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Le droit de choisir

Essais sur le droit du Québec à disposer de lui-même

The Right to Choose

Essays on Quebec's Right of Self-Determination

The Right to Choose: Essay on Québec's Right of Self-determination

I. **The Right of Québec to Pursue Secession** 807

A. The Predictable Rebuttal of an International Right of Secession 808

B. The Unforeseen Emergence of a Constitutional Right of Secession 814

II. **Québec's Right to Self-Determination** 822

A. The Implicit Denial of Québec's Right of Self-Determination 822

B. The Explicit Affirmation of Québec's Right to Self-Determination 831

On November 15, 1976, the Parti Québécois took office with the objective of achieving sovereignty for Québec. Twenty-five years later, the Parti Québécois still holds office and the Prime Minister of Québec continues to promote sovereignty as an objective to attain in the near future, perhaps before the year 2005.

Hence, during a quarter of a century, Quebecers have debated about sovereignty and they are still today called upon to discuss the political and constitutional future of Québec. Two referendums have been held on such status, on May 20, 1980, and October 30, 1995, and a third one could be held if the Parti Québécois obtained another mandate to govern Québec. These referendums have allowed Quebecers to participate in unprecedented democratic exercises, as did the work of several parliamentary bodies that were created to determine the political and constitutional future of Québec[1].

If the question of Québec's political future has been discussed in essentially political and economic terms, the legal dimension of the debate has never been totally absent. Many publicists have analysed the legal aspects of Québec's claim to independence and studied in particular the rules of constitutional and international law that are applicable to such a claim[2].

The debate on Québec's political status took a very juridical shape on the eve of, and perhaps mostly after, October 20, 1995, referendum where the YES camp came very close to a victory. Hence, the right of Québec to choose its own future was put into question and put to the courts. The Supreme Court of Canada was eventually brought into the picture and rendered an advisory opinion on August 20, 1998, which is seen, by the National Assembly of Québec, as having a political importance.

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1 See the Commission on the Political and Constitutional Future created by an *Act to Establish the Commission on the Political and Constitutional Future of Quebec*, S.Q. 1990, c. 34 (Appendix 9), the Committee to Examine Matters Relating to the Accession of Québec to Sovereignty and the Committee to Examine any Offer of a New Constitutional Partnership created by an *Act respecting the Process for Determining the Political and Constitutional Future of Quebec*, S.Q. 1991, c. 34 (Appendix 11). The regional commissions as the National Commission on the future of Québec which were created to consult the population of Québec on the *Draft Bill on Quebec Sovereignty* (appendix 14) were not created by virtue of a legislative act and proposed recommendations which led to the drafting *of Bill n° 1 on the Future of Quebec* (Appendix 15).

2 See the bibliography on Québec's Right of Self-determination which I have prepared for the present *Essays*.

At stake in this juridical debate, that this advisory has not brought to an end, is the "the right to choose." A right to choose that we will endeavour to study in this final essay whose ambition is to propose a synthesis of 25 years of arguments, debates and writings related to Québec's right of self-determination, as well as evaluate the impact of recent judicial and legislative developments that could have a decisive impact on the exercise of such a right by Québec.

Since the Quiet Revolution, the successive governments of Québec have reaffirmed the right of the people of Québec to determine freely their political status. From Jean Lesage to Daniel Johnson, Robert Bourassa to René Lévesque, and Jacques Parizeau to Lucien Bouchard, the Heads of the Québec Government have constantly reiterated the right and the freedom of Québec to master its own destiny and to opt, if its people so wished, for sovereignty and independence. Such a consensus brought about resolutions of the National Assembly which were adopted in 1981 and 1991.

In light of the imminence of the 1995 referendum, the adversaries of Québec's right to choose tried to break such a consensus and seek a declaration that Québec did not possess, neither in virtue of constitutional law nor international law, the right to achieve sovereignty and independence. This legal battle was led at the outset by lawyer Guy Bertrand who tried to prevent the holding of the October 30, 1995, referendum, an attempt which was not met positively by the Superior Court of Québec[3].

This legal battle was resumed after the referendum and gave rise to another judicial decision of Québec's Superior Court of Québec in which the role of constitutional and international law in the process of Québec's accession to sovereignty was discussed[4]. Whereas the constitutional dimension of such process was only debated briefly in relation to the theoretical character of the issue brought before the Court[5], a summary analysis of the content of the right of peoples to self-determination and of opinions of sev-

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3 *Bertrand* c. *Bégin*, [1995] R.J.Q. 2500 (C.S.). In the conclusions of the judgment the Court declared that the "Draft Bill 1, under the title an *Act on the future of Québec*, [...] aimed at giving the National Assembly the power to proclaim that Québec becomes a sovereign country without having to follow the amending procedure prescribed in Part V of the *Constitution Act, 1982*, constitutes a serious threat to the rights and freedoms of the applicant guaranteed by the *Canadian Charter of Rights and Freedoms*, and in particular art. 2, 3, 6, 7, 15 and 24, para. 1. *Id.*, p. 2516.

4 *Bertrand* c. *Bégin*, (1996) 138 D.L.R. (4th) 481 (Que. S. Ct.), of which some excerpts are reprinted in appendix 16 hereinafter.

5 *Id.*, p. 505.

eral publicists on the right of secession was offered by the Court. In its decision rejecting the inadmissibility plea of the Attorney General for Québec, the Superior Court declared the following:

> "It must be concluded, then, that there is no clear consensus that the process of accession by Quebec to sovereignty is recognized in international law. However, I wonder if it is possible that the recognition that is sought pertains to customary international law, of which I take no judicial notice."[6]

While refusing to deal the issue at the stage of admissibility and decide on the meaning and extent of the right of peoples to self-determination, the Court found however useful to draft questions to which it thought answers should be given by the Court at the merits stage of the case. Those questions read as follows:

- Is the right to self-determination synonymous with the right to secession?
- Can Quebec unilaterally secede from Canada?
- Is Quebec's process for achieving sovereignty consistent with international law?
- Does international law prevail over domestic law?[7]

Rather than allowing this case to proceed further, the federal government decide to refer the matter to the Supreme Court of Canada and to put to Canada's court of final appeal three questions obviously inspired by the wording of those drafted by the Québec's Superior Court. Hence, the nine judges of the Supreme Court were asked to answer the three following questions:

> "1. Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally?
>
> 2. Does international law give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?

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6 *Id.*

7 *Id.*, p. 507-508.

3. In the event of a conflict between domestic and international law on the right of the National Assembly, legislature or government of Quebec to effect the secession of Quebec from Canada unilaterally, which would take precedence in Canada?"[8]

The Supreme Court of Canada was thus invited to draw an opinion on the meaning and extent of the right of unilateral secession under constitutional and international law. These questions circumscribed the debate to the sole question of Québec's "unilateral" secession from Canada. Such questions were considered by a reknowned international lawyer, professor Alain Pellet, as a "blatent attempt at political manipulation."[9] In spite of (or was because of ?) this attempt, the Supreme Court refused to simply answer the questions by the negative and formulated answers which lead to the unassailable conclusion that Québec has the right to chose its own political status, and notably to achieve sovereignty and independence[10].

According to the Court, it is not international law which recognizes such a right, as it only confers a right of secession in limited cases, but rather Canadian constitutional law which confers on Québec the right to pursue secession (I). Having been deprived of the desired legal argument, the government of Canada will attempt to neutralize Québec's constitu-

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8 These questions are contained in the Order P.C. 1996-1497 of September 30, 1996. The preamble of the order reads as follows:
"Attendu que le gouvernement du Québec a fait connaître sa position à l'effet que l'Assemblée nationale ou le gouvernement de cette province aurait le droit de procéder unilatéralement à la sécession du Québec du reste du Canada;
Attendu que le gouvernement du Quebec a fait connaître sa position à l'effet que ce droit de procéder unilatéralement à la sécession du Québec pourrait être acquis lors du référendum;
Attendu que plusieurs Québécois et autres Canadiens sont incertains quant à la situation constitutionnelle et internationale qui prévaudrait dans l'éventualité d'une déclaration unilatérale d'indépendance du gouvernement du Québec;
Attendu que les principes d'autodétermination, de volonté populaire, des droits et libertés fondamentales, de la primauté du droit, ont été soulevées dans plusieurs contextes par rapport à la sécession du Québec du Canada;
Attendu que le gouvernement du Canada juge opportun de soumettre ces questions à la Cour suprême du Canada;
À ces causes, sur recommandation du ministre de la Justice et en vertu de l'article 53 de la *Loi sur la Cour suprême*, Son Excellence le Gouverneur en conseil soumet à la Cour suprême les questions suivantes: [...]"

9 See Anne BAYEFSKY, *Self-Determination in International Law Quebec and Lessons Learned*, The Hague, Kluwer Law International, 2000, p. 125.

10 *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217 [hereinafter referred to as the *Reference*]

tional right to secede by adopting an *Act to give effect to the requirement for clarity as set out in the opinion of the Supreme Court of Canada in the Quebec Secession Reference* [11]. In its reply, Québec will affirm, through an *Act respecting the exercise of the Fundamental Rights and Prerogatives of the Quebec People and the Quebec State*[12], its right to self-determination (II).

I. The Right of Québec to Pursue Secession

Several publicists have argued that Québec had the right to freely decide its political and constitutional future and that it detained consequently a right to leave Canada to form a sovereign and independent State. Basing itself, at the domestic level, on the absence of any prohibition of secession in the Constitution of Canada and the existence of a constitutional convention[13], stemming from the democratic principle[14], these authors were arguing moreover that Québec's right to accede to sovereignty was also rooted in international law and in treaties and other international instruments affirming the right of peoples to self-determination.

These arguments have their detractors and several authors have attempted to demonstrate that Québec could not rely on neither constitutional law nor international law to secede from Canada[15]. As long as the courts were not called upon to discuss the issue of the right of secession, governments had cautiously avoided to define a definite position on such an issue. But the reference to the Supreme Court by the government of

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11 S.C. 2000, c. 26 [hereinafter referred to as the *Clarity Act*].

12 S.Q. 2000, c. 46 [hereinafter referred to as the *Quebec's Fundamental Rights Act*].

13 See on this issue Claude BEAUCHAMP, "De l'existence d'une convention constitutionnelle reconnaissant le droit à l'autodétermination du Québec", (1992) 6 *R.J.E.U.L.* 55, Jean-Maurice ARBOUR, "Le droit international permet la reconnaissance d'une déclaration unilatérale d'indépendance", *Le Soleil*, Québec, 9 octobre 1990, Ghislain OTIS, "Québec peut-il négocier à deux", *Le Devoir*, Montréal, 18 décembre 1991, p. B-8. Read also the testimony of Professor Henri Brun before the Committee to Examine Matters Relating to the Accession of Québec to Sovereignty: ASSEMBLÉE NATIONALE, 1re session, 34e législature (Qué.), *Journal des débats*, 9 octobre 1991, nº 5, p. CEAS-130, 26 novembre 1991, p. CEAS-270.

14 See Daniel TURP, "Le droit de faire sécession: l'expression du principe démocratique", in Alain-G. GAGNON et François ROCHER (ed.), *Répliques aux détracteurs de la souveraineté du Québec*, Montréal, VLB Éditeur, 1992, p. 51, reprinted in the present *Essays*.

15 See, *inter alia*, Sharon A. WILLIAMS, *International Legal Aspects of Secession by Quebec*, Background Studies of the York University Constitutional Reform Project nº 3, North York, York University, Centre for Public Law and Public Policy, 1992.

Canada compelled the governments to propose detailed legal arguments and to ask the court to solve these issues[16]. It was predictable that the Supreme Court rally behind the majority view according to which there is no unlimited right of secession (A) but the recognition of a constitutional right of secession was rather unexpected (B).

A. The Predictable Rebuttal of an International Right of Secession

The existence of an international right of secession is discussed by the Court in its answer to question 2 of the *Reference*. It is analysed through the prism of international law and then with regards to the principle of effectivity.

The question of secession in international law is studied from two distinct viewpoints: firstly in relation to the absence of a prohibition of the right of secession and secondly with regards to the right of a people to self-determination. Whereas the absence of a prohibition on the right of secession does not give rise to a significant development[17], the examination of the right to self-determination is dealt with in 25 paragraphs and allows the Supreme Court to review several international instruments securing a right to which it reconignizes the status of a "a general principle of international law."[18] Hence, the *Charter of the United Nations*[19], the *International Covenants on Human Rights*[20], the *Friendly Relations Declaration*[21], the *Helsinki Final Act*[22], the *Vienna Declaration and Programme of Action*[23] and the *Declaration on the Occasion of the Fiftieth Anniversary of the United Nations*[24]

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16 For selected factums and interventions presented by parties and intervenors, see A. BAYEFSKY, *op. cit.*, note 9, p. 305-403.

17 Hence, in one paragraph only, the Court states that:
"International law contains neither a right of unilateral secession nor the explicit denial of such a right, although such a denial is, to some extent implicit in the exceptional circumstances required for secession to be permitted under the right of a people to self-determination (e.g., the right of secession that arises in the exceptional situation of an oppressed or colonial people, discussed below." *Reference*, para. 112.

18 *Id.*, para. 114.

19 See Appendix 1 of the present *Essays*.

20 See Appendix 2 of the present *Essays*.

21 See Appendix 3 of the present *Essays*.

22 See Appendix 4 of the present *Essays*.

23 See Appendix 13 of the present *Essays*.

24 See Appendix 16 of the present *Essays*.

re analysed by the Court in order to determine if one or the other of these ıstruments confer on Québec the right to unilaterally secede from Canada.

In its first two observations, the Court demonstrates the perilous nature f the exercise in which the Supreme Court has accepted to engage itself. he first is to the effect that peoples are the beneficiaries of the right of self-etermination, and that such a right is not reserved only to States as some ıthors have suggested[25]. Yet, after having made such an important distinc-on, the Court shies away from any definition of the word people and, ıoreover, refuses to discuss the existence of a Québec people. The Court xplains its refusal:

> "While much of the Quebec population certainly shares many of the character-istics (such as a common language and culture) that would be considered in determining whether a specific group is a 'people', as do other groups within Quebec and/or Canada, it is not necessary to explore this legal characterization to resolve Question 2 appropriately. Similarly, it is not necessary for the Court to determine whether, should a Quebec people exist within the definition of public international law, such a people encompasses the entirety of the provincial population or just a portion thereof. Nor is it necessary to examine the position of the aboriginal population within Quebec. *As the following discussion of the scope of the right to self-determination will make clear, whatever be the correct application of the definition of people(s) in this context, their right of self-determination cannot in the present circumstances be said to ground a right to unilateral secession.*"[26]

Thus, in order to answer question 2, the Court does not see fit to make a gal determination and to acknowledge the existence or not of a Québec ɔople. Yet, the refusal to recognize such an existence could have provided e Court with a quick answer to question 2, pronouncing that Québec ɔuld not invoke the right of self-determination nor be a beneficiary of a ght of secession derived from the right of peoples to self-determination.

In refusing to decide if individuals residing on the territory of Québec ere a people or to affirm that the people of Québec and aboriginal peo-

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See Stephen SCOTT, "Autodétermination, sécession, division, légalité: observations", in COMMISSION D'ÉTUDES DES QUESTIONS AFFÉRENTES À L'ACCESSION DU QUÉBEC À LA SOUVERAINETÉ, *Les attributs d'un Québec souverain*, Exposés et études, vol. 1, p. 583. See also Jean-François GUILHAUDIS, *Le droit des peuples à disposer d'eux-mêmes*, Grenoble, PUG, 1976, p. 201 and Jean CHARPENTIER, "Le droit des peuples à disposer d'eux-mêmes et le droit international positif", (1985) 2 *R.Q.D.I.* 95.

Reference, para. 125 [emphasis is mine].

ples coexisted on such a territory, the Court appeared to want to leave the question unanswered. And when the Court went on later to distinguish the right to internal and external self-determination, the Court will also maintain the uncertainty on this issue. Thus, after having demonstrated that Québec did not fulfil the conditions to avail itself of the right of external self-determination that the *Friendly Relations Declaration* appears to have recognized, the Court states "neither the population of the province of Québec, *even if characterized in terms of 'people' or 'peoples'*, nor its representative institutions, the National Assembly, the legislature or government of Québec, possess a right, under international law, to secede unilaterally from Canada."[27]

It is within the framework of this analysis of the meaning and extent of the right of self-determination that the Court endeavours to discover the existence or not of a right of self-determination. It recalls that the right has an internal dimension, *i.e.* the pursuit by a people of its political, economic, social and cultural development within the existing State, but that it has an external dimension which opens the door to a right of unilateral secession. According to the Court, such a door is closed to peoples which threaten the territorial integrity of the State, in light of the *Friendly Relations Declaration*, *the Vienna Declaration* and the *U.N. 50th Anniversary Declaration* which protect parent States from such threats[28].

Conversely, the Court seems inclined to admit the existence of a limited right of secession. The recourse to external self-determination is open to an oppressed or colonised people, under colonial domination or occupation. It would also be available to peoples under "alien subjugation, domination or exploitation outside a colonial context."[29] But, while affirming that is was unnecessary to make such determination[30], the Court appears to be favorable, along with some publicists[31], to the recognition of a right of remedial secession open to a people which "is blocked from the meaningful exercise

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27 *Id.*, para.125 [emphasis is mine].

28 *Id.*, para. 127 et 128.

29 *Id.*, para. 133.

30 *Id.*, para. 135.

31 See Theodore CHRISTAKIS, *Le droit à l'autodétermination en dehors des situations de décolonisation*, Paris, La Documentation française, 1999, p. 314. See also Lee C. BUCHHEIT, *Secession: The Legitimacy of Self-Determination*, New Haven and London, Yale University Press, 1978, p. 94.

of its right to self-determination internally, [and] entitled, as a last resort, to exercise it by secession."[32]

However, the Court adds hastily that such a blocking is not present in the Québec context. This context is referred to by the *amicus curiae* which is quoted abundantly and upon which the judges rest their argument to the effect that 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."[33]

The Court seems to set aside such an argument that I had put forward in an article "Le droit de faire sécession, l'expression du principe démocratique" and that was formulated as follows:

> "Even in the hypothesis where the right of secession could only be exercised by peoples to which an internal right of self-determination has been refused, perhaps is it possible to argue that the adoption of the *Constitution Act, 1982*, without the assent of the Parliament and government of Québec, as well as the rejection of the Meech Lake Accord (and of the five conditions put forward by Québec) constitute a denial of Quebec's right of internal self-determination."[34]

The Court replies to this argument in the following manner:

> "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 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."[35]

The Court's interpretation entails that if the constitutional order is not modified to take into account the claims of Québec and that such an order continues to allow that the totality of the population belonging to the territory is represented in the parent State without any distinction, the right of internal self-determination is not breached and there is no right of remedial secession. The internal right of self-determination is thus interpreted in a restrictive manner. Such a right should constitute, according the Supreme

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32 *Reference*, para. 134.

33 *Id.*, para. 136.

34 See D. TURP, *loc. cit.*, note 14 [my translation].

35 *Reference*, para. 137.

Court, a remedy to sustain objections to the imposition of changes affecting the political status or the economic, social or cultural development of a people within a State, and indeed to achieve any desirable additional autonomy. Such an interpretation deprives the internal component of the right to self-determination of any real meaning and one can regret that the Court did not adopt a more original approach on this aspect of the right of self-determination[36].

Thus, the Court concludes that

> "neither the population of the province of Québec, even if characterized in terms of 'people' or 'peoples', nor its representative institutions, the National Assembly, the legislature or government of Québec, possess a right, under international law, to secede unilaterally from Canada." [37]

After having answered question 2, the Court considers useful to look into other notions of international law advanced by the *amicus curiae*. Even though the interest by the Court for such notions does not change its conclusion on the inexistence of a right of unilateral secession under international law, it allows the Court to further study the issue of sovereignty and independence in a larger context.

Hence, the Court will discuss the concepts of effectivity and recognition and the relationship that these two international law concepts may entertain with the right of self-determination and the creation of an independent and sovereign State. The interest of this discussion resides with the fact that "international law may well, depending on the circumstances, adapt to recognize a political and/or factual reality, regardless of the legality of the steps leading to its creation."[38]

Concerning the principle of effectivity, the Court recalls that "[i]t may be that a unilateral secession by Québec would eventually be accorded legal status by Canada and other States, and thus give rise to legal consequences."[39] And the Court adds:

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36 In this respect, the treatment of the whole issue of the right of self-determination of peoples is considered by an author as greatly lacking in originality. See José WOEHRLING, "L'avis de la Cour suprême du Canada sur l'éventuelle sécession du Québec", (1999) 37 *R.F.D.C.* 3, p. 21.

37 *Reference*, para. 138.

38 *Id.* para. 141.

39 *Id.*, para. 144.

"[B]ut this does not support the more radical contention that subsequent recognition of a state of affairs brought about by a unilateral declaration of independence could be taken to mean that secession was achieved under colour of a legal right."[40]

If the Court shows a lack of understanding of the concept and extent of international recognition[41], it is right in suggesting that international recognition only has a declaratory effect, in contrast with a constitutive effect. The Court declares, rightly so, that recognition "is not alone constitutive of statehood and, critically, does not relate back to the date of secession to serve retroactively as a source of a 'legal' right to secede in the first place."[42]

But, it is interesting to note that the Court did not refer to recognition for the sole purpose to comfort a conclusion to the effect that there is no right of secession in international law and of presenting, in a right perspective, the possible role of recognition in the process of the accession of a people to statehood. The Court also links the question of international recognition to the answer given to the first question concerning the existence of a right of secession under domestic rather than international law. The Court speaks as follows:

"As we indicated in our answer to Question 1, an emergent state that has disregarded legitimate obligations arising out of its previous situation can potentially expect to be hindered by that disregard in achieving international recognition, at least with respect to the timing of that recognition. On the other hand, compliance by the seceding province with such legitimate obligations would weigh in favour of international recognition."[43]

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40 *Id.*

41 Hence, the Court refers to the *European Community Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union* as "legal norms", without reminding that such norms are only applicable to the member States of the European Community and do not have a general scope. Furthermore, the Court considers "[r]ecognition occurs only after a territorial unit has been successful, as a political fact, in achieving secession" (*Reference*, para. 142), whereas, in some cases, recognition is granted before such success. On this issue of recognition in the advisory opinion. See Daniel TURP, "International Recognition in the Supreme Court of Canada's Quebec Reference", (1998) 35 *Canadian Yearbook of International Law* 335 and "Globalizing Sovereignty—The Issue of International Recognition in the Supreme Court of Canada's Reference on Quebec Sovereignty", reprinted in the present *Essays*.

42 *Reference*, para. 142.

43 *Id.*, para. 143.

The legitimate obligations that are referred to in the above-mentioned passage are those relating to the obligation to negotiate that the Court established in answering the first question and from which flows, as the Court recognizes itself, a right to pursue secession.

B. The Unforeseen Emergence of a Constitutional Right of Secession

Rare are the commentators who could have imagined that the Supreme Court of Canada would recognize a domestic right of secession. If the emphasis was clearly put on a constitutional obligation to negotiate, the Court derived from this obligation a right to pursue secession. Hence, in the summary of its conclusion, the Court acknowledged explicitly such a right to pursue secession. The relevant passage of the opinion should be quoted in its entirety:

> "Quebec could not, despite a clear referendum result, purport to invoke a right of self-determination to dictate the terms of a proposed secession to the other parties to the federation. The democratic vote, by however strong a majority, would have no legal effect on its own and could not push aside the principles of federalism and the rule of law, the rights of individuals and minorities, or the operation of democracy in the other provinces or in Canada as a whole. Democratic rights under the Constitution cannot be divorced from constitutional obligations. Nor, however, can the reverse proposition be accepted. The continued existence and operation of the Canadian constitutional order could not be indifferent to a clear expression of a clear majority of Quebecers that they no longer wish to remain in Canada. 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."[44]

Thus, the clear expression, by a clear majority of Quebecers, of their will to cease to be part of Canada has, as a corollary, the "right to pursue secession" and to achieve sovereignty and independence. This right is the other face of the constitutional and binding[45] obligation to negotiate. The Court put great emphasis in its answer to the first question on this obligation which is considered to be, by most commentators, the most original dimen-

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44 *Id.*, para. 151 [emphasis is mine].

45 *Id.*

sion of the August 20, 1998, opinion[46]. This obligation is described by the Court in the following terms in the infamous paragraph 88 of the opinion:

> "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 amendment of the Constitution begins with a political process undertaken pursuant to the Constitution itself. In Canada, the initiative for constitutional amendment is the responsibility of democratically elected representatives of the participants in Confederation. Those representatives may, of course, take their cue from a referendum, but in legal terms, constitution-making in Canada, as in many countries, is undertaken by the democratically elected representatives of the people. The corollary of a legitimate attempt by one participant in Confederation to seek 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.*"[47]

This obligation to negotiate has its origins in two of the four constitutional principles defined by the Supreme Court, the principle of federalism and the principle of democracy. These principles play a key role with regards to the existence of a right to unilateral secession and in order to answer the first question.

On the principle of federalism, one can perhaps understand that the emergence of an obligation to negotiate derives from the fact that the principle of federalism recognizes the diversity of the component parts of

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[46] See Patrice GARANT, "Un an après l'avis de la Cour suprême sur la sécession du Québec—L'élément de plus novateur de l'arrêt: L'obligation de négocier—Mais la Cour a-t-elle sous-estimé ou feint d'ignorer la complexité du processus de négociation qu'elle recommande?", *Le Devoir*, Montréal, 20 août 1998, p. A-9, Peter W. HOGG, "The Duty to Negotiate", (1999) 7 *Canada Watch*, p. 1, and Alan C. CAIRNS, "The Quebec Secession Reference: the Constitutional Obligation to Negotiate", (1998) 10.1 *Constitutional Forum* 6.

[47] *Reference*, para. 88 [emphasis is mine].

Confederation, and the autonomy of provincial governments to develop their societies within their respective spheres of jurisdiction."[46]

The democratic principle is given, in its case, several meanings by the Court. It is understood as a "political system of majority rule"[49], seen as "connected to substantive goals, most importantly, the promotion of self-government"[50] and accommodating for "cultural and group identities."[51] It comprises also the fundamental value in our concept of a free and democratic society, *i.e.* the "consent of the governed."[52] In relation with the obligation to negotiate, the democratic principle appears to imply "a continuous process of discussion"[53] and it is this last dimension of the democratic principle that the Court must have had in mind when it derived from it the obligation to negotiate.

Besides, is it not in the process of defining the democratic principle that the Court brings about for the first time the obligation to negotiate and appears to create an obligations which is not only applicable in the context of secession, but also with regards to an initiative relating to any constitutional amendment. The Court states:

> "The *Constitution Act, 1982* gives expression to this principle, by conferring a right to initiate constitutional change on each participant in Confederation. In our view, the existence of this right imposes a corresponding duty on the participants in Confederation to engage in constitutional discussions in order to acknowledge and address democratic expressions of a desire for change in other provinces. This duty is inherent in the democratic principle which is a fundamental predicate of our system of governance."[54]

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48 *Id.*, para. 58. This obligation could thus emerge from the fact that this principle "facilitates the pursuit of collective goals by cultural and linguistic minorities which form the majority within a particular province. This is the case in Québec, where the majority of the population is French-speaking, and which possesses a distinct culture." *Id*, para. 59.

49 *Id.*, para. 68.

50 *Id.* para. 64.

51 *Id*

52 *Id.*, para. 67.

53 *Id.*, para. 68.

54 *Id.*, para. 69. Since it is the only reference to the *Constitution Act, 1982* in the opinion, one could argue that the Court may be favoring an interpretation tending to make the amending formula more acceptable to a province which is not been given any form of consent to the Act and which was imposed on Québec in the light of the *Patriation Reference*. A Québec constitutional lawyer also brought up a similar concern in noting the very little importance given by the Court to the constitutional amending formula in order to prevent

If the obligation to negotiate thus has its source in the principles of federalism and democracy, this obligation has also a well-defined content when it purports to deal with the repudiation of the existing constitutional order and the clear expression of the population of the province of the desire to pursue secession. The obligation seems to have two distinct components.

The general component of this obligation is to "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."[55] The specific component of the obligation appears to be "to negotiate constitutional changes to respond to that desire to pursue secession."[56]

In its opinion, the Court attempts to explain the way in which the general component of the obligation must be assumed through a description of the nature of the obligations and an appreciation of the means that should be chosen to respect the obligation. The Court reminds firstly that "conduct of the parties in such negotiations would be governed by the same constitutional principles which give rise to the duty to negotiate: federalism, democracy, constitutionalism and the rule of law, and the protection of minorities."[57] The Court also states that it intends to reject the two extreme positions: first, "that there would be a legal obligation on the other provinces and federal government to accede to the secession of a province, subject only to negotiation of the logistical details of secession"[58], second that "that a clear expression of self-determination by the people of Quebec would impose *no* obligations upon the other provinces or the federal government."[59]

It is in fact in the explanation relating to the rejection of the first extreme position that the Supreme Court acknowledges the internal "right" of secession of Québec. Hence, in stating that "[n]o negotiations could be effective if their ultimate outcome, secession, is cast as an absolute legal

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such formula from becoming "an obstacle which could thwart a clear will of Quebecers" [my translation]. See José WOEHRLING, "La Cour suprême a-t-elle voulu se 'racheter' pour son attitude de 1982", *La Presse*, Montréal, 10 septembre 1998, p. B-3.

55 *Reference*, para. 88.

56 *Id.*

57 *Id.*, para. 90.

58 *Id.*

59 *Id.*, para. 92 [the underlining is of the Court].

entitlement based upon an obligation to give effect to that act of secession in the Constitution"[60], the Court recognizes that Québec is the beneficiary of a "right", albeit a right which is not absolute and which is subject to an obligation to negotiate. In its explanation of the rejection of the second extreme position, the Court also reiterates the existence of a "right" of secession by stating that the "[t]he rights of other provinces and the federal government cannot deny the right of the government of Québec to pursue secession, should a clear majority of the people of Québec choose that goal, so long as in doing so, Québec respects the rights of others."[61]

After having rejected the extreme positions, the Court explains that it is the conciliation of the different rights and obligations which ensure the respect of the obligation to negotiate. In the course of such an explanation, the Court identifies the parties to the negotiation and refers to the representatives of the two legitimate majorities, *i.e.* "the clear majority of the population of Québec, and the clear majority of Canada as a whole, whatever that may be."[62] But, the Court does not seem to be willing to be specific on the appropriate means to implement the general component of the obligation to negotiate, except for the fact that it will suggest that "the conduct of the parties assumes primary constitutional significance [...] [and that] [t]he negotiation process must be conducted with an eye to the constitutional principles we have outlined, which must inform the actions of *all* the participants in the negotiation process."[63]

The Court continues its analysis on the obligation to negotiate by exposing the potential difficulties of the negotiation[64] and in describing the respective role of the political actors and tribunals in these matters[65]. As it will do later again in its opinion, the Court refers to the international "repercussions" of the non-respect of the obligation to negotiate.

Thus, as a prelude to the views it will later present on the issue of international recognition, the Court states:

> "To the extent that a breach of the constitutional duty to negotiate in accordance with the principles described above undermines the legitimacy of a

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60 *Id.*, para. 91.

61 *Id.*, para. 92.

62 *Id.*, para. 93.

63 *Id.*, para. 94 [the underlining is of the Court].

64 *Id.*, para. 96-98.

65 *Id.*, para. 98-102.

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 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."[66]

As we noticed earlier, this position of the Court carries a major consequence *i.e.* to internationalise the process of the accession to sovereignty and to grant a role of evaluation to the member States of the international community[67]. The Court thereby invites these States to take into account not only the international legal norms applicable in the process of recognition and to which the Court will later refer in the course of its opinion[68], but also the principles of federalism, democracy, constitutionalism and the rule of law and of the rights of minorities which it has defined itself[69].

The Supreme Court of Canada is much more laconic when it discusses the specific component of the obligation to negotiate, *i.e.* reciprocal obligation on all parties of Confederation to negotiate constitutional changes to respond to that desire. Hence, after having stated that the obligation to negotiate entails the negotiation by all parties of constitutional modifications, the Court refuses to identify the amending formula which would be applicable in the circumstances. In so doing, the Court seems to grant the wish of the Attorney General of Canada which had asked the Court during

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66 *Id.*, p. ra. 103 [emphasis is mine].

67 See D. TURP, *loc. cit.* note 41, p. 4-5.

68 *Reference*, para. 148.

69 It is interesting to note that three of these principles, the exception being the principle of federalism, are also mentioned in the Guidelines on recognition which the Court will refer to in paragraph 149 of its opinion. For a comment of these Guidelines, See Jean CHARPENTIER, "Declarations des Douze sur la reconnaissance des nouveaux États," (1992) 96 *R.G.D.I.P.* 342.

the pleadings to avoid such identification and justifies her silence in the following manner:

> "It will be noted that Question 1 does not ask how secession could be achieved in a constitutional manner, but addresses one form of secession only, namely unilateral secession. Although the applicability of various procedures to achieve lawful secession was raised in argument each option would require us to assume the existence of facts that at this stage are unknown. In accordance with the usual rule of prudence in constitutional cases, we refrain from pronouncing on the applicability of any particular constitutional procedure to effect secession unless and until sufficiently clear facts exist to squarely raise an issue for judicial determination."[70]

Perhaps, this prudence is linked to the problem of, from a Québec standpoint, the illegitimacy of the *Constitution Act, 1982*, and notably of its Part V relating to the amending formulae of the Constitution of Canada. Such a prudence is related to the fact that the two amending formulas that could apply in the case of secession, the unanimity rule and the 7/50 rule, grant in both cases powers to block any constitutional amendment that would allow for the secession of Québec. A careful analysis of the Court's prudence on this question makes Professor Donna Greschner come to the following conclusion:

> "Overall, the Court's description of the functions of principles and the duty to negotiate, when coupled with the absence of Part V in the reasoning, leads to the inference that in the secession context the strict application of Part V rules will give way to broader principles. The Court's message to political actors is that the written rules, and the rights of parties that flow from the rules, are not as important as underlying constitutional principles. The application of principles softens the existing amending rules, an thus fulfils their raison d'être of facilitating change."[71]

Professor Guy Tremblay reads in this opinion an implicit amending formula with regards to the secession of Québec, rooted in the existence of two legitimate majorities described in the opinion of the Court. Thus, for a constitutional amendment to bring about such secession, it would need to

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70 *Reference*, para. 105.

71 See Donna GRESCHNER, "The Quebec Secession Reference: Goodbye to Part V?", (1998) 10.1 *Constitutional Forum* 19, p. 23. This author adds that "[t]he diminished importance of Part V makes sense in the context of secession. The amending procedures do not fit comfortably with secession because they were not designed for the purpose of creating two new countries." (*Id.*).

be assented to by Québec, as well as by the resolutions of the federal Parliament and the legislatives assemblies comprising at least two-thirds of the other provinces representing at least 50 % of their respective populations.[72]

Whatever the constitutional amending formula, the fact remains that the Supreme Court of Canada acknowledged the existence of a constitutional right of secession which is subjected to an obligation to negotiate. Some years ago, we had come, albeit through the route of the constitutional convention, to an analogous conclusion:

> "Does this constitutional convention recognizing the right of Quebec to self-determination comprise a right to achieve sovereignty? Precedents point to such a direction and seem to accept that one of the avenues of self-determination that Quebec can follow is the accession to sovereignty and independence. In this sense, the exercise of a right of secession by the people of Quebec would be respectful of a constitutional convention. The existence of such a constitutional convention would entail a conventional obligation to adopt the necessary modifications to the *Constitution du Canada* in order to give effect to the constitutional convention and allow for the withdrawal of Quebec from the federation."[73]

If the intention of the government of Canada was to bring the Supreme Court of Canada to affirm in a categorical way that Québec did not possess a right to secede unilaterally and to limit the scope of such a negation, the government of Canada must have been disappointed on August 20, 1998. The Supreme Court not only gave a stamp of legitimacy to the promoters of sovereignty, but also confirmed the legality of a pursuit of secession based on constitutional principles and binding obligations.

Such a disappointment is ultimately translated by a will to neutralise the opinion of the Court and the adoption of a legislation to give effect to newly discovered requirements, *i.e* clarity, to which the government of Québec will reply hastily by the affirmation of the fundamental right of the people of Québec to self-determination.

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72 See Guy TREMBLAY, "La procédure implicite de modification de la Constitution du Canada pour le cas de la sécession du Québec", (1998) 58 *R. du B.* 423, p. 431 and 432. On the amending formula applicable to secession. See also the comment of André TREMBLAY, *Droit constitutionnel—Principes*, 2e éd., Montréal, Éditions Thémis, 2000, p. 58-66.

73 D. TURP, *loc. cit.*, note 14, p. 51-52 [my translation].

II. Québec's Right to Self-Determination

As several commentators have noted the advisory opinion of the Supreme Court of Canada was received favorably by political commentators in Québec and Canada[74]. The Prime Minister of Canada claimed that with the Supreme Court's opinion the "time of astuteness and winning questions was over"[75], whereas the Prime Minister of Québec suggested that the Court had buried "federalist myths" relating to the accession of Québec to sovereignty[76].

Realising perhaps that the opinion of the Supreme Court of Canada was clearly favorable to Québec sovereigntists[77], the government of Canada quickly raised the possibility of imposing referendum rules[78]. However, the federal government would not go ahead immediately with such a plan and awaited the result of the Québec election of November 30, 1998, before defining its position. The re-election of the Parti Québécois will prompt the government to remind that it did not exclude the possibility of adopting a piece of legislation dealing with a referendum to be held in Québec.

On December 10, 1999, the government of Canada tabled a document which was to become Bill C-20 and a *Clarity Act* which denies, in an unavowed fashion, Québec's right of self-determination (A). Five days later, the government of Québec replied by the presentation of Bill 99 which became *Quebec's Fundamental Rights Act* and affirmed, more clearly than ever before the right of the people of Québec to self-determination (B).

A. The Implicit Denial of Québec's Right of Self-Determination

After putting forward several options, from a Ministerial Statement to a White paper, the federal government chose to table a draft bill to give effect, as its title suggested, to the requirement for clarity as set out in the

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74 See the numerous reactions to the opinion referred to by Warren J. NEWMAN, *The Quebec Secession Reference: The Rule of Law and the Position of the Attorney General of Canada*, Toronto, York University, 1999, p. 79-87.

75 See Jean CHRÉTIEN, "Fini les astuces!", *Le Devoir*, Montréal, 23 août 1998, p. A-9 [my translation].

76 See Lucien BOUCHARD, "La démarche souverainiste est légitime", *Le Devoir*, Montréal, 22 août 1998, p. A-9.

77 See J. WOEHRLING, *loc. cit.*, note 54

78 See Manon CORNELLIER, "Dion n'exclut pas qu'Ottawa impose les règles référendaires", *Le Devoir*, Montréal, 26 août 1998, p. A-4.

opinion of the Supreme Court of Canada in the Québec Secession Reference. Adopted in its first reading on December 12, 1999, Bill C-20 was heavily debated in the House of Commons and the Senate, as well as during the hearings of the legislative committees to which the Bill was referred to for the purpose of a detailed examination. With the help of several closure motions imposed in both houses and their respective committees, Bill C-20 was adopted in an expeditive manner, first by the House of Commons, on March 15, 2000, and then by the Senate on June 29, 2000, the date on which the Governor General gave her assent to the Bill and on which it came into force[79].

If the *Clarity Act* recognizes that Québec has a right to secede under constitutional law and that Canada is thus not indivisible[80], a careful reading of the Act tends to suggest it is more a legislation on the obligation "to refuse to negotiate" insofar as it defines the circumstances following which the government of Canada "shall not enter into negotiations on the terms on which a province might cease to be part of Canada."[81] In a legal opinion related to the Bill and commenting on the numerous references to negotiations in Supreme Court's opinion, Professor Alain Pellet remarked that the

> "central idea on which rests the Opinion of the Supreme Court [...] seems to be that the process as a whole must be dominated by the idea of negotiations (the word appears at least 57 times, in the singular and plural, in the opinion) [...] [and] as a consequence, if there can be advantages that the 'rules of the games' be defined in advance, it is hardly consistent with the spirit of the Supreme Court's opinion that such rules be defined in the absence of any preliminary negotiation."[82]

Such an obligation not to negotiate is linked with a mechanism by which the House of Commons is given a power to determine, by resolution,

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79 For a description of such debates, see Daniel TURP, *La nation bâillonnée. le plan B ou l'offensive d'Ottawa contre le Québec*, Montréal, VLB Éditeur, 2000, p. 43-73.

80 Paragraph 3 (1) of the *Clarity Act* recognizes, *a contrario*, a right of secession subject to an obligation to negotiate since it is provides that "[i]t is recognized that there is no right under the Constitution of Canada to effect the secession of a province from Canada unilaterally." On the question of divisibility, important debates were held during the hearings of the legislative committee of the Senate and ended with the rejection on an amendment which would have affirmed the indivisible nature of Canada.

81 *Id.*, para. 1 (6) et 2 (4).

82 See Alain PELLET, *Avis juridique sommaire sur le projet de loi visant à donner effet à l'exigence de clarté formulée par la Cour suprême du Canada dans son avis sur le Renvoi sur la sécession du Québec* available on the website www.daniel.turp.qc.ca. [my translation].

if a referendum question and majority are consistent with the requirement of clarity defined by the law. This procedure is in itself the source of the implicit denial of Québec's right to pursue secession which the Supreme Court of Canada derived from the constitutional principles of federalism and democracy to which the obligation to negotiation is intended to give effect.

Such an implicit denial of Québec's right of secession became even more apparent when one carefully examines the provisions on the basis of which the government can rely to refuse to enter into negotiations on the Québec secession, whether it be the provisions on the clarity of the question or related to the clarity of the majority.

On the question of the clarity of the question, paragraphs 1 (3) and (4) of the Act provide:

> "Art. 1 [...] (3) In considering the clarity of a referendum question, the House of Commons shall consider whether the question would result in a clear expression of the will of the population of a province on whether the province should cease to be part of Canada and become an independent State.
>
> (4) For the purpose of subsection (3), a clear expression of the will of the population of a province that the province cease to be part of Canada could not result from
>
> (*a*) a referendum question that merely focuses on a mandate to negotiate without soliciting a direct expression of the will of the population of that province on whether the province should cease to be part of Canada; or
>
> (*b*) a referendum question that envisages other possibilities in addition to the secession of the province from Canada, such as economic or political arrangements with Canada, that obscure a direct expression of the will of the population of that province on whether the province should cease to be part of Canada."

As we can see, these provisions limit considerably the margin of manoeuvre of a legislative assembly in the exercise of its right to adopt a question to which the preamble of the Act refers to[83]. Not only does the Act suggest that clarity requires that a question necessarily refer to the idea that a province "cease to be part of Canada and become an independent State",

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83 The third paragraph of the preamble of the *Clarity Act* reads as follows:
"WHEREAS the government of any province of Canada is entitled to consult its population by referendum on any issue and is entitled to formulate the wording of its referendum question; [...]"

but it takes exception with the clarity of a question that would refer to a mandate to negotiate or to an offer of a political or economic arrangement with Canada. One cannot avoid noticing that these two exclusions refer in a such an obvious fashion to the wording of the Québec referendum questions 1980 and 1995[84]. Such exclusions are framed in such a way to prevent the government of Québec to emphasize the obligation to negotiate to which the Supreme Court refers and which is applicable to both legitimate majorities, but also to include its sovereignty project in a wider perspective and to propose to achieve sovereignty while accepting to exercise jurisdiction in common with Canada within a union of a confederal nature[85].

These exclusions find no support in the opinion of the Supreme Court of Canada. Nowhere in the opinion can we find a suggestion that questions put the people of Québec in 1980 and 1995 were unclear. Only an abusive interpretation of the Court's opinion could lead to such exclusions. And the result of such an abusive interpretation and of the application of a determination based on such an interpretation would be to deny Québec's right to determine freely its political status and to exercise its right to self-determination[86].

With regards to the clarity of the majority, paragraphs 2 (1) et (2) of the Act appear to be even less respectful to Québec's right to pursue secession to exercise its right of self-determination. To fully understand their meaning, a careful reading of these provisions can be useful:

> "**2.** (1) Where the government of a province, following a referendum relating to the secession of the province from Canada, seeks to enter into negotiations on the terms on which that province might cease to be part of Canada, the House of Commons shall, except where it has determined pursuant to section 1 that a referendum question is not clear, consider and, by resolution, set out its determination on whether, in the circumstances, 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.

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84 These two questions are reprinted in Appendix 21 and follow the excerpts of the *Referendum Act*, R.S.Q., c. C-64.1 through which theses questions were adopted.

85 See on this question Michel SEYMOUR and Daniel TURP, "Le projet d'une union confédérale entre le Québec et le Canada—Les compétences et les institutions d'une union confédérale", *Le Devoir*, Montréal, 18 juin 2001, p. A-7 et "L'union confédérale—L'union confédérale, une formule de partenariat parmi d'autres", *Le Devoir*, Montréal, 19 juin 2001, p. A-7.

86 See on this issue Andrée LAJOIE, *Avis juridique sur la notion de clarté de la question Renvoi sur la sécession du Québec* accessible sur le site www.danie l.turp.qc.ca.

(2) In considering whether there has been a clear expression of a will by a clear majority of the population of a province that the province cease to be part of Canada, the House of Commons shall take into account:

(*a*) the size of the majority of valid votes cast in favour of the secessionist option;

(*b*) the percentage of eligible voters voting in the referendum; and

(*c*) any other matters or circumstances it considers to be relevant."

Thus, after having been given the right to determine the clarity of the question, Parliament is invested with the power to determine the clarity of the majority and to apply criteria which lack clarity themselves. Rather than stating clearly that a clear majority entails an absolute majority of votes (50 % + 1), the *Clarity Act* enumerates three criteria which confer an absolute discretion to Parliament and could allow it to make a determination rejecting the universally accepted rule of 50 % + 1. Whether it be the criteria of the "size of the majority of valid votes" or of the "percentage of eligible voters voting", such size and importance are not quantified and are open to arbitrary appreciation. As for the criterium that Parliament could take into consideration "any other matters or circumstances it considers to be relevant", it is not difficult to realise that this is the antithesis of clarity and a licence for arbitrariness. The absence of clarity of these provisions has led a constitutional scholar to suggest that these provisions could be declared unconstitutional for vagueness[87].

To justify the absence of more objective norms and to a defined percentage of valid votes or eligible voters, the promoters of Bill C-20 have often relied on the notion a "qualitative majority" to which the Court refers

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87 See Patrice GARANT, "Projet de loi C-20 sur le 'clarté'—Des modifications s'imposent", *Le Devoir*, Montréal, 1er mars 2000, p. A-7. In commenting paragraph 2 (2) of the Bill, Professor Carant stated: "These criteria are not of a flashing clarity. Yet an important debate is at stake. The decision will affect the freedom and the security, at least psychological, of a great number of citizens. Should it not be taken on the basis of fundamental justice as prescribed by article 7 of the Canadian Charter? One of the principles dealt with on several occasions in its numerous judgement of the Supreme Court, stipulates that legislation must be sufficiently precise; they must not be infected by 'a vice of constitutional imprecision'. As held by the Court, 'it is a principle of fundamental justice [...] that laws will be too imprecise' (*Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, 625). A law will be deemed constitutionally imprecise if it lacks precision to the point of not constituting a sufficient guide for a judicial decision. The legislative norms must not allow arbitrariness (*Morales*, [1992] 3 S.C.R. 711, 736).

to in its advisory opinion[88]. However, this notion of qualitative majority refers to the referendum process as was very aptly explained by Professor Henri Brun[89]. In the absence of quantitative criteria, the House of Commons can define the importance of votes validly cast and the percentage of admissible voters at the level it so decides without reference to any objective criteria.

As we argued so often during the debates relating to Bill C-20 and in light of the suggestion by Supreme Court of Canada in its opinion of August 20, 1998, that the disallowance power contained in the *Constitution Act, 1867* has been abandoned[90], the new powers conferred to the House of Commons to determine the clarity of the referendum question and majority confer a new power of disallowance. The House of Commons could hence disavow the referendum question and consequently an act of Québec's National Assembly adopted following a democratic debate governed by rules set by the National Assembly itself[91]. Afterwards, the House of Commons can disallow the result of a referendum and thus the will of the people of Québec itself.

The temptation to exercise such power of disallowance will be increased by the fact that the *Clarity Act* stipulates that the House of Commons must

> "take into account the views of all political parties represented in the legislative assembly of the province whose government is proposing the referendum on secession, any formal statements or resolutions by the government or legislative assembly of any province or territory of Canada, any formal statements or resolutions by the Senate, any formal statements or resolutions by the representatives of the Aboriginal peoples of Canada, especially those in the province whose government is proposing the referendum on secession, and any other views it considers to be relevant."[92]

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[88] *Reference*, para. 87. The relevant excerpt reads as follows: "Our political institutions are premised on the democratic principle, and so an expression of the democratic will of the people of a province carries weight, in that it would confer legitimacy on the efforts of the government of Québec to initiate the Constitution's amendment process in order to secede by constitutional means. In this context, we refer to a 'clear' majority as a qualitative evaluation."

[89] See on this subject Henri BRUN, *Avis juridique sur la notion de clarté de la majorité dans le Renvoi sur la sécession du Québec* accessible sur le site www.daniel.turp.qc.ca.

[90] *Reference*, para. 55

[91] See *Referendum Act*, *supra*, note 34.

[92] *Clarity Act*, para. 1 (5) and 2 (3).

Hence, if either one of these institutions or groups view the question or the majority as unclear, the House can rely on such view to determine, by resolution, that clarity is lacking. The acts of the National Assembly of Québec and of the people come not only under the scrutiny of the House of Commons of Canada, but are subject to the advice of a multitude of political actors which could consequently bring the government of Canada to refuse to enter into negotiations with Québec and to thwart Québec's right to pursue secession.

Could this implicit denial of Québec's right of self-determination not also have its source in the application of the third and last article of the *Clarity Act*? This article makes the accession of Québec to sovereignty conditional to a constitutional amendment preceded by negotiations on matters which suggests that the borders and the territorial integrity of Québec could be called into question. Article 3 of the *Clarity Act* reads as follows:

> "**3.** (1) It is recognized that there is no right under the Constitution of Canada to effect the secession of a province from Canada unilaterally and that, therefore, an amendment to the Constitution of Canada would be required for any province to secede from Canada, which in turn would require negotiations involving at least the governments of all of the provinces and the government of Canada.
>
> (2) No Minister of the Crown shall propose a constitutional amendment to effect the secession of a province from Canada unless the government of Canada has addressed, in its negotiations, the terms of secession that are relevant in the circumstances, including the division of assets and liabilities, any changes to the borders of the province, the rights, interests and territorial claims of the Aboriginal peoples of Canada, and the protection of minority rights."

Like the Supreme Court of Canada, Parliament did not identify the amending formula which would follow the constitutional negotiations between the federal and provincial governments. Regarding these negotiations, the use of the word "at least" could allow for the participation, as evidenced by the negotiations leading to the Charlottetown Accord, of other political actors, such as the representatives of territories, Aboriginal peoples or official language minorities.

In this way, the Parliament leaves open the possibility of applying the general amending formula which requires unanimity or the specific 7/50 procedure. It confers upon itself a margin within which a minimal number of provinces could prevent the adoption of a constitutional amendment effecting the secession of Québec. It would allow such political actors, who neither detain any formal right to initiate a constitutional amendment nor to

participate in such process, to exert an influence on the actors bestowed with such powers[93].

Moreover, in presenting a open-ended list of matters that must be open to negotiations and in putting the emphasis on issues which could be perceived as sources of economic or territorial instability, has the *Clarity Act* not been conceived as a tool to inhibit the possible success of negotiations which would lead to the elaboration of a proposal of constitutional amendment giving effect to secession and allow Québec to achieve sovereignty and independence? The emphasis put on borders and territory seems to be used to place Québec in a situation where it might not want to negotiate the reduction of its territorial foundation. Perhaps the government of Canada could invoke against Québec a violation of its obligation to negotiate and its refusal to pursue negotiations, thus preventing the recognition of Québec by member States of the international community.

This analysis of the provisions of *Clarity Act* can not prevent us from seeing that it has created numerous obstacles for those leading Québec's democratic struggle for sovereignty and independence and have, in reality, attempted to deny Québec's right of secession.

But, have the architects of the *Clarity Act* given birth to an unconstitutional legislation? Arguments based on the vagueness of some provisions of the Act have been made by Professor Garant[94]. Henri Brun stated on his part that the Parliament of Canada did not have the power to "shield [...] indirectly the federal government from its obligation to negotiate imposed on it by the Constitution."[95]

On this question, an experienced political analyst has demonstrated the very worrying character of this provision: See Jean-François LISÉE, *Sortie de secours: Comment échapper au déclin du Québec*, Montréal, Boréal, 2000, p. 356-358.

See P. GARANT, *loc. cit.*, note 87 and the text accompanying the note.

See Henri BRUN, "Le *Clarity Act* est insconstitutionnel—Le gouvernement du Québec devrait contester par renvoi la constitutionnalité de la loi", *Le Devoir*, Montréal, 23 février 2000, p. A-7. Professor Brun precedes this affirmation with the following argument: "From a legal standpoint, the idea according to which the *Clarity Act* would govern the obligation to negotiate of the federal government is also inadmissible. In its Reference re Secession, the Supreme Court repeats that the question of clarity is exclusively a political question which is not governed by law, but by different political actors acting under the auspices of the international community. In attempting to contain this notion of clarity a legal framework totally in the abstract, the federal Parliament is acting, in reality in a complete unconstitutional manner." [my translation].

Yet, could there not be an argument of a more general nature which could call into question the constitutionality of the *Clarity Act* in its entirety?

Are we not contemplating a legislation that, in pith and substance, is neither federal nor provincial, but that should be adopted by way of constitutional amendment. Perhaps, the federal government was conscious of the fact that a constitutional amendment was the appropriate vehicle to give effect to what he framed as a requirement of clarity and to delineate the federal obligation to negotiate to effect the secession of Québec. But the federal government was well aware of the fact that the adoption of such a constitutional amendment would be governed by either the unanimity rule, which Québec could prevent the adoption of such an amendment, or by the specific 7/50 procedure which could be called upon and could allow for adoption, without Québec's consent, of a constitutional amendment designed exclusively for Québec.

The government of Canada thus preferred to initiate a federal piece of legislation and argue that that such law was based on the power of the federal Parliament to make laws for peace, order and good government[96]. Some argued that federal legislation only relates to the participation of the Parliament and the government of Canada in the determination of whether a constitutional obligation to negotiate must be implemented and that such legislation falls under the exclusive jurisdiction of Parliament of Canada as in requires a modification of the Constitution of Canada relating to federal institutions[97].

It is highly contentious however, that the question of secession and the obligation to negotiate to effect secession be governed by a federal law, as in dealing with such a question, a judgment must be made with regards to an act emanating from another legislative assembly: it thus cannot be considered as a matter relating solely to federal internal modification procedures for the Constitution. In reality, the *Clarity Act* can be deemed as colourable legislation and regarded, for such motive, as unconstitutional[98].

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96 See Peter W. HOGG, "La *Loi sur la clarté* est conforme au droit constitutionnel—La sécession étant un geste irréversible, la majorité simple ne suffit pas; le gouvernement fédéral pourrait juger de la solidité d'un OUI après le vote", *Le Devoir*, Montréal, 25 février 2000, p. A-7.

97 See *Constitution Act, 1982*, art. 44 and the comments on such powers by Benoît PELLETIER, *La modification constitutionnelle au Canada*, Toronto, Carswell, p. 185 et 186.

98 See *Re Upper Churchill Water Reversion Act*, [1984] 1 S.C.R. 297 and Henri BRUN et Guy TREMBLAY, *Droit constitutionnel*, 3e éd., Cowansville, Éditions Yvon Blais, p. 462.

Having found that the obligation to negotiate has its origin in constitutional principles and having emphasized, as Professor Pellet made clear[99], on negotiations, the Supreme Court of Canada did certainly not intend to create a federal unilateral power to amend the Constitution of Canada with concern to secession. Serious arguments can thus be raised against the constitutionality of a *Clarity Act* to which Québec replied by an act which would explicitly affirm Québec's right to determine its own future.

B. The Explicit Affirmation of Québec's Right to Self-Determination

Bill C-20 did not leave the government of Québec indifferent. It considered important to reply to the *Clarity Act* with a piece of legislation emphasizing the prerogatives and fundamental rights of the Québec people and the State of Québec. After its examination by the Committee on Institutions of the National Assembly and negotiations to obtain the support of all political parties represented in the Assembly, *Quebec's Fundamental Rights Act* was adopted on December 7, 2000, and assented to by the Lieutenant-Governor of Québec on December 13, 2000. It came into force on February 28, 2001.

Coined as a charter for collective rights[100], *Quebecs' Fundamental Rights Act* is very similar in its content to an introductory chapter of a national constitution[101] and raises questions of international and constitu-

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99 See Alain PELLET's avis, *supra*, note 82.

100 This qualification was used by the Prime Minister Lucien Bouchard on several occasions, and notably during the debate on the adoption of the *Quebec's Fondamental Rights Act* on December 7, 2000, where he said:
"The different chapters of this legislation can be summarized as follows: that the State of Quebec gains its legitimacy from the will of our people; that French is the official language of Quebec; that our anglophone minority has inalienable rights; that our territory is inviolable; that the Aboriginal nations must develop themselves and their growth be supported; and finally a provision which stipulates that no other Parliament or government can weaken the powers, the authority, the sovereignty and the legitimacy of the National Assembly nor constrain the democratic will of the people of Quebec to self-determination in the future. It is therefore more than a simple legislation; it is more like a *Charter of political rights for the people of Quebec.*" [emphasis and my translation are mine].

101 See on this subject D. TURP, *op. cit.*, note 85, p. 151-156. On the question of a Constitution for Québec, See also Jacques-Yvan MORIN, "Pour une nouvelle constitution du Québec", (1985) 30 *McGill L.J.* 171 and Daniel TURP, "Des arguments constitutionnels et un projet de Constitution Québécoise", in Michel SARRA-BOURNET (ed.), *Manifeste des intellectuels pour la souveraineté suivi de Douze essais sur l'avenir du Québec*, Montréal, Fides, 1995, p. 239 and "Révolution tranquille et évolution constitutionnelle: d'échecs et

tional law of interest[102]. It contains provisions affirming the right of the people of Québec to self-determination. Hence, articles 1 to 3 are to be seen as the reply of Québec to the attempt of the federal Parliament to implicitly deny the right of the people to Québec to self-determination. These three articles read as follows:

> "**1.** The right of the Quebec people to self-determination is founded in fact and in law. The Quebec people is the holder of rights that are universally recognized under the principle of equal rights and self-determination of peoples.
>
> **2.** Quebec people has the inalienable right to freely decide the political regime and legal status of Quebec.
>
> **3.** Quebec 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 Quebec.
>
> No condition or mode of exercise of that right, in particular the consultation of the Quebec people by way of a referendum, shall have effect unless determined in accordance with the first paragraph."

Evidently inspired by the wording of bills presented by the MNA's Fabien Roy in 1978[103] and Gilbert Paquette in 1985[104], *Quebec's Fundamental Rights Act* shows a will to affirm the existence of the people of Québec and to declare that it is the beneficiary of a right of self-determination.

The three first articles begin with a reference to the people of Québec and solidifies the concept referred to in other Québec laws. The people of Québec had never been elevated to a rank as a subject of law. Such an affirmation was deemed to be necessary in light of the unwillingness of Canada to recognise the existence on the territory of Québec of a people or a nation, albeit a distinct society, but also with regards to the refusal by the Supreme Court itself to deal with the issue of Québec's existence as a people[105].

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d'hésitations", in Yves BELANGER, Robert COMEAU and Claude MÉTIVIER (ed.), *La Révolution tranquille 40 ans plus tard: un bilan*, Montréal, VLB Éditeur, 2000, p. 63.

102 See notably article 7 relating to the jurisdiction of Québec in matters relating to international treaties.

103 *Act to Recognize the right of the people of Quebec to Self-Determination*, Bill 194, reprinted in Appendix 5 of the present *Essays*.

104 *An Act to Recognize the right of the people of Quebec to Self-Determination*, Bill 121, reprinted in Appendix 8 of the present *Essays*.

105 See *supra*, note 26 and the text accompanying the note.

The affirmation of the existence of the people of Québec was linked to the recognition of its right to self-determination which is based, as stated by article 1, on fact and on law. With regards to law, article 1 affirms that the people of Québec are the beneficiaries of "rights" by virtue of the principle of equality of rights of peoples and their rights to self-determination. One can note that the terminology used here is that of the *Charter of the United Nations* and that there seems to be several rights stemming from these principles and right. Among the rights which can be seen to be contained in such a reference and which are mentioned in article 2 are the "inalienable right" to choose freely the political regime and the legal status of Québec. This terminology is close, yet not identical, to the wording of common article 1 of the *International Covenants on Human Rights* which stipulates that peoples "freely determine their political status and freely pursue their economic, social and cultural development." The article makes clear that determination of the modalities of the exercise of the right is made "alone" and "through its own political institutions."

Read together, these three articles are the response to the implicit denial of Québec's right to self-determination and to the requirements and conditions that Canada appears to impose on Québec so that the latter can exercise its democratic right to pursue secession. It is furthermore the recusation of the authority conferred upon the House of Commons by the *Clarity Act*, and upon the other political actors enumerated in the Act and which could also jeopardize the right of Québec to determine alone, acting through its own political institutions, the mode of exercise of its right to choose the political regime and legal status of Québec.

Quebec's Fundamental Rights Act also defines one of the modalities of exercise of the right of self-determination and opposes to the criteria set forth in the *Clarity Act* a criterium much more objective. Thus, the rule of absolute majority is presented with clarity (50% + 1) in article 4 of the Act which reads as follows:

> "**4.** The Quebec people is consulted by way of a referendum under the *Referendum Act*, 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."

It is also worth noting that the article serves to specify that it is the votes declared as valid that are calculated for the determination of the majority. This precision appeared to be necessary because of the uncertainty main-

tained by the *Clarity Act* on this question, as certain positions tend to calculate the majority from the entirety of ballots, being valid or spoiled.[106]

The *Quebec's Fundamental Rights Act* ascribes one last time the right of self-determination in article 13, which reads:

> "**13.** 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 Quebec people to determine its own future."

The importance of this article cannot be ignored as it constitutes another recusation of the *Clarity Act* and the right which it appears to have conferred upon the House of Commons and the government of Canada to limit the right of secession of Québec and restrain the democratic will of the people of Québec to self-determination.

This presentation of the provisions of *Quebec's Fundamental Rights Act* highlights the fact that this law is on a collision path with the *Clarity Act*. While the latter Act defines implicitly the methods for exercising the right of Québec to choose its own political regime and judicial status, the *Quebec's Fundamental Rights Act* reaffirms that these methods are only within the competence of Québec.

This collision appears so evident that a petition to declare that articles 1 to 5 and 13 are "*ultra vires*, absolutely null and void, and of no force and effect" was submitted to the Superior Court of Québec and invites the tribunal to declare that these articles

> "and any other legislative or executive measure purporting to confer authority to establish Québec as a sovereign State, or otherwise to alter the political regime and legal status as a province of Canada, constitutes an infringement and denial of Petitioner's rights under the *Canadian Charter of Rights and Freedoms*, and is accordingly unlawful, invalid, and of nor force and effect."[107]

Québec is therefore engaged in a new confrontation with laws that could either consecrate its right of self-determination or on the contrary confirm that the Canadian constitutional system limits, or even eliminates Québec's right to choose and subjects this province to the will of the rest of Canada.

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106 See REFORM PARTY, *The New Canada Act*, December 1999, p. 16-19.

107 *Henderson and Equality Party* v. *A.G. of Quebec*, Superior Court of Quebec, n° 500-05-065031-013, May 9, 2001.

The adoption of the *Clarity Act* and the implicit negation of the right of Québec to self-determination accentuates without any doubt the constitutional dead lock in Canada. This federal law exacerbates the relationship of Québec and Canada and creates the illusion that national unity will be necessarily preserved. If the *Clarity Act* was used on the occasion of the next Québec referendum to justify the refusal to assume the constitutional, and imperative, obligation to negotiate with Québec, it may find itself at the origin of a serious conflict over legitimacy. In this situation, *Quebec's Fundamental Rights Act* and the affirmation of Quebecers' right to self-determination will contribute to placing the legitimacy of a decision on the political and constitutional future of Québec first and above all on a National Assembly whose members represent the people of Québec.

Twenty-five years after the victory of the Parti Québécois, it is not useless to recall that the question of Québec's right of self-determination remains a major stake. A stake in which not only are law and politics intertwined, but in which precedence should be given to a fundamental political principle, the freedom of peoples, and even further to a legal norm just as fundamental, their right to choose.