THE CASE OF QUEBEC

A. *Early Formulation of the Doctrine*

The initial formulation of the theory of the right of self-determination was developed in the period following World War I, when the need to reorganize the European continent provided the opportunity to adjust national borders, taking into account the desires of national minority groups. The most visible proponent of national self-determination, Woodrow Wilson, was concerned primarily with restructuring the existing political order so as to prevent the eruption of localized disputes which might again lead to world war.¹⁰⁵ Prior to

102. The Supreme Court of Canada has allowed delegation to executive and administrative bodies. See Mayer, *supra* note 41, at 65.

103. Section 51 of the Commonwealth of Australia Constitution Act, 1900, 63 & 64 Vict., c. 121, outlines the general delegation powers. In practice, the scheme has been unworkable because of the inability of the various states of Australia to agree on powers to be delegated. See WHEARE, FEDERAL, *supra* note 22, at 248-50.

104. See note 74 *infra*. See also OPTION FOR QUEBEC, *supra* note 18, at 35. The notion of special status is rejected out of hand. See *id.* at 10; NEW DEAL, *supra* note 7, at 42-43.

105. For sources on Wilson's approach to self-determination, see generally R. BAKER & W. DODD, 1 THE PUBLIC PAPERS OF WOODROW WILSON: WAR AND PEACE 155-62 (1925); Woolsey, *Self-Determination*, 13 AM. J. INT'L L. 81 (1919); Pomerance, *The United States and Self-Determination: Perspectives on the Wilsonian Conception*, 70 AM. J. INT'L L. 1 (1976); R. LANSING, THE PEACE NEGOTIATIONS: A PERSONAL NARRATIVE, 93-105 (1921). A territorial adjustment was hoped for "in substance (involving) particularly the destiny of the peoples in Eastern Europe, the Balkans, and the Middle East who were directly affected by the defeat or collapse of the German, Russian, Austro-Hungarian, and Turkish land empires." Emerson, *Self-Determination*, 65 AM. J. INT'L L. 459, 463 (1971) [hereinafter cited as Emerson]. However, theory diverged from practice, and States were not created on the basis of self-determination. See Sinha, *Is Self-Determination Passe?* 12

this effort, the doctrine suggesting that the national aspirations of a people should be recognized and acted upon had not yet been accorded formal attention as a guiding principle of international law. "The crucial innovation after World War I was self-determination's elevation to the status of an international touchstone of governmental legitimacy which could properly be encouraged or even enforced by the international community."¹⁰⁶

However, at that time in the doctrine's formation, there existed no accepted formula to determine at what point national groups should be allowed to exercise the right to determine their own fate.¹⁰⁷ A purely doctrinal application contained the potential for the creation of a nearly unlimited number of small States within existing independent States. The danger to vested interests inherent in that possibility impeded the development and the acceptance of the doctrine in a world still dominated by colonial structures.¹⁰⁸ During the period between the world wars, the question of the limits of the doctrine's applicability were not effectively resolved in the League of Nations.¹⁰⁹

B. *Development of the Doctrine in the United Nations*

The Charter of the United Nations makes direct reference to self-determination in Articles 1(2)¹¹⁰ and 55,¹¹¹ and mentions the principle in

COL. J. TRANSN'T'L L. 260, 267 (1973) [hereinafter cited as Sinha]. The view of classic writers in international law as to the principle of self-determination is reviewed in Dumbauld, *Independence Under International Law*, 70 AM. J. INT'L L. 425 (1976).

106. BUCHHEIT, *supra* note 79, at 4.

107. In 1920, the Aaland Islands sought annexation to Sweden, having been under the technical control of Finland. A League of Nations commission of three international jurists was instructed to report on the request. In the jurists' view,

[t]o concede to minorities of either language or religion, or to any fractions of the population, the right of withdrawing from the community to which they belong, because it is their wish or good pleasure, would be to destroy order and stability within States and to inaugurate anarchy in international life; it would be to uphold a theory incompatible with the very idea of a State as a territorial and political entity.

The Aaland Islands Question: Report Submitted to the League of Nations, LEAGUE OF NATIONS Doc. B. 7. 21/68/106 (1921). For the Islander's response to the Commission's position, see *Aaland Islands*, 7 LEAGUE OF NATIONS PUBLICATIONS (POLITICAL) c. 138 (1921) (response dated June 19, 1921).

108. Similar difficulties took place in the United Nations in its study of the reach of self-determination. See notes 113-129 *infra* and accompanying text. See also Gregory, *The Neutralization of the Aaland Islands*, 17 AM. J. INT'L L. 63, 76 (1923).

109. See BUCHHEIT, *supra* note 79, at 60-73.

110. U.N. CHARTER art. 1(2) reads: "The Purposes of the United Nations are: (2) To develop friendly relations among nations based on respect for the principle of equal rights and self-determinations of peoples and to take appropriate measures to strengthen universal peace." *Id.*

111. U.N. CHARTER art. 55 reads in part:

With 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 principles of equal rights and self-determination of peoples, the United Nations shall promote:

c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.

Id.

directly in Articles 73¹¹² and 76.¹¹³ Self-determination was a phrase understood by the majority of the delegates to the San Francisco Conference as an expression of the need to eliminate colonialism.¹¹⁴ The colonial condition was not only apposite to the flourishing doctrine of human rights which included, *inter alia*, freedom from political oppression, but presented the possibility of frequent and bitter local conflicts. The United Nations has committed itself to the eventual elimination of colonial political structures.¹¹⁵

In 1948, the Universal Declaration of Human Rights,¹¹⁶ while not specifically mentioning the words 'self-determination' pronounced that "the will of the people shall be the basis of the authority of government."¹¹⁷ This section implied that these 'peoples' were vested with the right to form new

112. U.N. CHARTER art. 73 reads in part:

Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust to promote to the utmost . . . the well-being of the inhabitants of these territories and, to this end

b. to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions . . .

Id.

113. U.N. CHARTER art. 76 reads in part:

"The basic objectives of the trusteeship system, . . . shall be:

b. to promote the political, economic, social and educational advancement of the inhabitants of trust territories, and their progressive development towards self-government or independence as may be appropriate . . ." *Id.* For discussions of Articles 73 and 76 of the U.N. Charter, see S. CALOGEROPOULOS-STRATIS, *LE DROIT DES PEUPLES A DISPOSER EUX-MÊMES*, 107-13 (1973) [hereinafter cited as CALOGEROPOULOS-STRATIS]; I. CLAUDE JR., *SWORDS INTO PLOWSHARES: THE PROBLEMS AND PROGRESS OF INTERNATIONAL ORGANIZATION* 349-76 (4th ed. 1971); Haas, *The Reconciliation of Conflicting Colonial Policy Aims: Acceptance of the League of Nations Mandate System*, 6 INT'L ORG. 521 (1952); C. TOUSSAINT, *THE TRUSTEESHIP SYSTEM OF THE UNITED NATIONS* (1956); D. HALL, *MANDATES, DEPENDENCIES AND TRUSTEESHIP* (1948).

114. See generally Hass, *The Attempt to Terminate Colonialism: Acceptance of the United Nations Trusteeship System*, 7 INT'L ORG. 1 (1953); Good, *The United States and the Colonial Debate, in ALLIANCE POLICY IN THE COLD WAR* 224-70 (A. Wolfers ed. 1959); Mustafa, *The Principle of Self-Determination in International Law*, 5 INT'L LAW. 479 (1971) [hereinafter cited as Mustafa]; BUCHHEIT, *supra* note 79, at 7; Sinha, *supra* note 105, at 271; Friedlander, *Self-Determination: A Legal-Political Inquiry*, 1 DET. C. L. REV. 71 (1975) [hereinafter cited as Friedlander]; R. HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* 100-03 (1963); Emerson, *Self-Determination Revisited in the Era of Decolonization*, in 9 OCCASIONAL PAPERS IN INTERNATIONAL AFFAIRS (Dec. 1964) [hereinafter cited as Emerson, *Self-Determination*].

115. See generally Jacobson, *The United Nations and Colonialism: A Tentative Appraisal*, 16 INT'L ORG. 37-58 (1962); D. WAINHOUSE, *REMNANTS OF EMPIRE: THE UNITED NATIONS AND THE END OF COLONIALISM* (1964); A. RIGO SUREDA, *THE EVOLUTION OF THE RIGHT OF SELF-DETERMINATION* 95-225 (1973) [hereinafter cited as SUREDA]; U. UMOZURIKE, *SELF-DETERMINATION IN INTERNATIONAL LAW* (1972) [hereinafter cited as UMOZURIKE]; CALOGEROPOULOS-STRATIS, *supra* note 113, at 115-33; Emerson, *Self-Determination*, *supra* note 114, at 42-62.

116. G. A. Res. 217, 3 U. N. GAOR, Supp. (No. 2), 71, U. N. Doc. A/810 (1948).

117. *Id.* at 75, art. 21(3).

political unions through a clear expression of their will. Shortly thereafter, the Economic and Social Council of the United Nations and the Committee on Human Rights were given the task of specifying the means by which 'peoples' could accede to power through the exercise of the right to self-determination.¹¹⁸

The focus of the ideological struggle among the various viewpoints centered on how to affirm self-determination for colonial peoples without promoting numerous separatist demands emanating from a non-colonial context.¹¹⁹ In 1966, the General Assembly adopted the International Covenant on Economic, Social and Cultural Rights¹²⁰ and the International Covenant on Civil and Political Rights,¹²¹ both of which affirmed that "[a]ll people have the right to self-determination. By virtue of the right they freely determine their political status and freely pursue their economic, social and cultural development."¹²²

The struggle over the extent to which the right could be applied is reflected in the 1960 Declaration on the Granting of Independence to Colonial Peoples and Countries.¹²³ Paragraph 2 of the Declaration contains precisely the same wording with respect to the right of self-determination that is used in the 1966 international covenants.¹²⁴ However, as will be discussed in Section D of this Comment, the right of self-determination may be severely curtailed as a result of an apparent prohibition of actions that would disrupt existing States.¹²⁵

118. Inclusion in the International Covenant on Human Rights of an article relating to the rights of peoples to self-determination, G. A. Res. 545, 6 U. N. GAOR, Supp. (No. 20), 36, U. N. Doc. A/2119 (1952). The idea of setting up such a Commission was first proposed in 1946. See Election of the Members of the Economic and Social Council, G. A. Res. 4, 1 U. N. GAOR, Supp. (No. 2), 4, U. N. Doc. A/64 (1946). For a review of the U.N.'s early history with respect to declarations of human rights, see Comment, *Entry Into Force of the International Covenants on Human Rights and the Optional Protocol to the International Covenant on Civil and Political Rights*, 70 AM. J. INT'L L. 511 (1976) [hereinafter cited as *Entry into Force*].

119. See BUCHHEIT, *supra* note 79, at 83-85.

120. G. A. Res. 2200, 21 U.N. GAOR, Supp. (No. 16), 49, U.N. Doc. A/6319 (1966) [hereinafter cited as *Economic Covenant*].

121. G. A. Res. 2200, 21 U. N. GAOR, Supp. (No. 16), 52, U. N. Doc. A/6316 (1966) [hereinafter cited as *Political Covenant*].

122. See *Economic Covenant*, *supra* note 120, art. 1(1); *Political Covenant*, *supra* note 121, art. 1(1). The Covenants did not enter into force until January 3, 1976. See *Entry into Force*, *supra* note 118, at 512.

123. G. A. Res. 1514, 15 U. N. GAOR, Supp. (No. 16), 66, U. N. Doc. A/4684 (1960) [hereinafter cited as *1960 Declaration*].

124. 1960 Declaration, *id.* art. 2 states: "All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development." *Id.* See *Economic Covenant*, *supra* note 122, art. 1(1), *Political Covenant*, *supra* note 121, art. 1(1).

125. See the 1960 Declaration, para. 6, which reads: "Any attempt at the partial or total disruption of the national unity and territorial integrity of a country is incompatible with the Purposes and Principles of the Charter of the United Nations." *Id.* See also notes 136-140 *infra*.

In 1970, the Declaration on Friendly Relations¹²⁶ reiterated the right of self-determination, but also called on member-States to assist in the promotion of legitimate efforts to achieve self-determination.¹²⁷ Similar to the 1960 Declaration, this Declaration adhered to the principle of territorial integrity with respect to a claim of self-determination,¹²⁸ thus, limiting the extent to which the right could be invoked. Territorial integrity was qualified in the text of the Declaration.¹²⁹

Whether or not Quebec could advance a legitimate claim to self-determination under the aegis of the declarations of the United Nations is dependent upon the traditional limitation of the right to colonial peoples and the relationship between the right of self-determination and secession.

C. *Traditional Limitation to the Colonial Context*

The majority of countries initially approving the United Nations Charter conceived that self-determination would only apply in those limited situations in which groups were politically and economically dominated by an alien ruling power.¹³⁰ It is not as clear that such a uniform view can be ascribed to the General Assembly's membership at the time of the announcement of the

126. Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G. A. Res. 2625, 25 U. N. GAOR, Supp. (No. 28), 121, U. N. Doc. A/5217 (1970) [hereinafter cited as 1970 Declaration]. An Optional Protocol was adopted the following year, which re-affirmed the principles of the 1970 Declaration *supra*. See Importance of the Universal Realization of the Right of Peoples to Self-Determination and of the Speedy Granting of Independence to Colonial Countries and Peoples for the Effective Guarantee and Observance of Human Rights, G. A. Res. 2787, 26 U. N. GAOR, Supp. (No. 29), 82, U. N. Doc. A/8543 (1971). That resolution has been affirmed in the following resolutions of the same title: G. A. Res. 2955, 27 U. N. GAOR, Supp. (No. 30), 63, U. N. Doc. A/8936 (1972); G. A. Res. 3070, 28 U. N. GAOR, Supp. (No. 30), 72, U. N. Doc. A/9030 (1973); G. A. Res. 3246, 29 U. N. GAOR, Supp. (No. 29), 87, U. N. Doc. A/9866 (1974); G. A. Res. 3382, 30 U. N. GAOR, Supp. (No. 30), 84, U. N. Doc. A/10309 (1975); G. A. Res. 31/34, 31 U. N. GAOR, Supp. (No. 30), 93, U. N. Doc. A/31/291 (1976); G. A. Res. 32/14, 32 U. N. GAOR, Supp. (No. 30), 133, U. N. Doc. A/32/318 (1977).

127. See 1970 Declaration, *supra* note 126, para. 2. It reads in part:

Every State has the duty to promote, through joint or separate action, the realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter . . .

(b) To bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned.

Id.

128. *Id.* Para. 7 states in part: "Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign or independent States . . ." *Id.* See also notes 181-187 *infra* and accompanying text.

129. See note 133 *infra*.

130. See notes 114-115 *supra*.

1960 and 1970 Declarations.¹³¹ However, it is possible to draw inferences as to intent from textual interpretation and subsequent practice.

Paragraph 1 of the 1960 Declaration prohibits the domination and exploitation of 'peoples' as a violation of human rights,¹³² and expands on the Assembly's concern for those rights by proclaiming that member-States must avoid interference in the affairs of other countries and respect the 'peoples' sovereign rights.¹³³ This provision is wide in scope. "An important aspect of the resolution is that it does not restrict the principle of self-determination, but extends the principle to all peoples. Both the preamble and the operative part of the resolution in effect refer to self-determination as a doctrine of universal applicability."¹³⁴ Nevertheless, even if one accepts this liberal interpretation, the question of whether self-determination was intended to apply to secessionist movements, is left unanswered.¹³⁵

Paragraph 6 of the 1960 Declaration demands that an already united country remain so: "Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the Purposes and Principles of the Charter of the United Nations."¹³⁶ On the one hand, the language of the paragraph appears to limit the acknowledgment of a secessionist right outside of the colonial context.¹³⁷ Following this approach, Quebec would find little support for a right to secede unless the Province could come forward with a claim for relief based upon an alleged colonial status, the practicality of which will be discussed below.¹³⁸ However,

131. See Nayar, *Self-Determination Beyond the Colonial Context: Biafra in Retrospect*, 10 TEX. INT'L L. J. 321, 335-37 (1975) [hereinafter cited as Nayar]; BUCHHEIT, *supra* note 79, at 85-97; see also Rosenstock, *The Declaration of Principles of International Law Concerning Friendly Relations: A Survey*, 65 AM. J. INT'L L. 713 (1971); Johnson, *Toward Self-Determination — A Reappraisal as Reflected in the Declaration on Friendly Relations*, 3 GA. J. INT'L & COMP. L. 145 (1973).

132. The 1960 Declaration, *supra* note 123, states: "The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world-peace and co-operation." *Id.* para. 1.

133. *Id.* Para. 7 states in part:

All States shall observe faithfully and strictly the provisions of the Charter of the United Nations, the Universal Declaration of Human Rights and the present Declaration on the basis of equality, non-interference in the internal affairs of all States, and respect for the sovereign rights of all peoples and their territorial integrity.

Id.

134. Nawaz, *The Meaning and the Range of the Principle of Self-Determination*, 1965 DUKE L. J. 82 [hereinafter cited as Nawaz].

135. BUCHHEIT, *supra* note 79, notes: "It is impossible to know how many statements containing the phrase "right to self-determination" were assumed by their authors to refer only to the process of decolonization and would be significantly recast under the influence of secessionist proposals." *Id.* at 20 (emphasis in original).

136. 1960 Declaration, *supra* note 123, para. 6.

137. See Emerson, *Self-Determination*, *supra* note 114, at 30.

138. See notes 160-168 *infra* and accompanying text.

it is possible to regard the paragraph as indicative of the desire of the United Nations to prevent member-States from interfering, either in support of or in opposition to disaffected elements, in countries actively engaged in the process of decolonization.¹³⁹ This view is bolstered by the principle of non-interference in Paragraph 7.¹⁴⁰ However, the view does not support Quebec's claim to self-determination since it simply states that third parties could not interfere with the Province's aspirations.

The self-determination language in the 1970 Declaration mirrors that of the 1960 Declaration, but with one important difference: the limitation placed upon the principle of territorial integrity. Paragraph 7 affirms that integrity but adds that it is to apply only to those "sovereign and independent states conducting themselves in compliance with the principles of equal rights and self-determination of peoples as described previously and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour."¹⁴¹ The precise scope of this limitation is important because in a literal sense the words suggest that a showing of unequal treatment for a particular race or group would activate a right of self-determination. French-Quebeckers believe that they can demonstrate this.¹⁴²

One view of the degree of the limitation is based on the effective control a government has over its territory. Generally, if a State possesses a representative government that serves all of the people within its territory, then it may be presumed to fulfill the requirements of the principles of equal rights and self-determination towards them.¹⁴³ However, this approach is inadequate in several respects. It does not address the manner in which control is exercised given the specific call for equal rights within the 1970 Declaration;¹⁴⁴ rights which are not *de facto* preserved within the vague concept of 'representative government.' The presumption that representative government *per se* satisfies

139. Compare note 137 *supra* with Suzuki, *Self-Determination and World Public Order: Community Response to Territorial Separation*, 16 VA. J. INT'L L. 779 (1976) [hereinafter cited as Suzuki]. Suzuki believes that Paragraph 6 outlined

[t]he expectation shared by all participants in the Declaration, . . . that colonial powers should have avoided intervention in a decolonization process that had caused unfortunate partitions, such as the Ewe separation, the Somali separation, "Mauritanization," and Katanganization The participants were primarily concerned with averting possible attempts at disruption by *third parties, particularly by colonial powers.*

Id. at 842-43 (emphasis added).

140. See note 133 *supra*.

141. 1970 Declaration, *supra* note 126, para. 7.

142. See notes 11-12, 82 *supra*.

143. This was the substance of proposals submitted by the United States and Great Britain to the Special Committee on Friendly Relations. See Report of the Special Committee on Principles of International Law Concerning Friendly Relations and Co-operation Among States, 24 U.N. GAOR, Supp. (No. 19), 50-52, paras. 140(B), 142(4), U. N. Doc. A/7619 (1969).

144. 1970 Declaration, *supra* note 126, para. 1. It states in part: "By virtue of the principle of equal rights and self-determination of peoples . . . all peoples have the right to freely determine . . . their political status and to pursue their economic, social and cultural development." *Id.*

the obligation of States under the Declaration, was rejected expressly by the draftsmen.¹⁴⁵

A more reasonable view, based on the language of Paragraphs 3 and 7 of the 1970 Declaration, removes the presumption that a *de facto* representative government satisfies the demand placed upon member-States. Emphasis is placed on representative government as a continuing process¹⁴⁶ and the requirement that States 'promote' and 'respect' equal rights and self-determination as described within the text of the Declaration.¹⁴⁷ This interpretation gives greater force to a claim for secession from an existing State since it implies that a member-State is required to recognize and act upon the aspiration of 'peoples' living within its borders.

In the context of Quebec, this viewpoint reflects the opinion of various constitutional commissions over a period of time that the Province should be allowed to secede if voters in the Province so choose.¹⁴⁸ However, when Canada became a signatory of the 1970 Declaration, it was made clear that she understood the Declaration to apply solely to the colonial situation.¹⁴⁹

Despite the seemingly inevitable clash between the principle of territorial integrity and self-determination, "the former must, under present international law, give way to the latter."¹⁵⁰ A limitation upon the right of secession that gives priority to the maintenance of territorial integrity over claims to in-

145. BUCHHEIT, *supra* note 79, at 93 n. 212.

146. Under this formulation of the principle, if a government does not represent the governed, and if peoples within a state are denied equal rights and are discriminated against, their right to self-determination will revive. In other words, the right to self-determination is a continuing right.

Nayar, *supra* 131, at 338. See note 153 *infra* and text accompanying notes 188-192 *infra*.

147. See note 133 *supra*.

148. See note 69 *supra*.

149. "[N]ote that many States that approved the 1970 Declaration, like Canada, did not fail to underline in so doing, that in their view the Declaration applied to colonial situations and not to causes arising in established States." BROSSARD, *supra* note 10, at 101 (author's translation).

150. UMOZURIKE, *supra* note 115, at 187. The author continues:

There is little disposition to investigate the question of human rights and self-determination within a member-state; the lethargic attitude toward the Sudan, where a civil war had been raging and to Lesotho, where the ruling Basutoland National Party seized power after losing the election held in January 1970 are recent examples.

Id.

Former Secretary-General U Thant expresses a different view:

[A]s far as the question of secession of a particular section of a Member-State is concerned, the United Nation's attitude is unequivocal. As an international organization, the United Nations has never accepted and does not accept and I do not believe will ever accept, the principle of secession of a part of its Member-State.

Secretary-General's Press Conference, 7 U. N. MONTHLY CHRONICLE 30, 36 (Oct. 1970).

His view has been specifically criticized because "it risks being out of tune with what may well be the next incarnation of self-determination when the peoples now subjected to what they regard as alien rule in states composed of heterogenous elements rise up and demand the right to rule themselves." Emerson, *supra* note 105, at 464. For further criticism, see also BROSSARD, *supra* note 10, at 106-07; CALOGEROPOULOS-STRATIS *supra* note 113, at 191-94.

dependent political identity would severely limit the instances of the exercise of the right to self-determination.¹⁵¹

1. The Practice of the United Nations

While the 1970 Declaration affords some limited acceptance of a right to secession, the practice of the United Nations does not lend a great deal of support to the idea of secession for Quebec. The dominant view has circumscribed the application of self-determination to colonial groups anxious for self-rule.¹⁵² By implication, the principle of territorial integrity has been difficult for claimant States to overcome.¹⁵³ It is not likely that this limitation on the principle will be significantly compromised in the near future.¹⁵⁴ Even

151. See Emerson, *supra* note 105, at 464.

152. See note 150 *supra*. See also BUCHHEIT, *supra* note 79, at 87. For discussions of the above examples, see generally CALOGEROPOULOS-STRATIS, *supra* note 113, at 296-301, 342-48; Suzuki, *supra* note 139, at 780-830; BUCHHEIT, *supra* note 79, at 141-53, 162-76, 198-215; Tiewul, *Relations Between the United Nations Organization and the Organization of African Unity in the Settlement of Secessionist Conflicts*, 16 HARV. INT'L L. J. 259, 262-66 (1975) [hereinafter cited as Tiewul]; Ijalaye, *Was "Biafra" at any Time a State in International Law?*, 65 AM. J. INT'L L. 551 (1971) [hereinafter cited as Ijalaye]; Panter-Brick, *The Right to Self-Determination: Its Application to Nigeria*, 44 INT'L AFF. 254 (1968); C. O'BRIEN, *TO KATANGA AND BACK: A U.N. CASE HISTORY* (1962); Akindele, *The Organization of African Unity and the United Nations: A Study of the Problems of Universal-Regional Relationship in the Organization and Maintenance of International Peace and Security*, 9 CAN. Y. B. INT'L L. 30 (1971); Post, *Is There a Case for Biafra?*, 44 INT'L AFF. 26 (1968); S. CRONJE, *THE WORLD AND NIGERIA: THE DIPLOMATIC HISTORY OF THE BIAFRAN WAR 1967-1970* (1972); Lemarchand, *The Limits of Self-Determination: The Case of the Katanga Secession*, 56 AM. POL. SCI. REV. 404 (1962); G. MARTELLI, *EXPERIMENT IN WORLD GOVERNMENT: AN ACCOUNT OF THE UNITED NATIONS OPERATION IN THE CONGO 1960-1964* (1966); *Civil War in Pakistan*, 4 N. Y. U. J. INT'L L. & POL. 524 (1971); K. MISRA, *THE ROLE OF THE UNITED NATIONS IN THE INDO-PAKISTANI CONFLICT, 1971* (1973); Nanda, *Self-Determination in International Law: The Tragic Tale of Two Cities-Islamabad and Dacca*, 66 AM. J. INT'L L. 321 (1972).

153. See SECRETARIAT OF THE INTERNATIONAL COMMISSION OF JURISTS, *THE EVENTS IN EAST PAKISTAN, 1971: REPORT* (1972). In the Committee's investigation of the principle of territorial integrity as expressed in the 1970 Declaration, it discussed whether secession could be allowed when a group had already exercised their right to self-determination at one point in their history. It noted that

[i]t is a widely held view among international lawyers that the right of self-determination is a right that can be exercised once only. According to this view, if a people or their representatives have once chosen to join with others within either a unitary or federal state, that choice is a final exercise of their right to self-determination; they cannot afterwards claim the right to secede under the principle of the right to self-determination. It was on this principle that the claim to independence . . . of Biafra in the Nigerian civil war resisted.

Id. at 69. However, the Committee limited the applicability of the 'once only' doctrine by declaring that the right to self-determination is revived if a 'peoples' are denied equal rights. *Id.*

The Committee's interpretation is consistent with the idea that the 1970 Declaration establishes rights of a continuing nature and that in order to support a claim for secession, a major deprivation of rights must be demonstrated. See note 146 *supra* and note 182 *infra*. For criticisms of the 'once only' doctrine, see notes 188-192 *infra*.

154. For the United States and British position, see note 143 *supra*. Canada also expressed reservations about the scope of the 1970 Declaration, *supra* note 126, when she became a

newly-formed States on the African continent, do not support the right to self-determination insofar as the right may impinge on existing political structures.¹⁵⁵

It is difficult to predict what the opinion of the United Nations might be when confronted with a secessionist claim from a territory that is a part of the Western bloc of nations.¹⁵⁶ Despite abuses of human rights in some former colonial States, the United Nations has been reluctant to recognize secessionist demands.¹⁵⁷ This reluctance points out the *de minimus* impact of the much-discussed obligation of member-States to be an effective and representative government for all peoples within their territories that appears in Paragraph 7 of the 1970 Declaration.¹⁵⁸ The presumption in favor of territorial integrity is so great that the death of millions of human beings in Bangla Desh in the early 1970's produced a slow, mixed reaction from the United Nations.¹⁵⁹ In the case of Quebec, where any alleged violations of rights are on an entirely different plane in terms of their severity, convincing the international body that relief is necessary would indeed be a difficult task.

2. Characterization of Quebec as a Colony

If it is possible to characterize Quebec as a colony, then the legitimacy of the Province's claim of self-determination will be enhanced significantly.

signatory. See note 149 *supra*. A similar reservation was expressed when she agreed to the terms of the Helsinki Declaration.

States with militant minorities, such as Canada and Yugoslavia, felt the need for a "balancing element", which was a euphemism for a limit to the application of the principle to national minorities in order to avoid any implication that the principle (of self-determination) could be used to bring about the dissolution of federated states comprised of peoples of different nationalities or other minorities.

Russell, *The Helsinki Declaration: Brobdingnag or Lilliput?*, 70 AM. J. INT'L L. 242, 269-70 (1976).

155. Secessionist movements have been condemned by the O.A.U. Nayar, *supra* note 131, at 326. The Charter of the Organization of African Unity is reproduced at 479 U.N.T.S. 39 (1963). Two reasons are submitted for their position. First, the large number of ethnic minority groups on the continent, estimated to be 2,000. Nayar, *supra* note 131, at 327. Second, the preservation of existing arrangements as a matter of self-interest. See Ijalaye, *supra* note 152, at 556 (quoting former emperor Haile Selassie); see also Tiewul, *supra* note 152, at 300-01.

One writer comments on the meaning of the O.A.U. position: "The principle of self-determination is apparently now that of *selective* self-determination, to be applied only in non-African or perhaps non-Third World situations. In other words, it is purely a political concept," Friedlander, *supra* note 114, at 86 (emphasis in original). See also notes 194-197 *infra*.

156. The O.A.U. position, read literally, applies only to the integrity of the African Continent. That body may not pay a great deal of attention to the territorial integrity of lands that are linked to Africa's former colonizers, Great Britain and France. For an argument that the U.N.'s deliberations are essentially *ad hoc*, see notes 194-197 *infra*.

157. For a review of the Biafran, Congolese and the Bangladesh secession movements see note 152 *supra* and note 159 *infra*, and sources cited therein. For the Somalia-Kenya-Ethiopia and Nagas dispute, see BUCHHEIT, *supra* note 79, at 176-97 and sources cited therein.

158. See note 128 *supra*.

159. See BUCHHEIT, *supra* note 79, at 198-215; see also note 152 *supra*.

However, this is a difficult assertion. Premier Lévesque has not lost any opportunity to dress Quebec in colonial garb,¹⁶⁰ based largely on economic inequality¹⁶¹ and enforced cultural inferiority. Despite the self-serving nature of his remarks, they are partially accurate. Even the 1979 Task Force on Canadian Unity, an avowedly 'federalist' organization, has recognized the disparate treatment of French-Quebeckers over the course of Canadian history.¹⁶² Others regard the French in Quebec as the only ethnic group in the Western Hemisphere that has yet to be liberated from the grasp of the seventeenth and eighteenth century European colonial powers.¹⁶³

Yet, Quebec lacks an important feature of classic colonial domination: a denial of adequate political representation.¹⁶⁴ There is no significant restriction on Quebec's full political participation in the Confederation. In addition, Quebec's separate system of civil laws has been respected,¹⁶⁵ and at least three of the nine judges sitting on the Canadian Supreme Court must be drawn from the Province.¹⁶⁶

There is some evidence suggesting that Quebec suffers economically from Confederation.¹⁶⁷ Further, it cannot be denied that the *mentalité* dominating Anglo and French Canadian history has some similarity to the colonial pattern.¹⁶⁸ The feeling among many Quebeckers is that the present struggle is aimed at ensuring their survival as a distinct culture and hence a 'peoples.' However, there is little doubt that a list of grievances does not support a claim of colonial status. Quebec, first and foremost, is a full-fledged participating member of the Canadian Confederation. It is not merely a political colony.

D. *Requisites for a Claim of Self-Determination*

It is clear from the language of Paragraph 7 of the 1970 Declaration and the subsequent practice of the United Nations, that a group wishing to claim the

160. For example, Premier Lévesque has stated that "we are a colonial setup and I think that colonial setups, in many ways have had their day." Lévesque Interview, *supra* note 12, at 3. "All told, it hasn't been such a bad deal, this status of inner colony in a country owned and managed by another national entity. Undoubtedly, French Quebec was (as it remains to this day) the least ill-treated of all colonies in the world." Lévesque, *Independent Quebec*, *supra* note 74, at 737. See also BROSSARD, *supra* note 10, at 223-26; R. BARBEAU, *LE QUÉBEC: EST-IL UNE COLONIE?* (1962).

161. See notes 12, 18 *supra*.

162. TASK FORCE, *supra* note 3, at 23-25.

163. J. HARBRON, *CANADA WITHOUT QUEBEC* (1970) [hereinafter cited as HARBRON]. The author discusses Spanish and Portuguese liberation movements in the Americas and mentions that French-Quebec's efforts at independence should be viewed as part of this continent's historical evolution. *Id.* at 13-38.

164. BNA Act, 1867, 30 & 31, Vict., c. 3, arts. 22, 40, 71-73, 86-87, 92; BNA Act, 1915, 5 & 6 Geo. 5, c. 45, art. 1 (ii).

165. See notes 5-7 *infra*.

166. See The Supreme Court Act, CAN. REV. STAT. c. 259, § 6 (1952).

167. See notes 12, 18 *supra*.

168. "From the psychological point of view and perhaps even from a socio-cultural viewpoint, the majority of English-Canadians and the majority of French-Quebeckers conform remarkably

right of self-determination must demonstrate a wholesale deprivation of basic rights. This standard is not met by reference to ethnic distinctiveness.

The mere claim of a particular form of self-determination, such as independence, does not make it *ipso facto* a question of self-determination in international law. The action of the government complained of must amount, in the words of the committee of jurists, to a manifest and continued abuse of sovereign power, to the disfavor of a section of the population.¹⁶⁹

Presumably, if a substantial question existed as to the treatment accorded a particular group, a claim of self-determination could be asserted. That group would be required to demonstrate the exhaustion of local remedies.¹⁷⁰ Several characteristics are necessary before a claim of self-determination can be advanced by a group.

1. Composition of Groups or Peoples

For a proper claim of self-determination, the complaining group must possess features which identify a separate political grouping and a cultural uniqueness, *e.g.*, compatible basic values, unbroken links of communication, an expanding elite, and mobility.¹⁷¹ Features of distinct political groups include a centralized population, majority status in a particular territory, established territorial boundaries, the desire to live as one and the existence of a political organization.¹⁷² The third element, essentially an indicator of national consciousness, has been regarded as an indispensable element for a proper claim of self-determination.¹⁷³

There are a number of objective criteria that can be employed to determine whether a national consciousness does exist. These criteria include elements of a racial, historic, geographic, ethnologic, economic, linguistic and religious character.¹⁷⁴ Language, culture and history are the foundations for determining

well to the portraits of colonizers and colonized.' BROSSARD, *supra* note 10, at 226 (author's translation).

169. UMOZURIKE, *supra* note 115, at 196.

170. *See id.* at 199; I. DELUPIS, INTERNATIONAL LAW AND THE INDEPENDENT STATE 17 (1974).

171. K. DEUTSCH, NATIONALISM AND ITS ALTERNATIVES 108-12 (1969). *See also* List of Factors Indicative of the Attainment of Independence or other Separate System of Self-Government, G. A. Res. 742, 8 U. N. GAOR, Supp. (No. 17), 21, U. N. Doc. A/2630 (1953).

172. BROSSARD, *supra* note 10, at 108-09.

173. National consciousness,

[W]hen active, . . . constitutes a bond between the members of a group in regard to the pursuit of certain aims, the foremost of which is a striving for a national personality.

When the latter is dominant, the group, as a whole, desires to have a separate identity, to be sovereign among other peoples by means of a separate and independent status.

H. JOHNSON, SELF-DETERMINATION WITHIN THE COMMUNITY OF NATIONS 21 (1967) [hereinafter cited as JOHNSON].

174. BUCHHEIT, *supra* note 79, at 10.

whether a distinct populace exists. Language is by far the greatest differentiator.¹⁷⁵

The question of whether Quebec can legitimately claim a right to self-determination is based on the degree to which the 'people' of Quebec are held to satisfy the objective criteria mentioned above. As has been seen, the *Québécois* do meet many, if not all, of these objective criteria.¹⁷⁶ They adhere to a separate language, church, and legal tradition.

History, language, law, ethnicity, feelings and politics render Quebec at once a society, a province and the stronghold of the French-Canadian people. Taken together, these factors produce in the *Québécois* a vision of Quebec as the living heart of the French presence in North America . . . (t)he shared desires, aspirations and even fears of the collectivity provide perhaps the most compelling evidence in support of Quebec's cultural distinctiveness.¹⁷⁷

There is little doubt that the French inhabitants of Quebec do constitute a 'people' for purposes of invoking a claim of self-determination.

2. Additional Requirements for a Secessionist Claim

There has been a reluctance on the part of members of the international community to allow a claim of self-determination when the question of secession is involved.¹⁷⁸ Although no principle of international law bars all secessions,¹⁷⁹ there are greater burdens imposed on a 'people' desirous of withdrawing from an existing State. When a request for secession from an existing State is advanced, the factors of ethnicity and language are not as supportive of a claim for relief as in the case of colonial self-determination. The distinct culture is regarded as having certain political and other rights within their existing State. Thus the need for relief is less severe.¹⁸⁰

These additional requirements include consent of the State from which

175. "Historically, since the nineteenth century, language has served as the point of departure for nearly all the seizures of consciousness and the majority of the definitions of communities and nationals." BROSSARD, *supra* note 10, at 66-67 (author's translation).

176. See notes 3-4 *supra*.

177. TASK FORCE, *supra* note 3, at 24-25. For a discussion of Quebecers as a 'people', see Note *Self-Determination in the Post-Colonial Era: The Case of Quebec*, 1 A.S.I.L.S. INT'L L. J. 47, 49-51 (1977).

178. See notes 153-159 *supra*.

179. UMOZURIKE, *supra* note 106, at 199.

180. While members of national minorities have political rights, they do not necessarily have the right to carve out a State. See JOHNSON, *supra* note 173, at 57. The former Prime Minister of Canada, M. Trudeau, is of the belief that ethnicity is not an adequate basis for a claim to independent status, finding that "a state that defined its function essentially in terms of ethnic attributes would inevitably become chauvanistic and intolerant." TRUDEAU, *supra* note 3, at 4.

secession is sought,¹⁸¹ or, alternatively, sufficient reasons, which allege a denial of basic rights, to leave the State.¹⁸² Further it must be shown that separation will not cause the remaining State undue economic and political harm.¹⁸³ In addition, one school of thought asserts that the right of secession cannot be invoked when a 'people' have at some point in their history chosen the terms of their political allegiance. The first two issues have been addressed *supra*,¹⁸⁴ while the latter two will be discussed *infra*.

The secession of the Province of Quebec would divide Canada into two parts, cutting the Maritime Provinces off from the rest of the country. In cases of secession since 1945, no similar geographical separation has occurred. In other instances, the separating region was located at an extremity of the affected country or was apart from the mainland entirely.¹⁸⁵ In response to this concern, however, the P. Q. has indicated that it intends to allow the free passage of goods and people.¹⁸⁶ Given the sophisticated transportation system that already serves the area, the concern is less important than it would be in a less developed country. Moreover, the P. Q. has expressed its desire to form an economic association with the rest of Canada.¹⁸⁷ If Ottawa and the other provinces refuse to negotiate the question of economic association, they will undermine the significance of the argument that the physical break-up of the country would cause undue hardships.

181. For discussion of the difficulties Quebec would encounter in attempting to convince the other provinces to allow it to secede, *see* notes 18, 68-92 *supra*.

182. What seems to be required is a denial of political freedom and/or human rights as a *sine qua non* for a legitimate separatist claim. This does not of course totally invalidate the claims of, for instance, the French Canadians, American Blacks, Welsh or Bretons, but it does suggest that their respective States are under no obligation imposed by international law to recognize their demands beyond providing protection for human rights . . .

BUCHHEIT, *supra* note 79, at 94. For a summary of Quebec's arguments in this regard, *see* notes 11-12, 82 *supra*.

183. *See, e.g.*, Bowett, *Self-Determination and Political Rights in Developing Countries*, 1966 AM. SOC'Y INT'L L. PROC. 129. He suggests that secession "cannot result in a miniscule without economic or political viability, and the remaining State cannot be deprived of its economic base." *Id.* at 131. For a discussion of the application of this principle to Katanga, Pakistan and Biafra, *see* Suzuki, *supra* note 139, at 824-26. *But see* Richardson, *Self-Determination, International Law and the South African Bantustan Policy*, 17 COLUM. J. TRANSNT'L L. 185 (1977). It is argued that "[t]he case of Katanga indicates that the legality of such actions [secessionist] is not to be determined by the economic viability of the breakaway territory but by an authoritative assessment of the legitimacy, under international community policies, of the entire process of secession." *Id.* at 202.

184. *See* notes 11-12, 82, 181-182 *supra*.

185. "Singapore, Senegal, Katanga, and Biafra were situated at one of the extremities of the States concerned . . . Syria, Jamaica, Bangladesh and South Rhodesia, were separated completely from a geographic standpoint, from the rest of the State that they separated from." BROSSARD, *supra* note 10, at 178 (author's translation).

186. NEW DEAL, *supra* note 7, at 58.

187. *See* note 18 *supra*.

Under the principle that a 'people' can choose their political fate only once, "groups do not retain any residual rights of self-determination in the form of an option unilaterally to secede from the society and extinguish its existence."¹⁸⁸ Such a position is not acceptable for the following reasons.

First, the provisions of the 1970 Declaration require that a State respect the rights of its people on a continuous basis.¹⁸⁹ A United Nations Committee of Jurists has interpreted those provisions as implying that, if human rights are violated, the right to self-determination is revived.¹⁹⁰

Second, it is arguable that French-Canadians have never completely accepted Confederation. At the founding conference of 1864-1865, of the 49 deputies representing the area of Lower Canada (Quebec), two of whom were English, the vote in favor of Union was 27-22.¹⁹¹ To maintain that this inconclusive vote stand, *ad infinitum*, as an unalterable commitment to Confederation, without the opportunity to determine whether support for the arrangement continues, removes meaning from free choice.¹⁹²

It appears, then, that some of the additional burdens imposed on a 'people' wishing to secede from an existing union can be met by the Province. Also, Quebec might be able to employ the treaty doctrine of *rebus sic stantibus* in support of its appeal.¹⁹³ Whether Quebec's claim will be accepted is another question, the answer to which ultimately depends on a display of political strength.

E. Self-Determination — A "Political Doctrine"

Regardless of the appropriateness of Quebec's claim to self-determination, it must be observed that the fate of the Province is as much a matter of politics as it is of law. The abstract existence of a right is given value only if it can be exercised by those wishing to invoke it. It is certain that legality affects the extent to which a right is enjoyed. Legal support for an avowedly political deci-

188. BUCHHEIT, *supra* note 79, at 21.

189. See notes 146 & 153 *supra*.

190. See note 153 *supra*.

191. See NEW DEAL, *supra* note 7, at 9. This conflicts slightly with a figure given earlier. See note 10 *supra*. There is no apparent reason for the disparity.

192. See BROSSARD, *supra* note 10: "In an ever-changing world, that will no doubt be so in the future, it is unthinkable that the decision of a group of men, at a given moment, could serve as a perpetual tie for their descendants." *Id.* at 85 (author's translation).

193. *Rebus sic stantibus* is an objective rule of law by which a fundamental change of circumstances, under certain conditions, may be invoked by a party as a ground for terminating a treaty. 1 G. SCHWARTZENBERGER, A MANUAL OF INTERNATIONAL LAW 158 (1960). Quebecers would contend that the circumstances under which it signed the Confederation 'treaty' have changed, warranting their withdrawal from the Union. See note 20 *supra*. A full discussion of the doctrine's applicability to Quebec is beyond the scope of this Comment. See generally Lissitzyn, *Treaties and Changed Circumstances*, 61 AM. J. INT'L L. 895 (1967). For the doctrine's application to a particular dispute, see Comment, *An Examination of the Treaties Governing the Far-Eastern Sino-Soviet Border in light of the Unequal Treaties Doctrine*, 2 B.C. INT'L & COMP. L. REV. 445 (1979).

sion fosters greater public support for a cause which, in its context, seeks to promote the interests of inhabitants. An argument exposing an unequivocal legal right authorizing Quebec's separation would unquestionably promote support for the Parti Québécois' effort.¹⁹⁴

Ultimately, "so far as self-determination is concerned, principles and rights are usually subordinate to political events and to the hard facts of success or failure. People who succeed in establishing themselves as distinct political communities generally will secure appropriate international recognition in due course."¹⁹⁵ Previous examples of national minority efforts indicate that the success of a claim is related to the success that a group is able to achieve in a display of strength.¹⁹⁶ The decision as to whether a 'people' exists has, in practice, been an *ad hoc* one.¹⁹⁷

It is not suggested that this *ad hoc* recognition be the standard by which secessionist claims are judged and legalized. Such an approach lacks any systematic examination of the validity of their claims. General standards, especially those contained in the 1970 Declaration concerning the obligation of States to promote and respect the equal rights of all within their borders,¹⁹⁸ offer means through which a claim of self-determination (secession) can be assessed. In a world composed of varying political systems, those standards inevitably will be applied in various ways. However, predictability and precedent are lost when the events of the moment are permitted to dictate the international community's response to specific demands. A systematic analysis of the problem would require that the Province prepare a dossier outlining their objections to the present Union.

IV. CONCLUSION

This Comment has sought to explore the legal avenues available to the people of Quebec in their search for sovereignty and to assess the implications

194. See Mayer, *supra* note 41, at 61. For discussion of the referendum, see notes 16-19 *supra*.

195. TASK FORCE, *supra* note 3, at 113. "In cases of secession, it is less a question of right than of success or failure." JOHNSON, *supra* note 173, at 50.

From its Wilsonian origins, the concept of self-determination has been more an instrument of international politics than a humanitarian principle associated with the law of nations, . . . The principle was distorted in practice, and the net result has been to turn it into an ideological weapon which, though purporting to champion popular sovereignty on a global scale, actually serves to perpetuate the deep divisions between the countries of the Third World and their former colonial masters.

Friedlander, *supra* note 114, at 87-88.

196. "It was not the 'right' of national self-determination which triumphed in East Pakistan but Indian military might. Bangladesh succeeded where Biafra failed because it had the strong support of an effective political ally." *Id.*

197. "We arrive at the conclusion, after considering the contemporary practice of the United Nations, that its organs are called upon to pronounce *ad hoc* if a people — whether they are a nation or not — have the elements necessary to benefit from a proper disposition by that body. CALOGEROPOULOS-STRATIS, *supra* note 113, at 26 (author's translation). See also note 195 *supra*.

198. See note 147 *supra*.

of choosing a particular course of action. Some firm conclusions are possible. First, Quebec must seek an internal solution to the rift that divides the two ethnic groups. The success of the Province's intra-Canadian effort is, for most purposes, dependent upon the P. Q.'s ability to rally widespread provincial backing and enlist the support of English-Canadians in the rest of the country. Whether adequate support exists in Quebec will not be conclusively demonstrated until the mid-1980 referendum. Trans-Canadian support will probably never be forthcoming, but a reluctant acquiescence on the part of the English would have the same effect. Second, it is clear that any solution will occur within the political system and will not result from violence. This is manifested by Canada's foreign policy, which evidences a preference for the peaceful resolution of disputes. Finally, the international community will fulfill a secondary role. International bodies will become involved only if Quebec is unsuccessful in its search for an internal solution and the people of Quebec suffer a requisite harm as a result.

It is suggested that the next decade will witness profound changes in the Canadian political system. The English first exercised their control in the 1760's and solidified it in 1867. Resistance to the structures they erected has never been stronger and nothing on the horizon suggests that the resolve of the Quebecers will wane. Whatever form the changes take, Quebec will move inexorably forward and it appears likely that Quebec will come to exercise greater control over its destiny.

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