Autonomy and Self-determination

Between Legal Assertions and Utopian Aspirations

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12. Self-determination, autonomy, independence, and the case of Québec

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Enshrined in 1945 as a principle in the United Nations Charter[1] and consecrated in 1966 as a collective and universal right in the International Covenants on Human Rights,[2] the concept of self-determination has long been the foundation on which peoples have based their claim to freely determine their political status and freely pursue their economic, social and cultural development. The exercise of the right to self-determination can lead to claims for autonomy – or internal self-determination – or for full independence – or external self-determination.[3] While certain peoples are content with various degrees of autonomy, others have resolved to pursue full independence. For more than 50 years, Québec has straddled both options.[4]

[1] UNCIO, vol 15, p 365 (San Francisco, 26 June 1945), Bevans, vol 3, p 1153, Stat, vol 59, p 1031, TS No 993, *entered into force* 24 Oct 1945, art. 1(2).

[2] International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights (New York, 16 Dec 1966) UNTS, vol 999, p 171 and UNTS, vol 1057, p 407, *entered into force* 23 Mar 1976, art. 1.

[3] See Gilbert Geoff, 'Autonomy and Minority Groups: A Right in International Law' (2002) 35 *International Law Journal* 307; Akihisa Matsuno, 'Ethnic Groups' Right to Independence: Self-determination, Secession and the Post-Cold War International Relations' (Asia Peacebuilding Initiatives 2015) <http://peacebuilding.asia/ethnic-groups-right-to-independence-self-determinationsecession-and-post-cold-war-international-relations/#comment-115> accessed 31 July 2017.

[4] See Marc Chevrier, *Canadian Federalism and the Autonomy of Québec: A Historical Viewpoint* (Québec, ministère des Relations internationales, Gouvernement du Québec 1996) <https://english.republiquelibre.org/Canadian_federalism_and_the_autonomy_of_Québec:_A_historical_viewpoint> accessed 31 July 2017 and Daniel Turp, *Essais sur le droit du Québec à disposer de*

Since it passed under the yoke of the British Empire with the Conquest of 1759, formalized by the Treaty of Paris in 1763, Québec has consistently struggled for autonomy within British North America. After the Royal Proclamation of 1763,[5] the British North America (Quebec) Act 1774[6] granted limited autonomy to Québec through the reinstatement of French civil law in matters of private law, as well as with the restoration of the freedom to exercise the Catholic faith.[7] Although Lower Canada – as Québec was then known – was deprived of a significant part of its territory, the Constitutional Act 1791[8] also granted it a further degree of self-government with the creation of both a Legislative Assembly and a Legislative Council.

This additional autonomy was short-lived, however. After efforts to obtain responsible government and the 1837–8 rebellions, epitomized by the Declaration of Independence of Lower Canada,[9] the British Parliament adopted the Act of Union 1840,[10] which put an end to the institutional autonomy of Lower Canada. This Act merged Lower Canada's institutions with those of Upper Canada, in order to create the Province of Canada, comprised of a Canada West (today's Ontario) and Canada East (today's Québec). Implementing the infamous Durham Report,[11] this forced union deprived Lower Canadians, who now identified themselves as French Canadians, of the legislative autonomy they

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lui-même/The Right to Choose: Essays on Quebec's Right of Self-determination (Thémis 2001).

[5] 'The Royal Proclamation: October 7, 1763' <http://avalon.law.yale.edu/18th_century/proc1763.asp> accessed 15 August 2017. On the consequences the Proclamation had on Québec, see Ghislain Otis, 'The Impact of the Royal Proclamation of 1763 on Québec: Then and Now' (LCAC Creating Canada Symposium, Gatineau, 7 October 2013) <https://www.academia.edu/6703204/The_Impact_of_the_Royal_Proclamation_of_1763_on_Quebec_Then_and_Now> accessed 15 August 2017.

[6] (14 Geo 3 c 83).

[7] See Reginald Coupland, *The Quebec Act* (Clarendon Press 1968).

[8] The Clergy Endowments (Canada) Act 1791 (31 Geo 3 c 31).

[9] To read this Declaration, see George Aubin, *Robert Nelson: Déclaration d'indépendance et autres écrits* (Comeau & Nadeau 1998).

[10] British North America Act 1840 (3 & 4 Victoria c 35).

[11] See John Lambton, Earl of Durham, Her Majesty's Commissioner, *Report on the Affairs of British North America* (first published in 1838, Clarendon Press 1912). The following excerpt of the Report has been oft-quoted: 'There can hardly be conceived a nationality more destitute of all that can invigorate and elevate a people. That which is exhibited by the descendants of the French in Lower Canada, owing to their retaining their peculiar language and manners. They are a people with no history and no literature.' Assimilation of the French

had previously acquired.[12] There was, however, a continued resistance to the abrogation of such autonomy as well as to other measures such as the exclusive use of English in legislative documents of the legislature of the new Province of Canada.[13]

The Province of Canada was short-lived, however, and the Imperial Parliament finally enacted the Constitution Act 1867,[14] which is still the major component of Canada's fundamental law today. It confers constitutional autonomy upon the provinces within the Canadian federal system. Legislative, executive and judicial in scope, it allows the provinces to design, shape and implement their own political institutions. Since 1867 and through its successive provincial governments, Québec has attempted to extend this political autonomy. Over the 150 years of the Canadian federation, however, its claims for more political autonomy have consistently been met with resistance by the federal and other provincial governments in Canada.

Yet there was continuous growth in Québec's independence movement and the invocation of the right to self-determination as witnessed, which was exercised in a first referendum held on 20 May 1980 and where 40.44 percent supported the proposal for sovereignty-association. In a second referendum on Québec's independence, held on 30 October 1995, the pro-sovereignty movement lost by a narrow margin, with 49.42 percent voting in favour of Québec's independence.[15]

Canadians is seen as the optimal solution, and as Lord Durham suggested: 'Lower Canada must be governed now, as it must thereafter, by an English population; and thus, the policy which the necessities of the moment force on us as in accordance with that suggested by a comprehensive view of the future and permanent improvement of the province.'

[12] It is interesting to note that the legislation adopted by Lower Canada's legislative institutions between 1791 and 1840 remained in force in Canada East and that, although Lower Canada did not exist anymore, the civil code adopted in 1865 by the legislature of the Province of Canada was entitled the Civil Code of Lower Canada, which came into force in 1866.

[13] In 1848, for example, the Legislature repealed article 41 of the British North America Act 1840 (n 10), which provided that the legislative documents would be 'in the English language only'.

[14] RSC 1985 app II no 5. This Act was originally adopted as the British North America Act 1867 (30 & 31 Vict c 3) (UK).

[15] On the two referendums, see Ben Smith, 'The Québec Referendums' (research paper 13/47, House of Commons Library 2013) <https://www.files.ethz.ch/isn/167605/RP13-47.pdf> accessed 15 August 2017.

This near-victory led the federal government to ask the Supreme Court of Canada for an advisory opinion on Québec's right to self-determination. The 1998 *Reference re Secession of Québec*[16] has become a landmark opinion in Canadian and international law. It clarified the interplay between internal and external self-determination and continues to colour Québec's drive for autonomy and independence.

Keeping this historical context in mind, we focus both on (1) the application of the principle of autonomy to Québec and (2) Québec's exercise of its right to independence.

1. THE PRINCIPLE OF AUTONOMY AND ITS APPLICATION TO QUÉBEC

The Constitution Act 1867 first received an enthusiastic response in Québec. Although this was the fifth constitution to be enacted in just over a century, it was the first to actually provide Québec with the wherewithal to pursue – arguably to a certain extent only – its own and distinct political ends. Hence, while (1) the Constitution of Canada actually granted Québec a certain degree of autonomy, (2) Québec kept pursuing greater autonomy within the Canadian federation.

A. The Constitution of Canada and the Autonomy of Québec

Québec was one of the four initial provinces to form the Dominion of Canada. The preamble of the Constitution Act 1867, which created the new Dominion, provided that Ontario, New Brunswick, Nova Scotia and Québec entered into a federal structure to be governed by 'a Constitution similar in principle to that of the United Kingdom'. The Constitution Act 1867 came to apply to the ten provinces and three territories that now form Canada and remains the cornerstone of the Canadian constitutional framework. Yet the power to amend its key components, notably its institutional architecture and the distribution of powers, remained in the hands of the British Parliament until 1982.

Westminster formally relinquished this power with the entry into force of the Canada Act 1982[17] and the Constitution Act 1982.[18] The patriation

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[16] [1998] 2 SCR 217 (*Québec Secession Reference*).

[17] An Act to give effect to a request by the Senate and House of Commons of Canada 1982 (UK).

[18] RSC 1985 app II no 44. This Act is contained in Schedule B of the Canada Act 1982 (n 17), which comprises both the English version of the Constitution

of the Canadian Constitution was made without Québec's consent, and was never approved by any of the subsequent governments in Québec.

The Constitution Act 1867 does not explicitly set out the principle of autonomy, nor has the Supreme Court of Canada explicitly granted such principle the status of a constitutional principle. Irrespective, in its *Québec Secession Reference*, the Court acknowledged that autonomy was a component of the Canadian federal system: 'The principle of federalism recognizes the diversity of the component parts of Confederation, and the *autonomy* of provincial governments to develop their societies within their respective spheres of jurisdiction.'[19]

The autonomy of provincial governments, including that of Québec, is implemented through the general framework of the Canadian Constitution. Hence, in allowing provinces to adopt and modify their own constitutions, both the Constitution Act 1867[20] and the Constitution Act 1982[21] granted provinces constitutional autonomy. Although this internal constituent power did not lead to the adoption of codified constitutions (*constitution formelle*), except for British Columbia,[22] all provinces

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Act 1982 as well as a French version under the title Loi constitutionnelle de 1982. In Canada, both linguistic versions are equally official.

[19] *Québec Secession Reference* (n 16) [58] (emphasis added). This statement echoes the Supreme Court's *Reference re Securities Act*, [2011] 3 SCR 837 [73]: 'The circumscribed scope of the general trade and commerce power can also be linked to another facet of federalism – the recognition of the diversity and *autonomy* of provincial governments in developing their societies within their respective spheres of jurisdiction' (emphasis added).

[20] Until it was repealed by the Constitution Act 1982 (n 18), item 1(4), section 92(1) of the Constitution Act 1867 (n 14) granted the provinces jurisdiction over '[t]he Amendment from Time to Time, notwithstanding anything in this Act, of the Constitution of the Province, except as regards the Office of Lieutenant Governor'.

[21] The constituent power of the provinces is now enshrined in section 45 of the Constitution Act 1982 (n 18), which provides as follows: 'Subject to section 41, the legislature of each province may exclusively make laws amending the constitution of the province.'

[22] Constitution Act, RSBC 1996 c 66. For a comment on this unique provincial constitution in Canada, see Campbell Sharman, 'The Strange Case of a Provincial Constitution: The British Columbia *Constitution Act*' (1984) 17 *Canadian Review of Political Science* 87. On provincial constitutions in Canada, see also RI Cheffins and RN Tucker, 'Constitutions', in DJ Bellamy, John H Pammet and Donald C Rowat (eds), *The Provincial Political Systems: Comparative Essays* (Methuen, 1976) 257; Nelson Wiseman, 'Clarifying Provincial Constitutions' (1996) 6 *National Journal of Constitutional Law* 269; Frederick L Morton, 'Provincial Constitutions in Canada' (Federalism and Sub-National

possess their own uncodified constitutions (*constitution matérielle*) and have by exercising this power developed their societies within their respective spheres of jurisdiction.

These spheres of jurisdiction and the distribution of legislative powers are described mainly in articles 91 and 92 of the Constitution Act 1867. At the outset, the class of subjects, that is fields of provincial jurisdiction, seemed to afford a significant deal of autonomy and to provide for a decentralized federal polity. Provinces were able to adopt laws to levy direct taxation within the province in order to raise revenue for provincial purposes[23] as well as laws governing health,[24] municipal institutions,[25] property and civil rights,[26] and education.[27] They have also been able to adopt legislations on matters of shared jurisdiction, such as immigration and agriculture.[28]

Yet, the introductory paragraph of section 91 of the Constitution Act 1867 grants the federal Parliament the authority to make 'laws for the peace, order and good government in relation to all matters not coming within the classes of subjects (...) assigned exclusively to the legislatures of the provinces'. This 'residual power' has enlarged the federal spheres of jurisdiction, the Judiciary Committee of the Privy Council – and later on the Supreme Court of Canada – recognizing substantial new powers to the federal authorities.[29] Courts have construed this power as allowing the Parliament of Canada to fill in the gaps in the distribution of powers. Thus powers in broadcasting,[30] cable television,[31] and ocean pollution,[32] among other matters, have come under federal jurisdiction. The residual power has also been interpreted as allowing the Parliament of Canada to

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Constitutions: Design and Reform, Bellagio, March 2004); GA Tarr, 'Sub-national Constitutions and Minority Rights: A Perspective on Canadian Provincial Constitutionalism' (2008) 2 *Revue québécoise de droit constitutionnel* 175.

[23] Constitution Act 1867 (n 14), s 92, 2.

[24] ibid, s 92(7).

[25] ibid, s 92(8).

[26] ibid, s 92(13).

[27] ibid, s 93.

[28] ibid, s 95.

[29] For a more detailed analysis of the residuary power and all its branches, see Peter W Hogg, *Constitutional Law of Canada* (5th edn, Thomson Carswell, 2007) 443–74.

[30] *Reference re Regulation and Control of Radio Communication*, [1931] SCR 541; *The Attorney General of Quebec v The Attorney General of Canada and others*, [1932] AC 304.

[31] *Capital Cities Communications v CRTC*, [1978] 2 SCR 141.

[32] *R v Crown Zellerbach Canada Ltd*, [1998] 1 SRC 401.

adopt legislation in times of emergency.[33] In addition, section 92(10)(c) of the Constitution Act 1867 allows the Parliament of Canada to subsume any local work into its jurisdiction by simply declaring it 'to be for the general advantage of Canada'.[34]

Distinct executive, legislative and judicial provincial institutions are also demonstrative of Québec's autonomy within Canada's federal architecture. These institutions are set out in Title V 'Provincial Constitutions' of the Constitution Act 1867, equally applicable to all provinces, whereas Québec's executive[35] and legislative[36] powers are specifically outlined in sections concerning the province's institutions. With respect to the judicial power, however, the Constitution Act 1867 confers upon the Governor General of Canada the power to appoint judges to Superior, District and County Courts in each province. Their salaries, allowances and pensions are both fixed and provided by the Parliament of Canada.[37] Such appointment privileges are inconsistent with the principle of autonomy. This is particularly true in light of the provinces' exclusive

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[33] Robert Martin, 'Notes on Emergency Powers in Canada' (2005) 54 *University of New Brunswick Law Journal* 161.

[34] Moreover, Courts traditionally refused to decide whether or not this declaratory power was indeed used 'for the general advantage of Canada'. As of 2017, this power had been used almost 500 times. See Henri Brun, Guy Tremblay and Eugénie Brouillet, *Droit constitutionnel* (6th edn, Yvon Blais, 2014) c VI.

[35] Constitution Act 1867 (n 14), ss 58–68. The rules governing the executive power in Québec have been codified and completed in the provincial Executive Power Act, CQLR c E-18 (2017).

[36] Constitution Act 1867 (n 14), ss 71–80. Québec has exercised its power to amend its own provincial Constitution and brought changes to its legislative institutions in 1968. It abolished its Upper House and changed the name of its Legislative Assembly for the National Assembly. See Act respecting the Legislative council of Québec, SQ 1968 c 8. See also Jules Brière, 'Loi concernant le conseil législatif' (1969) 10 *Cahiers de droit* 370. The rules governing Québec's National Assembly are now found in the Act respecting the National Assembly, CQLR c A-23.1 (2017).

[37] Constitution Act 1867 (n 14), ss 96 and 100. However, it is worth noting that section 98 of the Constitution Act 1867 restricts this federal power by providing that '[t]he Judges of the Courts of Quebec shall be selected from the Bar of that Province', whereas the nine other Canadian provinces do not benefit from such disposition. This may be explained by the fact that provinces are entrusted with jurisdiction over 'civil rights' pursuant to section 92(13) of the Constitution Act 1867 and that Québec was and still is the sole Canadian province that opted for a private law system of civil tradition, making it inappropriate to appoint common law judges therein.

jurisdiction over the administration of justice, including the constitution, maintenance and organization of both civil and criminal provincial courts, including procedure in civil matters.[38]

In short, the Constitution of Canada has seemingly implemented the principle of autonomy. Like in most federations, it has attempted to reconcile the claim for provincial autonomy with the need for federal powers to achieve national goals. Yet, since it became a part of the Dominion of Canada in 1867, Québec has consistently claimed greater autonomy.

B. Québec's Claim for Additional Autonomy within Canada

Québec was the main advocate for a federal structure during negotiations that established the Dominion of Canada in 1867. Canada was then depicted as a decentralized State, which may explain why it was – and is still sometimes – mistakenly described as a confederation.[39] The principle of autonomy was of the utmost importance to Québec, as it would allow it to preserve its distinctiveness, especially in matters of language and culture. Since then, however, Québec has struggled to maintain its distinctiveness.[40] It resisted several federal attempts to diminish the powers vested in its National Assembly by the Constitution Act 1867[41] and has consistently criticized the centralizing approach of the Supreme Court of Canada.[42]

Multiple conferences were convened to discuss constitutional reforms during the 1960s and 1970s. Successive Québec governments submitted proposals that would have either granted the province not only more

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[38] ibid s 92(14).

[39] See Benoît Pelletier, 'Le Canada n'est pas une confédération!' *Le Journal de Québec* (Québec, 3 September 2014) <www.journaldequebec.com/2014/09/03/le-canada-nest-pas-une-confederation> accessed 21 May 2017.

[40] For an analysis of the early constitutional history of Canada and Québec, see Eugénie Brouillet, *La négation de la nation: l'identité culturelle québécoise et le fédéralisme canadien* (Septentrion, 2005).

[41] With respect to the consequences of the adoption of the Constitution Act 1982 without the consent of Québec's National Assembly, see Gérard Boismenu, 'Le Québec et la centralisation politique au Canada: Le "Beau Risque" du *Canada Bill*' (1985) 3 *Cahiers de recherche sociologique* 119.

[42] See, for example, *RJR-MacDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199; *R v Hydro-Québec*, [1997] 3 SCR 213. For a detailed analysis of the centralizing approach of the Supreme Court of Canada, see Eugénie Brouillet, 'La dilution du principe fédératif et la jurisprudence de la Cour suprême du Canada' (2004) 45 *Cahiers de droit* 7.

powers over culture and language, but also over social policy and international relations. If approved, such constitutional reforms would have granted Québec a special status, or would have led to a form of asymmetrical federalism. Sooner or later, however, these negotiations would falter because the federal and provincial governments could not find common ground, as evidenced by the failure of both the Confederation for Tomorrow constitutional conference and the Victoria Charter, in 1967 and 1971 respectively.[43]

The only substantial amendments to the Constitution of Canada were adopted after the first Québec referendum of 20 May 1980. The constitutional conferences of 1981 and 1982 ended with an agreement between nine provincial governments, excluding Québec, leading to the adoption of the Constitution Act 1982. This Act did not grant additional autonomy to Québec. Indeed, it actually made inroads into its existing autonomy, most notably by limiting its decision-making authority on future linguistic policies and by invalidating several provisions of Québec's Charter of the French Language.[44]

Enhanced autonomy for Québec continued to be the goal for those desiring it to remain in Canada, even including the Liberal Party of Québec, which successfully challenged the Parti Québécois in the 1985 election. Still, two important rounds of negotiations sought to return Québec into Canada's constitutional fold. The first of these rounds culminated in the 1987 Meech Lake Accord. This Accord increased Québec's jurisdictional authority with respect to immigration and contained amendments to the Constitution of Canada recognizing Québec as a distinct society, formalizing its entitlement to three judges in the Supreme Court of Canada and recognizing its right to designate these

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[43] On the attempts to reform the Canadian Constitution, see Edward McWhinney, *Québec and the Constitution* (University of Toronto Press, 1979) and André Tremblay, *La réforme de la Constitution au Canada* (Thémis, 1995). Notwithstanding the failure of these multilateral constitutional conferences, Québec signed intergovernmental agreements with the federal government, most notably with respect to old-age pensions, postsecondary scholarships and immigration. See Johanne Poirier, 'Intergovernmental Agreements in Canada: At the Crossroads between Law and Politics', in Institute of Intergovernmental Relations, Queen's University, *The State of the Federation 2001–2002* (McGill-Queen's University Press, 2003) 425.

[44] Such invalidity was acknowledged by the Supreme Court of Canada in several cases and notably in *Québec (Attorney General) v Quebec Association of Protestant School Boards*, [1984] 2 SCR 66, *Ford v Quebec (Attorney General)*, [1988] 2 SCR 712, *Devine v Quebec (Attorney General)*, [1988] 2 SCR 790 and *Nguyen v Quebec (Education, Recreation and Sports)*, [2009] 3 SCR 47.

judges, as well as a role in the appointment of senators. The Accord also granted Québec and the other Canadian provinces an implicit right of veto over certain constitutional amendments and a right to opt out of federal programs with appropriate compensation. However, the Meech Lake Accord ultimately ran aground in 1990, when two provincial legislatures, namely those of Manitoba and Newfoundland, refused to adopt a resolution approving the Accord before the period for doing so lapsed.[45]

The defeat of the Meech Lake Accord was quickly followed by new negotiations, in 1991 and 1992, leading to the Charlottetown Accord. These negotiations not only addressed Québec's call for greater autonomy as in the previous round, but also discussed the status of the aboriginal peoples in Canada and a thorough reform of the Canadian Senate. Again, all federal and provincial leaders reached a comprehensive agreement on these matters, but this time, the Accord had to be approved by a pan-Canadian referendum. The Charlottetown Accord did not survive this popular vote: it was defeated in a referendum held on 30 October 1992 under the aegis of two distinct Canadian and Québec referendum statutes.[46]

Since the demise of both the Meech Lake and Charlottetown accords, there have been no further negotiations seeking to invest Québec with greater autonomy within the Canadian constitutional framework.[47] Instead, Québec's thirst for autonomy has turned into hunger for independence.

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[45] On the Meech Lake Accord negotiations, see Carol Rogerson and Katherine Swinton, *Competing Constitutional Visions: The Meech Lake Accord* (Carswell, 1988) and Andrew Cohen, *Deal Undone: The Making and Breaking of the Meech Lake Accord* (Douglas & McIntyre, 1990).

[46] In Québec, under Referendum Act, CQLR c C-64.1 and in the rest of Canada, under the Referendum Act, SC 1992, c 30. The results of Québec's referendum were 56.6% against the Accord and 43.4% in favour. The cumulative results of the referendum held in the nine other Canadian provinces were 54.3% against and 45.7% in favour. On this episode of the Canadian constitutional history, see Kenneth McRoberts and Patrick Monahan (eds), *The Charlottetown Accord, the Referendum and the Future of Canada* (University of Toronto Press, 1993).

[47] On 1 June 2017 and on the occasion of the 150th anniversary of the Federation, the government of Québec presented a *Policy on Québec Affirmation and Canadian Relations*, which defines and asserts 'Québec's plural and inclusive national identity. It outlines our vision of Québec within Canada and explains how it will be implemented'. The full text of this policy can be found at

2. THE RIGHT TO INDEPENDENCE AND ITS EXERCISE BY QUÉBEC

Due to the failure of increased autonomy within Canada, Québec has been in a constitutional dead end. With accrued autonomy out of reach, Québec went ahead on the self-determination continuum with the goal of achieving outright independence. Two referendums were held. The 1980 'no' side was incontestable, with 59.6 percent of voters against the sovereignty-association project.[48] But the 'yes' side came within a hair's breadth of winning the 1995 referendum: 49.4 percent voted in favour of Québec's sovereignty, with only 54,288 votes between both options.[49]

These results were a rude awakening for the federal government, which realized that Québec's quest for self-determination could threaten Canadian unity. Instead of carrying on the struggle in the political arena, Ottawa turned to judicial means in order to constrain Québec's aspirations to self-determination, and referred the issue of Québec's right to unilateral secession to the Supreme Court of Canada. Although the Supreme Court dismissed (1) Québec's claim to independence under international law, it affirmed (2) its right to pursue secession in accordance with Canadian constitutional law.

A. Québec's Right to Independence under International Law

The international law question submitted to the Supreme Court was twofold. The Court had to determine whether Québec could claim an autonomous right to self-determination pursuant to international law, as well as whether Québec was entitled to such a right as an implicit element of the right to self-determination:

> Does international law give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that

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<http://www.saic.gouv.qc.ca/documents/relations-canadiennes/politique-affirmation-en.pdf> accessed 18 August 2017.

[48] Claude-V. Marsolais, 'Un Québec divisé: Le référendum de 1980' (1995) 41 *Cap-aux-Diamants* 62.

[49] Pierre Drouilly, 'Le référendum du 30 octobre 1995: une analyse des résultats' (1997) *L'année politique au Québec 1995–1996* <http://www.pum.umontreal.ca/apqc/95_96/drouilly/drouilly.htm> accessed 4 August 2017.

would give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?[50]

To begin with, the Court swiftly ruled out the possible existence of an autonomous right to unilateral secession under international law: '[it] is clear that international law does not specifically grant component parts of sovereign states the legal right to secede unilaterally from their "parent" state'.[51] Although international law does not explicitly deny the existence of an autonomous right to unilateral secession, the Court found that such a right would be inconsistent with the cornerstone of international law, namely the territorial integrity of nation states.[52] In addition, the Court emphasized that the right to self-determination would be materially undermined should such an autonomous right to unilateral secession be recognized.[53]

Indeed, the Supreme Court acknowledged that in certain exceptional circumstances, the right of a people to self-determination can give rise to such a right to unilateral secession.[54] As the Court held, '[the] existence of the right of a people to self-determination is now so widely recognized in international conventions that the principle has acquired a status beyond "convention" and is considered a general principle of international law'.[55]

The first legal recognition of a formal right to self-determination in international law is found in the Charter of the United Nations which affirms that the purpose of the United Nations is to 'develop friendly relations (...) based on respect for the principle of equal rights and self-determination of peoples'.[56] Both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights[57] identify the beneficiaries and clarify the exact meaning of the right to self-determination: 'All peoples have the right of self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development.' The foregoing international instruments, as well as the

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50 *Québec Secession Reference* (n 16) [2].
51 ibid [111].
52 ibid [112].
53 ibid.
54 ibid.
55 ibid [114].
56 See (n1), art. 1(2).
57 See (n2), art.1, common.

Helsinki Final Act,[58] the Charter of Paris for a New Europe,[59] the Vienna Declaration and Programme of Action,[60] and other instruments[61] clearly grant all peoples a collective right to decide their political status.

The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations[62] provides for three modes of implementing the right to self-determination, namely '[the] establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people'. However, the Supreme Court held that 'international law expects that the right to self-determination will be exercised by peoples within the framework of existing sovereign states and consistently with the maintenance of the territorial integrity of those states'.[63] Hence, the right to self-determination should not necessarily lead to national independence, and may very well take other forms, including the sufficient implementation of the principle of autonomy. In the Court's opinion, inasmuch as a people benefits from *internal* self-determination (i.e. autonomy), the State's territorial integrity takes precedence over their right to *external* self-determination (i.e. secession):

> There is no necessary incompatibility between the maintenance of the territorial integrity of existing states, including Canada, and the right of a 'people' to achieve a full measure of self-determination. A state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its own internal arrangements, is entitled to the protection under international law of its territorial integrity.[64]

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[58] Final Act of the Conference on Security and Cooperation in Europe (Helsinki, 1 Aug 1975) ILM, vol 14, p 1292.

[59] (Paris, 21 Nov 1990) ILM, vol 30, p 193.

[60] (Vienna, 26 June 1993) ILM, vol 32, p 1661, UN Doc A/CONF.157/23 (1993).

[61] Author Karl Doehring rightly points out that '[the] sheer number of resolutions concerning the right of self-determination makes their enumeration impossible': Karl Doehring, 'Self-determination' in Bruno Simma (ed), *The Charter of the United Nations: A Commentary* (Oxford University Press 1994) 60.

[62] GA Res 2625, UN GAOR, 25th sess, supp no 28, p 121, UN doc A/8028 (1970).

[63] *Québec Secession Reference* (n 16) [122].

[64] ibid [130].

Hanna refers to this principle as a 'rebuttable presumption in favor of statehood'.[65] In the Supreme Court's opinion, *external* self-determination – as opposed to *internal* self-determination – is only granted to peoples 'under colonial rule or foreign occupation',[66] two situations that clearly did not apply to Québec. The Court also raised a third situation that, according to some, may give rise to a right of secession, namely a people whose right to internal self-determination 'is somehow being totally frustrated'[67] in the sense where they are 'denied meaningful access to government to pursue their political, economic, social and cultural development'.[68] Although it refused to determine whether or not such situation could actually grant a people the right to external self-determination, the Court held that in any event, Québec was already in a position to fully exercise its right to internal self-determination within the Canadian legal and political framework, thus barring it from any legitimate claim to unilateral secession under international law:

> The population of Quebec cannot plausibly be said to be denied access to government. Quebecers occupy prominent positions within the government of Canada. Residents of the province freely make political choices and pursue economic, social and cultural development within Quebec, across Canada, and throughout the world. The population of Quebec is equitably represented in legislative, executive and judicial institutions. In short, to reflect the phraseology of the international documents that address the right to self-determination of peoples, Canada is a 'sovereign and independent state conducting itself in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a government representing the whole people belonging to the territory without distinction'.[69]

Despite the unilateral patriation of the Canadian Constitution and the numerous constitutional negotiation rounds that failed over three decades, the Supreme Court was of the view that Québec's inability to reach further autonomy within Canada did not amount to a denial of its right to internal self-determination:

> The continuing failure to reach agreement on amendments to the Constitution, while a matter of concern, does not amount to a denial of self-determination. In the absence of amendments to the Canadian Constitution, we must look at

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[65] Roya M. Hanna, 'Right to Self-determination in In Re Secession of Quebec' [1999] 23 Md J Int'l L 213.

[66] *Québec Secession Reference* (n 16) [131].

[67] ibid [135].

[68] ibid [138].

[69] ibid [136].

> the constitutional arrangements presently in effect, and we cannot conclude under current circumstances that those arrangements place Quebecers in a disadvantaged position within the scope of the international law rule.[70]

In light of Québec's position within the Canadian federation, the Supreme Court of Canada held that Québec's right to self-determination did not entail a right to secession under international law. And, although international recognition of Québec's statehood could one day make Québec an independent State, the Court held that this would not make its secession legal *ex post facto* under international law.[71] Interestingly, this so-called 'effectivity principle' was, as we will see below, implicitly recognized by the Court in relation to its findings respecting Québec's right to pursue secession under Canadian law.

Among the many questions that remain unanswered by the Supreme Court's opinion,[72] the issue of the potentially contradictory interplay between the three criteria giving rise to a right to external self-determination is crucial: what treatment should be afforded to a people that, after having been conquered by a foreign power, is granted the right to internal self-determination within this new structure? In certain respects, this is the case of Québec: after the military conquest of 1759, Québec was granted a certain degree of internal self-determination. Admittedly, granting, on the one hand, a unilateral right to secession to all peoples that were once conquered would risk getting lost in the midst of history. Such a right could ultimately result in the potential dismantling of most – if not all – existing States and therefore 'destroy order and stability within States and inaugurate anarchy in international life'.[73]

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[70] ibid [137].

[71] ibid [140]–[146]. For an analysis of these views of the Court, see Daniel Turp and Gibran Van Ert, 'International Recognition in the Supreme Court of Canada's Québec Reference' (1998) 35 Can Yearbook Int'l L 335.

[72] See Daniel Thürer and Thomas Burri, 'Self-determination' (2008) *Oxford Public International Law* 36 <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e873> accessed 4 August 2017:

> In how far is there a *right* to internal self-determination? Is there any difference to the traditional notion of the people? When exactly is a situation outside the context of decolonization? When does internal turn into external self-determination? When does a government not represent 'the whole people ... without distinction as to race, creed or colour' and what are 'just and effective guarantees'?

[73] Frederic Kirgis Jr, 'The Degrees of Self-determination in the United Nations Era' [1994] 88 A J Int'l L 304.

But, refusing the right to external self-determination to those peoples is tantamount to the *ex post facto* endorsement of unlawful conquests. One might argue that the international law practice has to balance between the territorial integrity of States with the right to self-determination of *formerly* conquered peoples. Unfortunately, the underlying principles for such an equilibrium were not detailed by the Supreme Court of Canada.

B. Québec's Right to Pursue Secession under Canadian Law

In spite of its conservative findings with respect to Québec's right to self-determination under international law, the Supreme Court of Canada proved to be audacious in recognizing Québec's right to seek independence under Canadian law. Deriving this right from the underlying constitutional principles of federalism and democracy,[74] the Supreme Court went as far as to enshrine in Canada's constitutional framework an obligation for the *Rest of Canada* to negotiate with Québec should a future referendum on independence receive a 'clear majority' in favour of a 'clear question'.[75] Québec's unambiguous will to become sovereign would impose on Canada such an obligation to negotiate:

> [88] The federalism principle, in conjunction with the democratic principle, dictates that the clear repudiation of the existing constitutional order and the clear expression of the desire to pursue secession by the population of a province would give rise to a reciprocal obligation on all parties to Confederation to negotiate constitutional changes to respond to that desire. (...) The corollary of a legitimate attempt by one participant in Confederation to seek

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[74] The Canadian Constitution does not contain any express rules pertaining to the secession of a province. The Supreme Court therefore based its assessment of Québec's right to secede on two underlying constitutional principles, namely 'the principles of democracy and federalism'. See *Québec Secession Reference* (n 16) [92]. For a detailed analysis of how the Supreme Court created the law on this matter, see Sujit Choudhry and Robert Howse, 'Constitutional Theory and the Quebec Secession Reference' (2000) 13 Can J L & Jurisprudence 143.

[75] The Court refused to explain the meaning of the terms 'clear majority' and 'clear question', and instead held that these were 'only subject to political evaluation'. See *Québec Secession Reference* (n 16) [100]. For a detailed analysis, see Claude Ryan, 'Consequences of the Quebec Secession Reference' (2000) 38 *CD Howe Institute Commentary* 1, Andrée Lajoie, 'La Loi sur la clarté dans son contexte' in Alain-G Gagnon (ed), *Québec, État et société* (vol 2, Québec/Amérique, 2003) and François Rocher and Nadia Verrelli, 'Question Constitutional Democracy in Canada: From the Canadian Supreme Court Reference on Quebec to the Clarity Act', in Alain-G. Gagnon, Montserrat Guibernau and François Rocher (eds), *The Conditions of Diversity in Multinational Democracies* (The Institute for Research on Public Policy, 2003).

> an amendment to the Constitution is an obligation on all parties to come to the negotiating table. The clear repudiation by the people of Quebec of the existing constitutional order would confer legitimacy on demands for secession, and place an obligation on the other provinces and the federal government to acknowledge and respect that expression of democratic will by entering into negotiations and conducting them in accordance with the underlying constitutional principles already discussed.[76]

These negotiations would have to 'be conducted with an eye to the constitutional principles (...) which must inform the actions of all the parties to the negotiation process'.[77] While the aforementioned obligation to negotiate stems from the underlying constitutional principles of federalism and democracy, both parties to the negotiations would also have to take into account the principles of respect for minority rights as well as constitutionalism and the rule of law. The obligation to negotiate is an obligation of means that does not necessarily require achieving secession:

> [91] (...) We hold that Quebec could not purport to invoke a right of self-determination such as to dictate the terms of a proposed secession to the other parties: that would not be a negotiation at all. As well, it would be naive to expect that the substantive goal of secession could readily be distinguished from the practical details of secession. The devil would be in the details. The democracy principle, as we have emphasized, cannot be invoked to trump the principles of federalism and rule of law, the rights of individuals and minorities, or the operation of democracy in the other provinces or in Canada as a whole. No negotiations could be effective if their ultimate outcome, secession, is cast as an absolute legal entitlement based upon an obligation to give effect to that act of secession in the Constitution. Such a foregone conclusion would actually undermine the obligation to negotiate and render it hollow.

Conversely, the Supreme Court held that its finding on the negotiations not entailing an obligation of result was not to be interpreted as granting Canada the right to negotiate in bad faith. The secession of Québec is an outcome both parties would have to contemplate with seriousness:

> [92] However, we are equally unable to accept the reverse proposition, that a clear expression of self-determination by the people of Quebec would impose

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[76] *Québec Secession Reference* (n 16) [88].

[77] ibid [94]. For a more detailed analysis of the Supreme Court's opinion on this matter, see Daniel Turp, *Le droit de choisir: essais sur le droit du Québec à disposer de lui-même/The Right to Choose: Essays on Québec's Right of Self-determination* (Thémis, 2001) 814–21.

> no obligations upon the other provinces or the federal government. The continued existence and operation of the Canadian constitutional order cannot remain indifferent to the clear expression of a clear majority of Quebecers that they no longer wish to remain in Canada. This would amount to the assertion that other constitutionally recognized principles necessarily trump the clearly expressed democratic will of the people of Quebec. Such a proposition fails to give sufficient weight to the underlying constitutional principles that must inform the amendment process, including the principles of democracy and federalism. The rights of other provinces and the federal government cannot deny *the right of the government of Quebec to pursue secession*, should a clear majority of the people of Quebec choose that goal, so long as in doing so, Quebec respects the rights of others. Negotiations would be necessary to address the interests of the federal government, of Quebec and the other provinces, and other participants, as well as the rights of all Canadians both within and outside Quebec.[78]

The Supreme Court relinquished its jurisdiction over the potential question of whether or not all parties had complied with their obligation to negotiate. However, the non-justiciability of the obligation to negotiate does not necessarily make it mere wishful thinking. Indeed, the Supreme Court suggested that should Canada refuse to act in good faith, Québec might possibly be entitled to remedial secession[79] pursuant to international law and politics:

> [103] To the extent that a breach of the constitutional duty to negotiate in accordance with the principles described above undermines the legitimacy of a party's actions, it may have important ramifications at the international level. Thus, a failure of the duty to undertake negotiations and pursue them according to constitutional principles may undermine that government's claim

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[78] *Québec Secession Reference* (n 16) [91], [92]. This affirmation of the 'right of the government of Québec to pursue secession' is reiterated in similar terms at [151]:

> The other provinces and the federal government would have no basis to deny the right of the government of Quebec to pursue secession, should a clear majority of the people of Quebec choose that goal, so long as in doing so, Quebec respects the rights of others. The negotiations that followed such a vote would address the potential act of secession as well as its possible terms should in fact secession proceed.

[79] For a detailed analysis of the right to remedial secession, see Simone F Van Den Driest, *Remedial Secession: A Right to External Self-determination as a Remedy to Serious Injustices?* (Intersentia 2013); Katherine Del Mar, 'The Myth of Remedial Secession' in Duncan French (ed), *Statehood and Self-determination: Reconciling Tradition and Modernity in International Law* (Cambridge University Press 2013).

> to legitimacy which is generally a precondition for recognition by the international community. Conversely, violations of those principles by the federal or other provincial governments responding to the request for secession may undermine their legitimacy. Thus, a Quebec that had negotiated in conformity with constitutional principles and values in the face of unreasonable intransigence on the part of other participants at the federal or provincial level would be more likely to be recognized than a Quebec which did not itself act according to constitutional principles in the negotiation process. Both the legality of the acts of the parties to the negotiation process under Canadian law, and the perceived legitimacy of such action, would be important considerations in the recognition process. In this way, the adherence of the parties to the obligation to negotiate would be evaluated in an indirect manner on the international plane.

Obviously, Ottawa had not foreseen that the *Québec Secession Reference* would result in an 'obligation to negotiate'. Hence, the federal Parliament replied with the Act to Give Effect to the Requirement for Clarity as Set out in the Opinion of the Supreme Court of Canada in the Québec Secession Reference.[80] Canada's Clarity Act was an attempt to neutralize the Supreme Court of Canada's affirmation of Quebec's right to pursue secession and Canada's obligation to negotiate the secession of Québec.[81] Indeed, while the Supreme Court held that a clear majority on a clear question would impose on the Rest of Canada an obligation to negotiate Québec's independence, the Canada's Clarity Act obviously tries to avoid this obligation in providing that '[t]he Government of Canada shall not enter into negotiations on the terms on which a province might cease to be part of Canada if the House of Commons determines (...) that a referendum question is not clear'.[82]

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[80] SC 2000 c 26 (Canada's Clarity Act).

[81] Many analyses were made with regards to the non-compliance of the Canada's Clarity Act in light of the Supreme Court's findings in the *Québec Secession Reference*. Among others, see Stephen Tierney, *Constitutional Referendums: A Theory and Practice of Republican Deliberation* (Oxford University Press, 2014) 318, Patrick Taillon, 'De la clarté à l'arbitraire: le contrôle de la question et des résultats référendaires par le Parlement canadien' (2014) 20 *Revista d'Estudis Autonòmics i Federals* 14 and José Woehrling, 'Les aspects juridiques de la redéfinition du statut politique et constitutionnel du Québec', in Québec, ministère du Conseil exécutif (bureau de coordination des études), *La mise à jour des études originalement préparées pour la Commission sur l'avenir politique et constitutionnel du Québec (1990–1991) et pour la Commission parlementaire d'étude des questions afférentes à l'accession du Québec à la souveraineté (1991–1992)*, (vol 2, ministère du Conseil exécutif, 2002) 78.

[82] Canada's Clarity Act (n 80) s 1(6). For a detailed analysis of the meaning of what is a clear question pursuant to the Canada's Clarity Act, see Anthony

However, Québec did not accept that Ottawa alone set the rules of its potential secession and replied with its very own statute. As it always did in the past, Québec relied on its right to self-determination to support the right of its people to decide its future and opt, if need be, for political independence. Thus, the National Assembly enacted the Act respecting the exercise of the fundamental rights and prerogatives of the Québec people and the Québec State in 2000.[83] Articles 1 to 5 and 13 of Québec's Fundamental Rights Act are worth quoting at length:

> **1.** The right of the Québec people to self-determination is founded in fact and in law. The Québec people is the holder of rights that are universally recognized under the principle of equal rights and self-determination of peoples.
>
> **2.** The Québec people has the inalienable right to freely decide the political regime and legal status of Québec.
>
> **3.** The Québec people, acting through its own political institutions, shall determine alone the mode of exercise of its right to choose the political regime and legal status of Québec.
>
> **4.** No condition or mode of exercise of that right, in particular the consultation of the Québec people by way of a referendum, shall have effect unless determined in accordance with the first paragraph.
>
> **5.** When the Québec people is consulted by way of a referendum under the Referendum Act (chapter C-64.1), the winning option is the option that obtains a majority of the valid votes cast, namely 50% of the valid votes cast plus one. (...)
>
> **13.** No other parliament or government may reduce the powers, authority, sovereignty or legitimacy of the National Assembly, or impose constraint on the democratic will of the Québec people to determine its own future.

Beauséjour, *Couronner la démarche constituante par un référendum sur l'indépendance et la Constitution du Québec: l'architecture d'une question claire* (to be published, Research Institute on Self-Determination of Peoples and National Independence, 2017). Besides, s 2(4) of the Canada's Clarity Act (n 80) deals with the 'clear majority' issue in very similar terms:

> The Government of Canada shall not enter into negotiations on the terms on which a province might cease to be part of Canada unless the House of Commons determines, pursuant to this section, that there has been a clear expression of a will by a clear majority of the population of that province that the province cease to be part of Canada.

[83] CQLR c E-20.2 (Québec's Fundamental Rights Act) (2017).

Indeed, one of the dominant features of Québec's Fundamental Rights Act is its unequivocal affirmation of the existence of the Québec people. In its articles 1 and 2, it declares the existence of a Québec people, a statement that no Québec legislation had ever done before. This affirmation was necessitated by Canada's refusal to recognize the existence of the people of Québec. In stating that the people of Québec actually exists, the Québec's Fundamental Rights Act creates an international law subject and provides it with the right to self-determination and the right to choose, as set out in sections 2 and 3. As opposed to the Canada's Clarity Act, which provides for no predetermined victory threshold, section 4 of the Québec's Fundamental Rights Act sets out that 'when the Québec people is consulted by way of a referendum under the Referendum Act,[84] the winning option is the option that obtains a majority of the valid votes cast, namely fifty percent of the valid votes cast plus one'.

Section 5 of the Québec's Fundamental Rights Act also provides that the Québec State derives its legitimacy from the will of the people inhabiting its territory and contains an affirmation fully consistent with the third paragraph of article 21 of the Universal Declaration of Human Rights,[85] which provides that 'the will of the people shall be the basis of the authority of government'. At section 5 of the Québec's Fundamental Rights Act, the reference to the fact that the will of the people is expressed through the election of members to the National Assembly by universal suffrage, by secret ballot, under the one person, one vote system, pursuant to the Election Act[86] and through referendums held in accordance with the Referendum Act, is also consistent with the requirements of the Universal Declaration of Human Rights. In providing that 'no other parliament or government may reduce the powers, authority, sovereignty or legitimacy of the National Assembly, or impose constraint on the democratic will of the Québec people to determine its own future', section 13 is designed to nullify any effect of the Canada's Clarity Act in Québec. It must also be seen as a stand taken against any power this Act might give the House of Commons to decide on the clarity of a measure of the National Assembly and specifically the clarity of a question adopted by a motion of the National Assembly. It also nullifies the effect of any measure by the House of Commons to determine the clarity of the result of a referendum and the votes cast by Québec electors.

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84 CQLR c C-64.1 (2017).
85 (New York, 10 Dec 1948) UNGA Res 217 A (III).
86 CQLR c E-3.3 (2017).

Québec's Fundamental Rights Act could be seen, in the same way as Canada's Clarity Act, as a political statement. Indeed, the Supreme Court made it very clear that the obligation to negotiate Québec's secession, as set out in the *Québec Secession Reference*, was non-justiciable and would therefore fall within the scope of a political assessment. At the end of the road, however, the aforementioned statutes essentially differ in that they provide for two very different custodians of Québec's right to self-determination. Whereas, pursuant to Canada's Clarity Act, the House of Commons would have to determine whether or not Québec is entitled to implement its right to pursue secession, the Québec's Fundamental Rights Act provides that this issue only belongs to the people of Québec.

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Throughout its history, Québec has attempted to preserve its distinct identity through democratic means – including referendums – to decide its constitutional and political future. In its quest for self-determination, and in order to achieve greater autonomy or national independence, it has attempted to reform the Constitution of Canada and also held referendums on the independence of Québec.

Québec could envisage a new approach in order to achieve additional autonomy or independence. It could rely on the constituent power it is already vested with in order to initiate a popular process with the aim of developing its own fundamental law. A constitution is, first and foremost, a document that establishes the bedrock of a nation's life. It is a founding text that belongs to all those desirous of taking part in the democratic life of their nation. Such an approach could resolve the constitutional stalemates that have thwarted Québec's renewed demands for enhanced autonomy in Canada. In defining among other things the values and rights – individual and collective – on which Québec's political community rests and the institutions through which it should govern itself, a constitution may become an instrument for the affirmation – and confirmation – of Québec's people's need for more autonomy within Canada. The exercise of such constituent power can lead a people to draft a fundamental law that implies increased autonomy and requires reforming the Constitution of Canada.

But it may also illustrate an incompatibility between the new constitutional order of Québec and the existing constitutional order of Canada, while leading to the conclusion that only national independence would allow the people of Québec to gain the autonomy it claims necessary to

achieve self-determination and freely pursue its economic, social and cultural development.

Engaging in a constituent process may thus prove to be the most appropriate approach and Québec could – and should, in our opinion – envisage following such a course in its quest for autonomy or independence.