COMMENTS

Secession Perspectives and the Independence of Quebec

Kevin MacMillan*

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I. INTRODUCTION

The issue of the secession of Quebec from Canada has been simmering for many decades. The Supreme Court of Canada recently

* B.A. 1994, Gettysburg College; J.D. candidate 2000, Tulane University School of Law. The author wishes to thank the staff of the *Tulane Journal of International & Comparative Law* and Courtney O'Hara for their help in editing this Comment.

addressed this matter issuing a reference opinion relating to the claim of whether the people of Quebec have a unilateral right to secede from the rest of Canada. This Comment will examine several theories on the rights of people to secede from their mother countries, or their oppressors as some would frame it, and will analyze other secession efforts around the world. The history of Canada and the formation of Quebec will be important in this discussion leading up to the decision by the Supreme Court of Canada. Finally, a comparison of the various theories of secession and experiences of other nations will be made against the claim that Quebec deserves to be a sovereign nation.

II. THE CONCEPT OF SELF-DETERMINATION

Any time there is a question of secession, the "right of self-determination" of a people is always at issue. This right is embodied in the United Nations Charter as well as in many conventions of the United Nations.[1] The concept of "self-determination" is ambiguous and must be explored before further discussing secession. Is self-determination a claim on the part of a group of people to determine their collective actions?[2] Is this the right claimed against a state or government for people to carry out activities without interference?[3] Is this the right of a people to choose the form of government under which they live?[4]

The concept of the right of self-determination developed in the context of anti-colonialism beginning with the American Revolution and is now accepted by a vast majority of the international community.[5] The belief that people should not be subjugated by an outside country, their resources harvested for the benefit of the foreign motherland, or their representation limited, is not controversial. While colonialism is less the issue today, people still desire actual self-governance.[6] Whether it be border disputes that have raged for generations, human rights abuses enacted by tyrannical governments, or the fear of losing a cultural identity, people around the world continue to claim the right of self-determination. Essentially, self-

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1. *See, e.g.*, U.N. CHARTER art. 1.
2. *See* Richard T. George, *The Myth of the Right of Collective Self-determination*, *in* ISSUES OF SELF-DETERMINATION 1 (William Twining ed. 1991).
3. *See id.*
4. *See id.*
5. *See id.*
6. *See id.*

determination is the ability of a people to separate from a national relationship and initiate their own government.[7]

The United Nations has recognized in its Charter that people must have the right to self-determination.[8] In order to join the United Nations, countries must adopt this Charter.[9] Thus, it should follow that all members of the United Nations recognize the right of self-determination. However, this is not the case.[10] For example, China is a very powerful U.N. Member Nation that rejects all calls for self-determination by the people of Tibet.[11] As we shall see in the case of the Baltic republics and the independence movements in Lithuania and Chechnya, many nations pay only lip service to the idea of self-determination.

Another important factor that must be resolved is the determination of what constitutes a "nation." There are many definitions of what a nation is or should be.[12] Most scholars contend that a nation is a group of people who share a common culture, who acknowledge a special obligation to one another and who typically have a historical attachment to a geographic area.[13] To make the jump from merely an ethnic group or national minority, a nation must also seek political independence and self-government.[14]

A. *Remedial Right Only Theory*

The "remedial right only" theory, which has been articulated by many international law scholars, states that a group of people has the right to secede only if the physical survival of its members is threatened by actions of the state; it suffers from violations of other basic human rights; or its previously sovereign territory was unjustly taken by the state.[15]

The remedial right only theory is also contingent upon credible guaranties that the new state will respect the human rights of all of its citizens and that it will cooperate in securing other just terms of

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7. *See id.*

8. *See* U.N. CHARTER art 1.

9. *See* U.N. CHARTER art. 4, para. 1.

10. *See* David O. Lloyd, Note, *Succession, Secession, and State Membership in the United Nations*, 26 N.Y.U. J. INT'L L. & POL. 761, 772 (1994).

11. *See* Dr. Bryan Schwartz & Susan Waywood, *A Model Declaration on the Right of Secession*, 11 N.Y. INT'L L. REV. 1, 8 (1998).

12. *See* Kai Neilsen, *Liberal Nationalism, Liberal Democracies, and Secession*, 48 UNIV. OF TORONTO L.J. 253, 255 (1998).

13. *See id.*

14. *See id.*

15. *See id.* at 264 (citing Allen Buchanan, *Theories of Secession*, 22 PHIL. & PUB. AFF. 37 (1997)).

secession.[16] Among these terms deemed to be just are the fair apportionment of national debt, negotiated determination of new boundaries, agreed upon arrangements for continuing, renegotiating or terminating treaty obligations, and provisions for defense and security.[17]

The international community generally requires a group to meet these terms in order to legitimize secession. The United Nations, as indicated by its Charter, seeks to protect the territorial integrity of its Member Nations.[18] Because the right to self-determination and the promotion of human rights are both goals of the United Nations, the remedial right only theory fits well with the U.N. philosophy.[19] The biggest drawback to this theory is the likely need for armed uprisings to begin the secession process:[20] It is unlikely that a state that is violating the human rights of a people or holding their territory unjustly will peacefully hand over freedom to the people whom they are oppressing.

B. *The Primary Right Theory*

A second and very different theory of secession that has developed is the "primary right" theory. Proponents of the secession of Quebec from Canada adhere to this theory.[21] Under this primary right theory, secession does not depend upon a threat to the physical survival of a people.[22] Rather, this theory asserts that secession is warranted if the cultural survival of the group of people is threatened, either as a matter of deliberate policy by the state in which the group exists or by the state's unintended actions, and, if a clear expression by a majority of the people wishing to secede, such as a referendum vote, is not respected by the remainder state.[23]

Proponents of this theory believe that, in refusing to accept secession under these conditions, the remainder state acts wrongly.[24] Moreover, although the remainder state may not have done anything wrong initially, in denying secession it is thought to have acted

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16. *See id.* at 264-65.
17. *See id.* at 265.
18. U.N. CHARTER art. 1.
19. *See id.*
20. *See* Neilsen, *supra* note 12, at 267.
21. *See generally id.* (promoting "primary right" theory as theoretical basis for secession of Quebec).
22. *See id.* at 265.
23. *See id.*
24. *See id.* at 265, 266.

unjustly.[25] The crux of this theory is that people will not want to secede from a state that is just; there must be a reason to bring about secession movements.[26]

A major difficulty with the primary right theory is that it can only be realistically applied in liberal democratic countries.[27] Countries with autocratic rulers or wide-scale suppression of the people would never permit any type of referendum on secession and would most likely work to eliminate cultures that opposed the ruling culture. Any secessionist movements would be crushed, and the remedial right only theory would need to be effectuated.[28] In a functioning liberal democracy, pro-secession forces are permitted to operate without the threat of violence.[29] Thus, referendums may be held when non-majority cultures exist. In countries that respect freedom of religion and speech and do not discriminate on the basis of race or ethnicity, primary right theorists thrive.[30]

The primary right theory focuses on the loss of a culture and legitimizes the use of cultural decline to rally a defense of that culture, rather than the threat of human rights violations.[31] The greatest problem with this theory arises from its implementation in liberal democracies where individual freedoms are most respected. In liberal democracies, differing cultures arise, gain momentum and either fade or become the majority.[32] If it were possible for every culture that felt threatened within such a democracy to vote for and gain the ability to secede, the drawing and redrawing of national boundaries would never end. Global fractionalization and the weakening of liberal democracies would make states vulnerable to tyrannical governments and invasion. Not only is the successful implementation of primary right theory unrealistic, but it could be dangerous.[33]

Another defect in the primary right theory stems from the fact that in liberal democracies where the citizens enjoy substantial freedoms, pluralism will develop, and the complaints of a minority group will become an integral part of the majority's perspectives.[34]

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25. *See id.*
26. *See id.* at 266.
27. *See id.* at 276-77.
28. *See id.* at 267.
29. *See id.*
30. *See id.* at 267-68, 281.
31. *See id.* at 267.
32. *See id.* at 281-82 (citing Allen Buchanan, *What's So Special About Nations?*, *in* RETHINKING NATIONALISM 293-94 (J. Couture et. al. eds. 1996)).
33. *See id.* at 271.
34. *See id.* at 280-282.

Revisions as to what is just and unjust arise as the democratic society evolves.[35]

C. The Model Declaration on Secession and the Right of Self-Determination

In 1998, Dr. Bryan Schwartz and Susan Waywood developed what they called a Model Declaration on Secession and the Right of Self-determination.[36] Their goal was to establish a coherent strategy for states to address demands from various ethnic groups on the right to secede.[37] The Model Declaration directly addresses the conflict between the United Nations' assertion that there exists a right to self-determination and existing states' right to territorial integrity.[38]

The international community prefers to maintain the integrity of existing states for several reasons. First, there is the sense that a large state promotes a sense of security.[39] Second, states that have many different ethnic cultures within them tend to prevent one group from amassing too much power and oppressing the others.[40] Finally, it is only logical for existing states to oppose secession generally, in order to ensure that the people of their state do not seek to separate.[41] According to Schwartz and Waywood, there is a unilateral right to self-determination when it is clear that the existing state has denied a group's basic rights, and there is no realistic possibility that these rights can be honored through less drastic means.[42]

According to the Model Declaration, the international community must consider the following factors when assessing particular claims to sovereignty:

1. Has political cohabitation been deemed impossible?[43]
2. Is the existing government democratic? Will the emerging government be democratic?[44]
3. Does the existing government engage in human rights abuses?[45]

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35. *See id.* at 281-82.
36. *See* Schwartz & Waywood, *supra* note 11, at 10-12.
37. *See id.* at 1-5.
38. *See id.* at 5.
39. *See id.* at 8.
40. *See id.*
41. *See id.* at 8-9.
42. *See id.* at 10.
43. *See id.*
44. *See id.*
45. *See id.* at 10.

4. Does the government recognize the rights of minorities within the region wishing to secede?[46]

5. Has the population wishing to secede made every reasonable effort to gain its rights through less divisive means?[47]

6. Has the existing state used force or the threat of force to assimilate the region?[48]

7. Will secession fundamentally destabilize the existing state?[49]

8. Has there been a democratic referendum where a clear majority of the people wishing to secede voted in favor of secession?[50]

9. Does the seceding state honor and respect the various international and U.N. agreements on minority rights?[51]

10. Will the seceding state constitute the only state in the world in which that community is the majority, and will it be a safe haven for members of that community?[52]

11. Has secession been encouraged by a neighboring state, which is dominated by the same ethnic group wishing to secede?[53]

In sum, if it is impossible for a group to achieve fair understanding and treatment by the central government of the state, the group must be given some opportunity to develop its own.

The Model Declaration begins with the recognition of fundamental rights.[54] These rights include basic political rights (all people of the state have the right to form a government that is reflective of their values and grants equal rights to participate), universal human rights as set out in the Universal Declaration of Human Rights,[55] and basic minority rights (the right to choose to identify with an ethnic group and to educate one's children in that tradition).[56] If a state's structure is inconsistent with these rights, some form of self-government to accommodate the neglected group may be necessary.[57] The creation of a "provincial" or "state" status is

46. *See id.* at 11.
47. *See id.*
48. *See id.*
49. *See id.*
50. *See id.*
51. *See id.*
52. *See id.*
53. *See id.*
54. *Id.* at 17.
55. G.A. Res., U.N. GAOR, 3d Sess., 183d plen. mtg., U.N. Doc. A/810 (1948).
56. *See id.*
57. *See id.* at 18.

preferable to outright secession.[58] However, if fundamental rights are being denied and no remedies are available, then secession should be considered.[59]

III. MEMBERSHIP IN THE UNITED NATIONS AND STATEHOOD

While recognition by individual nations of a people as an independent state is important to any secession movement, recognition does not confer statehood.[60] Membership in the United Nations is the true affirmation of a claim of statehood.[61] Acceptance into the United Nations means that a state is legitimate and that the international community as a whole has recognized the independence of the people.[62] There are, however, criteria for membership in the United Nations.[63]

The U.N. Charter requires that membership be open to all peaceful states that accept the obligations enumerated in the Charter and are willing to meet them.[64] The International Court of Justice has interpreted this statement in the Charter to mean that an applicant to the United Nations must be a state willing to abide by the U.N. Charter.[65] Further, the U.N. has determined that, in terms of international law, a "state" must have (1) a permanent population, (2) defined territories, (3) a government, and (4) the ability to enter into relations with other States.[66]

Once a group has met the statehood requirement, it must be willing to uphold the U.N. Charter in order to receive recognition.[67] The members of the United Nations have many duties under the Charter, which include maintaining a commitment to respect human rights and recognizing the right to self-determination.[68] Any group of people that does not adhere to these standards will not receive U.N. recognition.[69]

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58. *See id.*
59. *See id.*
60. *See* Lloyd, *supra* note 10, at 766.
61. *See id.*
62. *See id.* at 767.
63. *See* U.N. CHARTER arts. 3-6.
64. *See id.* at art. 4, para. 1.
65. *See* Lloyd, *supra* note 10, at 770-71 (citing Conditions on the Admission of a State to Membership in the United Nations, 1948 I.C.J. 57, 62 (May 28)).
66. *See id.* at 771 (citing Montevideo Convention on the Rights and Duties of States, Dec. 26, 1933, 165 L.N.T.S. 19).
67. *See id.* at 772.
68. *See id.*
69. *See id.*

By granting admission to the United Nations, the international community recognizes the legitimate claim of a people for independence. This recognition is not simply granted to people who are oppressed, nor is it granted automatically to groups that successfully secede from their motherland. Rather, the group must have a valid claim, some semblance of a state structure and a willingness to abide by the rules that govern the United Nations.[70]

A. *The New Method for Achieving Independence*

Historically, the right to secede has not been supported by the international community outside of the colonial context.[71] Recent developments in the Baltic region and the emergence of the new eastern European countries have changed that approach. The United Nations in the Declaration on Friendly Relations began to change attitudes towards secession, by affirming the right of people to self-determination inside existing states where the government did not represent the governed.[72]

Initially the international community was reluctant to recognize the claims of independence by the Baltic states, but reaction to the Soviet crackdown on the secession movements in the region was swift and forceful.[73] For example, the European Community (EC) suspended food aid to the Soviet Union.[74] The United States shipped medical supplies to the Baltic region while calling for the withdrawal of Soviet troops.[75] These actions may have facilitated statehood for the Baltics, because once Russian President Boris Yeltsin recognized the independence of the region, the EC and the United States quickly followed suit.[76] This recognition legitimized the secession of this region and ensured the ability of these new states to participate in the international community and the United Nations.

70. *See id.* at 794.

71. *See* George, *supra* note 2.

72. *See* Declaration on Principles of International Law Concerning Friendly Relations and Co-operation in Accordance with the Charter of the United Nations, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 124, U.N. Doc. A/8028.

73. *See* Trent N. Tappe, Note, *Chechnya and the State of*, 34 COLUM. J. TRANSNAT'L L. 255, 263 (1995).

74. *See id.*

75. *See id.*

76. *See id.*

1. Lithuania—A Study in Secession

The people of Lithuania lived under Soviet rule from 1940 until 1991.[77] After being invaded by Soviet troops, they were coerced into voting in favor of joining the Soviet Union.[78] Prior to the Soviet invasion, Lithuania, a member of the League of Nations, enjoyed independent statehood.[79] After the invasion, many countries continued to recognize diplomatic representatives of Lithuania in exile.[80] In August of 1989, the Lithuanian Parliament declared invalid the Soviet Union's annexation of their country.[81] Pro-independence sentiments grew, and in 1991 the Soviet Union mobilized military forces in the region, clashing with demonstrators and seizing buildings.[82]

The people of Lithuania voted on a non-binding referendum in favor of secession.[83] The Lithuanian government refused to participate in governmental functions as a part of the Soviet Union.[84] On August 21, 1991, after a failed coup against Soviet President Mikhail Gorbachev, Lithuania again asserted its right to independence.[85] Lithuania was recognized as an independent state that same day.[86]

The people of Lithuania undisputedly had a legitimate claim for secession. They were taken by force and suppressed militarily. They were an independently recognized state prior to their incorporation into the Soviet Union and had voted in favor of a pro-independence government.

Many commentators believe that the rapid recognition of the independence of Lithuania by the international community was influenced by the concerns over renewed Soviet military activities.[87] Recognition by the international community protected Lithuania's right to self-determination.[88] These developments signal that a secessionist entity must have at least some objective claims to

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77. *See id.* at 269.
78. *See id.*
79. *See id.*
80. *See id.*
81. *See id.* at 270.
82. *See id.*
83. *See id.* at 271.
84. *See id.*
85. *See id.* at 271.
86. *See id.*
87. *See* Lloyd, *supra* note 10, at 787.
88. *See id.*

statehood before being recognized and that there must be willingness by the secessionist country to abide by the U.N. Charter.[89]

2. Chechnya—Similar Situation, Different Result

After a long and bloody war, Chechnya was conquered by Russia in 1864.[90] Since occupation, the people have maintained a separate cultural identity from Russia and been oppressed by the Russian government.[91] At the same time that Lithuania received its independence and recognition by the international community, the Chechen people declared their independence from Russia.[92] The Chechens held elections and voted for a pro-independence president.[93] These elections were declared illegal by Moscow,[94] but other than increased Russian military presence and some financial and trade restrictions, not much changed in Chechnya.[95]

In 1994 Russian President Boris Yeltsin, frustrated by the three-year-old independence movement, invaded the republic and began a campaign to suppress the secessionists.[96] The international reaction was muted.[97] There were calls to end the fighting,[98] but not to the degree seen after the invasion of Lithuania.

The question lingers as to why the international community and the United Nations has treated the Chechen people, who are part of Russia only as a result of conquest, are a distinct people, have clearly voted in favor of independence, and have been subject to widespread human rights abuses by the Russian government, differently than the Lithuanians. One reason for this double standard is the fact that the pro-independence government is not seen as one willing to uphold human rights if empowered.[99] Further, Chechnya has emerged as the organized crime capital of the former Soviet Union.[100] While there has been similar organized crime in Russia, it is unlikely that a newly independent Chechnya will have any ability to control the mobsters.[101]

89. *See id.*
90. *See* Tappe, *supra* note 73, at 273.
91. *See id.*
92. *See id.* at 275.
93. *See id.*
94. *See id*.
95. *See id.* at 276.
96. *See id*.
97. *See id.* at 277.
98. *See id.* at 278.
99. *See id.* at 283.
100. *See id* at 282.
101. *See id.* (noting that Chechen mafia has spread to major Russian cities and Western Europe.)

Finally, the secession of Chechnya would have a significant impact on the stability of the Russian state.[102] If Chechnya, a part of Russia for over 100 years, were permitted to leave, every region in the entire Russian state would have a valid claim to secession.[103]

The fighting in Chechnya has been suspended.[104] Russian and Chechen diplomats are currently meeting to formulate some resolution of the conflict.[105] However, the issue of independence is still unresolved. Economic chaos and an increase in violent crime within Chechnya have not helped their case for independence.[106]

One interesting and unique characteristic of the Soviet Constitution was the provision in Article 72 for the right to free secession.[107] This Article, at least in theory, permitted union republics like Lithuania to declare their independence from the Soviet Union. Chechnya, on the other hand, is a constituent republic, to which secession rights were never granted.[108] In reality and practice, however, neither union republics nor constituent republics were permitted to leave the Soviet Union.[109] The rights in this Article were never exercised.[110] The Russians can claim that they are enforcing their right to restore constitutional order, but "there is little difference between textual rights that have no application and no rights at all."[111]

B. The Secession Experience in the United States

We have seen secessionist movements in North America. The United States experienced an attempt at unilateral secession in 1860s when the southern states declared their independence from the Union and triggered the Civil War. The southern states formed a constitutional convention independently and dissolved the union between themselves and all the other states. While the war was fought on the battlefields and not in the courtroom, the principles of federalism, democracy, the rule of law and respect for minorities were at issue then as they are now.

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102. *See id.* at 287 (citing Michael Specter, *Russian Forces Move Into Rebel Region*, N.Y. TIMES, Dec. 12, 1994, at A1, A13).
103. *See id.*
104. *See* BBC NEWS ONLINE, *Analysis. Russia and Chechnya: A New Start?* (Jan. 14, 1998) <http://news1.thdo.bbc.co.uk/low/english/world/analysis/newsid_47000/47474.stm>.
105. *See id.*
106. *See id.*
107. Tappe, *supra* note 73, at 283-84 (quoting KONSTITUTSIA art. 72 (U.S.S.R.)).
108. *See id.* at 284.
109. *See id.*
110. *See id.*
111. *Id.*

In *Texas v. White*, the U.S. Supreme Court examined the secession claim of Texas to determine if the state was ever truly independent.[112] The Court held that when Texas became part of the United States, it entered into an "indissoluble relation with the other states in the Union."[113] The Court stated that the actions of the confederate legislature were absolutely null and without operation in law.[114] If Texas actually had separated from the Union, the State would have been considered foreign; its citizens would have become foreigners; and the Civil War would not have been the suppression of a rebellion, but a war for conquest and subjugation.[115] This, at least in the eyes of the Court, was not the case.[116] The Supreme Court recognized that people in a democratic union could not simply remove themselves from that union unilaterally but had to come to an agreement that ensured respect for the elements of a constitutional majority.[117]

The United States government, however, permitted the secession of West Virginia from Virginia.[118] The argument was made that if Virginia's secession from the Union was unconstitutional, then so was West Virginia's separation from Virginia.[119] However, President Lincoln intervened by stating that although secession of West Virginia was the legal equivalent of Virginia's secession from the United States, such actions in favor of the Union were permissible.[120] Accordingly, on December 10, 1862, the President signed into law the act naming West Virginia as the thirty-fifth state.[121] This secession was allowed because West Virginia opposed to slavery and desired to remain in the Union,[122] not because its people suffered oppression by Virginia.

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112. *See* Texas v. White, 74 U.S. (7 Wall.) 700, 726 (1868).
113. *Id.*
114. *See id.*
115. *See id.*
116. *See id.*
117. *See* White, 74 U.S. at 727-28.
118. *See* 140 CONG. REC. S7106 (June 20, 1994) (statement of Sen. Byrd) (citing S. 365, 40th Cong. (1862)).
119. *See id.*
120. *See id.*
121. *See id.*
122. *See id.*; *see also* 137 CONG. REC. S8240 (June 20, 1991) (statement of Sen. Byrd) (noting that although West Virginians owned slaves, they agreed to a gradual emancipation in exchange for statehood).

IV. A DIVIDED CANADA

In 1867, Canada was established by the British North America Act comprised of four provinces: Ontario, Quebec, Nova Scotia and New Brunswick.[123] Over the years, Canada has grown, as has the sentiment in Quebec that it should no longer be part of the Canadian confederation.[124] Unlike the noted examples of secession movements, Quebec's challenge has been mounted against a wealthy modern welfare state, not a totalitarian regime, third world country or new and struggling democracy.[125] Free speech and voting rights have always been available to the people of Canada.[126] Canada has some of the most renowned social programs in the world.[127] How could anyone have a legitimate claim to secede from a state where freedoms are so widely recognized?

Secession movements usually are rooted in three ideas: fear, confidence and a sense of rejection.[128] The fear of being weakened or diluted as a distinct people, confidence that they can perform as well, if not better, on their own, and the sense of no longer being welcome in the mother country drives the Quebec secessionists.[129]

Canada is a truly bilingual country, one of the few in the world.[130] However, most of the French-speaking population lives almost exclusively in Quebec (86.3% in 1986).[131] The remainder of the country is English-speaking, and there is little evidence of French influence, other than the mandated bilingual government activities.[132] Quebec has become increasingly French: as Anglophones have emigrated out of the province, and the residents have elected provincial leaders who support separation from Canada.[133] The fear that grips the people of Quebec is that the English language and culture surrounding them will reduce their French heritage to folklore.[134] Quebec has been struggling against cultural and linguistic assimilation since 1867.[135]

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123. *See* The British North America Act, 1867, 30 & 31 Vict., ch. 3 (Eng.).
124. *See* Stephane Dion, *Explaining Quebec Nationalism, in* THE COLLAPSE OF CANADA? 77, 112 (R. Kent Weaver ed. 1992).
125. *See id.* at 77.
126. *See id.*
127. *See id.*
128. *See id.* at 78.
129. *See id.*
130. *See id.* at 88.
131. *See id.*
132. *See id.*
133. *See id.* at 89.
134. *See id.*
135. *See id.* at 78, 79.

The idea of an independent Quebec began to grow strong in the 1960s, but this assertiveness was met with equal opposition from the federalists.[136] In 1968, Pierre Trudeau, a bilingual Quebecer supportive of a unified Canada, was elected to the office of Prime Minister.[137] The Trudeau government sought to foster an atmosphere where either language group could operate in any part of the country.[138] Accordingly, Trudeau began bilingual packaging requirements on consumer products, made government services available in both English and French, and employed more francophones in the upper levels of the civil service.[139] Quebecers still felt that they needed some recognition of their independent nature: This feeling culminated in the election of the pro-secession Parti Quebecois (PQ) to head the provincial government in 1976.[140]

The PQ instituted several measures in order to promote the use of the French language. Act 101 was the first law enacted when the PQ gained power.[141] It mandated the posting of signs in French, the teaching of French in all the schools and the determination that French would be the language of work, trade and business in Quebec.[142] These actions by the new government proved successful and convinced many moderate Quebecers that it was possible to protect the French language within the Canadian Confederation.[143] However, the federal government refused to grant Quebec a "special status" among the provinces.[144]

In 1980, a provincial referendum was called in Quebec to vote on secession.[145] The question presented to the voters called for giving the provincial government a mandate to negotiate a sovereignty-association with the federal government, not outright secession.[146] This question was formulated to draw broad support, but voters

136. *See* R. Kent Weaver, *Political Institutions and Canada's Constitutional Crisis*, *in* THE COLLAPSE OF CANADA? 7, 22-24 (R. Kent Weaver ed. 1992).

137. *See id.* at 24.

138. *See* JONATHAN LEMCO, TURMOIL IN THE PEACEABLE KINGDOM: THE QUEBEC SOVEREIGNTY MOVEMENT AND ITS IMPLICATIONS FOR CANADA AND THE UNITED STATES 6 (1994).

139. *See* Weaver, *supra* note 136, at 24-25.

140. *See id.* at 24.

141. *See* Dion, *supra* note 124, at 91.

142. *See id.*

143. *See id.*

144. *See* Weaver, *supra* note 136, at 25.

145. *See id.*

146. *See id.*

rejected it by a three-to-two margin.[147] This proved to be a major victory for the supporters of a unified Canada.[148]

Quebec sovereignty arose again as an issue in 1988, when the Supreme Court of Canada ruled that the Quebec law mandating all signs be printed in French was unconstitutional.[149] The court found that requiring French as the dominant language was permissible, but prohibiting the use of other languages (unilingualism) violated the constitutional right to freedom of expression.[150] The Court also held that French-dominant signs would be constitutional, so long as other languages were not prohibited.[151] This "intrusion" into the affairs of Quebec threw the secessionists into a frenzy that has lasted to this day.[152]

Quebec's provincial leaders were urged to ignore the ruling by the Court, but during this time they were also attempting to secure the passage of the Meech Lake Accord which would have given Quebec official recognition of its unique character.[153] As a result, Quebec passed the "inside-outside bill" which permitted the use of other languages on signs outside commercial buildings as long as French was the dominant language, but prohibited the use of other languages inside these buildings.[154] This new law may have been one of the reasons for the ultimate failure of the Meech Lake Accord and for fostering the impression that Quebec was anti-English.[155]

A. *Meech Lake Accord and Charlottetown Agreement*

In 1982 Canada passed the Constitution Act, amending the national constitution.[156] All of the provinces in Canada participated, but it was enacted without ratification by Quebec.[157] The Meech Lake Accord was formulated among the premiers of all the provinces in order to address the concerns of Quebec, which had developed in relation to the Constitution Act.[158]

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147. *See id.*
148. *See id.*
149. *See* Dion, *supra* note 124, at 92 (citing Ford v. Quebec [1988] 54 D.L.R. 4th 577 (Can.)).
150. *See id.*
151. *See id.*
152. *See* Dion, *supra* note 124, at 94.
153. *See id.* at 93.
154. *See id.*
155. *See id.* at 94.
156. *See* Lemco, *supra* note 138, at 19.
157. *See id.*
158. *See id.* at 20.

Quebec had wanted special recognition as a distinct society in the Constitution Act, but was absent from the negotiations in what has become to be known in Quebec as *la nuit des longs couteaux* or the night of the long knives.[159] In 1987, Quebec presented the Canadian government with the shortest list of constitutional demands ever requested by the province:

1. Recognition of Quebec as a distinct society,
2. A greater role over immigration,
3. A role in appointments to the Supreme Court,
4. A limitation on federal spending power, and
5. A veto on constitutional amendments.[160]

These terms were agreed on in principle by the federal government and the ten provincial leaders, but the agreement required ratification by the provinces within three years.[161] In the end, the provinces of Manitoba and Newfoundland refused to give their assent to the Accord, claiming that there were no gains for aboriginal people and Quebec received too many concessions.[162] Anti-French sentiments had been growing throughout Canada.[163] The general sentiment was that the Canadian government should not be making special concessions to Quebec because that province was no different than the rest of the country and should not receive special treatment.[164]

In reality, Quebec has long held special status in Canada. Since the confederation of Canada, the people of Quebec have retained a legal system based on the French Civil Code while the remainder of Canada followed the English common law.[165] The Canadian government also gave Quebec expanded powers in fiscal policy, international relations and immigration.[166] Following the rejection of the Meech Lake Accord, separatist sentiment soared and the people of Quebec developed the sense that the rest of Canada did not care if they were part of the country or not.[167]

In an attempt to salvage constitutional order in Canada, the federal government and the provinces again joined to write the

159. *See* Dion, *supra* note 124, at 111-12. Quebec's premier, Rene Levesque, was not told when the final negotiations were to be. *See id.*
160. *See id.*
161. *See id.*
162. *See id.* at 113.
163. *See id.*
164. *See id.* at 114.
165. *See id.* at 115.
166. *See id.*
167. *See id.* at 116.

Charlottetown Agreement in 1992.[168] To remedy the concern that Quebec was receiving special treatment to the detriment of the rest of the provinces, the provincial leaders joined together to formulate this document.[169] The Agreement had something for everyone, from aboriginal self-government, which had been a significant factor in derailing the Meech Lake Accord, to Senate reform and the "distinct society" clause requested by Quebec.[170] In fact, most of the terms of the Meech Lake Accord remained intact with additional guarantees that Quebec would receive twenty-five percent of the seats in the House of Commons and various veto powers on changes to the Senate.[171]

The Agreement was sent to the provinces to be voted on by the people.[172] Unlike the Meech Lake Accord, which was ratified by the provincial governments, the Charlottetown Agreement was to be voted on by all Canadian citizens.[173] In the end, this lengthy, rigid and technical document was crushed by its own weight.[174]

Every interest group in Canada found something they opposed in the Charlottetown Agreement.[175] The Reform Party believed that it gave Quebec too many concessions to the detriment of the rest of the provinces.[176] Former Prime Minister Pierre Trudeau argued that the agreement would establish a hierarchy of classes of citizens in which language and racial origin would be more important than equality and individual rights.[177] The ultimate result was that most Canadians determined that there was more to oppose in the Charlottetown Agreement than there was to support.[178] The Agreement was defeated in five of the twelve provinces with over fifty-five percent of the people in Canada voting against it.[179]

Since the failure of the Meech Lake Accord and the Charlottetown Agreement, the people of Quebec have had the opportunity to vote for a referendum to effect the secession of their

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168. *See* Ronald L. Watts, *Reform of Federal Institutions*, *in* THE CHARLOTTETOWN ACCORD, THE REFERENDUM, AND THE FUTURE OF CANADA 17 (1993).

169. *See* Lemco, *supra* note 138, at 48.

170. *See id.*

171. *See id.* at 48.

172. *See id.* at 53.

173. *See id.*

174. *See id.* at 49.

175. *See id.* at 49-52.

176. *See id.* at 52.

177. *See id.* at 49.

178. *See id.*

179. *See* KENNETH MCROBERTS & PATRICK MONAHAN, THE CHARLOTTETOWN ACCORD, THE REFERENDUM, AND THE FUTURE OF CANADA, Appendix 3 (1993).

province from Canada.[180] After several years of posturing and threats of secession, Bill No. 1, "[a]n Act respecting the future of Quebec," was introduced in the National Assembly of Quebec in 1995.[181] This legislation posed the following question to the people of Quebec: "Do you agree that Quebec should become sovereign, after having made a formal offer to Canada for a new Economic and Political Partnership, within the scope of the Bill respecting the future of Quebec and of the agreement signed on June 12, 1995?"[182]

The June 12, 1995, agreement in the reference question was made between the three sovereigntist political parties in Quebec.[183] The agreement affirmed that, in the event of a positive referendum vote by the people of Quebec, the governments would negotiate an offer for a new economic partnership with Canada.[184] In the event that these negotiations failed, the National Assembly would make a unilateral declaration of sovereignty.[185] Throughout the summer and fall of 1995, the federal government's strategy was to downplay the likelihood of a vote in favor of separation and to launch a campaign to make the case for Quebec to remain in Canada.[186] The Referendum was held on October 30, 1995, with 50.58% of the population voting "No" and 49.42% voting "Yes" to the question posed.[187] This razor-thin margin bolstered the hopes of the separatists and brought the federalists a brief measure of relief.[188]

In September 1996, the Canadian government, under strong opposition from Quebec, announced that it would pose reference questions regarding the secession of Quebec to the Supreme Court of Canada.[189] The Quebec government refused to participate in the process.[190] Accordingly, the Court ordered that an amicus curiae be appointed to represent the position of the Quebecers.[191]

The federal government had to submit this reference to the Court quickly. With the leaders of Quebec preparing to call another referendum and willingness by Quebec to consider a vote of more

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180. *See generally* H. Wade MacMauchlan, *Accounting for Democracy and the Rule of Law in the Quebec Secession Reference*, 76 CAN. B. REV. 155 (1997).

181. *Id.* at 160.

182. *Id.* (citing Bill 1, 1st Sess., 35th Leg.(Que. 1955)).

183. *See id.* at 158.

184. *See id.*

185. *See id.*

186. *See id.* at 162.

187. *See id.* at 160.

188. *See id.*

189. *See id.* at 161.

190. *See id.* at 163.

191. *See id.* at 164.

than fifty percent of the electorate a vote in favor of sovereignty, time was running out for the federal government.[192] The reference was considered necessary for the maintenance of orderly government in Canada and Quebec.[193]

B. The Supreme Court Reference on the Independence of Quebec

On August 20, 1998, after several decades of debate and political posturing, the Supreme Court of Canada issued its reference opinion on the issue of secession by Quebec from Canada.[194] The Court addressed three questions presented by the Governor in Council of Canada regarding unilateral secession and the constitutional requirements for a province to separate from the Canadian Confederation.[195] The questions the Court considered were:

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?

3. In the event of a conflict between domestic and international law of the right of the National Assembly, legislature or government of Quebec from Canada unilaterally, which would take precedent in Canada?[196]

The Court held that the constitution asserts order and stability, and accordingly, secession of a province under the constitution could not be achieved unilaterally, without principled negotiation with other participants in the Confederation within the existing national framework.[197] The Court continued by stating that an unambiguous majority of the people of Quebec voting in favor of a clear question of secession would grant the secessionist movement legitimacy that the rest of Canada would be compelled to recognize.[198] Recognition of

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192. *See id.* at 165.
193. *See id.* at 166.
194. *See* Reference re Secession of Quebec, No. 25506, 1998 LEXIS 39 (Can. S. Ct. Aug. 20, 1998).
195. *See id.* at *8-9. The Governor in Council is comparable to the U.S. Attorney General.
196. *Id.*
197. *See id.* at *25.
198. *See id.*

this movement would require the Canadian government to negotiate terms of such secession with Quebec.[199]

1. Question 1—Constitutional Right to Secession

The Court began its analysis by looking at a reference decision handed down in 1982 concerning the passage of the 1982 Constitution Act.[200] This reference question was presented to the Court when Quebec refused to agree to the Constitution Act and essentially requested a veto over the agreements between the federal government and other eleven provinces.[201] The Constitution Act provided for a revised method of amending the constitution and did not grant any province veto power over the decisions agreed to by the others.[202] In that decision, the Court held that "[t]he Constitution Act, 1982 is now in force. Its legality is neither challenged or assailable."[203] The Court determined that there were four organizing principles of the constitution: federalism, democracy, constitutionalism and the rule of law, and respect for minorities. These principles were the guidelines under which the Canadian constitutional identity was founded and under which the Court decided the first question in *Reference Re Secession of Quebec*.[204]

The Court noted first, that in a federalist system, political power is shared between the federal and provincial governments.[205] This system promotes democratic participation in government and grants the localities some power to govern themselves.[206] It is the responsibility of the judiciary to control the limits of the sovereignties.[207] The Court stated in *Re the Initiative and Referendum Act*:

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199. *See Reference re Secession of Quebec*, 1998 LEXIS 39, at *23.

200. *See id.* (*citing* Reference re Objection by Quebec to a Resolution to Amend the Constitution, [1982] 2 S.C.R. 793).

201. *See id.*

202. *See* CAN. CONST. (Constitution Act, 1982) pt. V (Canadian Charter of Rights and Freedoms). There are five methods of constitutional amendment: (1) Assent of the Parliament and two-thirds of the provinces representing 50% of the population (sec. 38); (2) unanimous consent of the Parliament and the provinces for special matters (sec. 41); (3) assent of the Parliament and the affected provinces (sec. 43); and (4) the Parliament alone for matters effecting the federal government (sec. 44)). *See id.*

203. *Reference re Secession of Quebec*, 1998 LEXIS 39, at *13 (citing Reference re Objection by Quebec to a Resolution to Amend the Constitution, [1982] 2 S.C.R. 793, 806).

204. *See id.*

205. *See id.* at 17.

206. *See id.*

207. *See id.*

> The scheme of the Constitution Act, 1867 was not to weld the Provinces into one, nor to subordinate Provincial Governments to a central authority, but to establish a central government in which these Provinces should be represented, entrusted with exclusive authority only in affairs in which they had a common interest.[208]

The Court also stated that the principal of federalism allows for linguistic or cultural minorities such as Quebec to thrive.[209] The justices asserted that, when Canada was confederated, the French-speaking Canadians were permitted to form a majority in Quebec so that this group could maintain its culture and language through the broad powers granted to the provinces in the Constitution Act of 1867.[210]

Proponents of Quebec's independence claim, however, that the concept of democracy mandates that if a majority of the people in Quebec vote in favor of unilateral secession, then the Canadian government must recognize this as a legitimate act.[211] However, the Court held that this idea of democracy goes deeper than the mere idea of majority rule.[212] Referencing *Regina v. Oakes*, the Court stated that the principles of a free and democratic society must include "respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society."[213]

With regard to governmental institutions, the Court determined that democracy was embodied in the election of provincial legislatures and the federal Parliament by a majority of the voters.[214] The Court agreed that democracy allowed expression of the sovereign will of the people, but the justices stated that "[t]he relationship between democracy and federalism means . . . that in Canada there may be different and equally legitimate majorities in different provinces and territories and at the federal level. No one majority is

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208. *Reference re Secession of Quebec*, 1998 LEXIS 39, at *17 (citing Re the Initiative and Referendum Act, [1919] A.C. 935, 942 (P.C.)).

209. *See id.*

210. *See id.* at 18.

211. *See id.*

212. *See id.*

213. *Reference re Secession of Quebec,* 1998 LEXIS 39, at *18 (quoting Regina v. Oakes [1986] 1 S.C.R. 103, 136).

214. *See id.* at 19.

more or less 'legitimate' than the others as an expression of democratic opinion. . . ."[215]

The Constitution Act of 1982 conferred the right to initiate constitutional change upon each member of the Confederation.[216] This power in the context described above indicates that a corresponding duty is imposed on the members of the Confederation to engage in discussions and negotiations with the other members in order to effectuate a true democratic change in the Constitution.[217]

The Court next examined the ideas of the rule of law and constitutionalism. The rule of law is at the very base of all society in every liberal democracy. It ensures a predictable and orderly structure in which citizens and residents conduct their affairs.[218] Without the rule of law there would be no respect for authority and no formula for the operation of a government.[219]

In *Reference Re The Manitoba Language Rights*, the Supreme Court outlined the elements that define the rule of law.[220] The Court found that:

1. The rule of law provides that the law is supreme over the acts of both government and private persons; there is one law for all.

2. The rule of law requires the creation and maintenance of an actual order.

3. The exercise of all public power must find its ultimate source in a legal rule, or law must regulate the relationship between the state and the individual.[221]

With regard to constitutionalism in Canada, the Court looked to Section 52 of the Constitution Act of 1982, which established the constitution as the supreme law of the land and declared void any law that was inconsistent with it.[222] All government actions resided under the constitution.[223] This document bound all federal and provincial

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215. *Id.*

216. *See* CAN. CONST. (Constitution Act, 1982) pt. V (Canadian Charter of Rights and Freedoms) § 46(1). The procedures for amendment under §§ 38, 41, 42 and 43 may be initiated by the Senate or the House of Commons or by the legislative assembly of any province. *See id.*

217. *See Reference re Secession of Quebec*, 1998 LEXIS 39, at *19.

218. *See id.* at 20.

219. *See id.*

220. *See id.* (citing Reference re The Manitoba Language Rights [1985] 1 S.C.R. 721, 747-52).

221. *See id.*

222. *See* Reference re The Manitoba Language Rights, 1998 LEXIS 39, at *20 (CAN. CONST. (Constitution Act, 1982 pt. VI (Canadian Charter of Rights and Freedoms), § 52).

223. *See id.*

governments.[224] After the 1982 act, all lawful authority exercised by the government came from the constitution and no other source.[225]

The Court asserted that a constitutional government such as Canada's is more than simple majority rule for three overlapping reasons.[226] First, a constitution may provide an added safeguard for fundamental human rights and individual freedoms.[227] Occasions might arise, even in a democracy, when the majority would be tempted to ignore fundamental rights in order to accomplish collective goals more easily.[228] Second, a constitution might ensure that vulnerable minorities were endowed with institutions and rights necessary to promote their ideas against the majority.[229] Finally, a constitution provided a division of power among different levels of government.[230]

The Court refuted as "superficially persuasive" the argument that the Constitution could be circumvented by a majority vote in a province-wide referendum.[231] Such an act would seem to be in line with the principles of democracy and self-government; however, it would be contrary to the reasons for the existence of the Constitution.[232] According to the Court, the actions of one province could not bind the entire country, because it would place an inordinate amount of power in the hands of the province attempting to change the Constitution.[233] Constitutional change must come through a process of negotiation, which would ensure that the rights of all parties were reconciled and respected.[234] The Court further stated that constitutionalism and the rule of law were necessary to the very function of a democracy.[235] Both provide an orderly framework in which people can make political decisions.[236] Without these elements, democracy would fail for lack of a means to ensure that decisions by the majority did not harm the minority.[237]

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224. *See id.*
225. *See Reference re Secession of Quebec*, 1998 LEXIS 39, at *20.
226. *See id.*
227. *See id.*
228. *See id.*
229. *See id.*
230. *See Reference re Secession of Quebec,* 1998 LEXIS 39, at *20.
231. *Id.*
232. *See id.*
233. *See id.*
234. *See id.* at 21.
235. *See Reference re Secession of* Quebec, 1998 LEXIS 39, at *20.
236. *See id* at 19, 20.
237. *See id.* at 21.

The final constitutional principal considered by the Court was the protection of minorities.[238] This concept had been with the people of Canada since the inception of the Confederation.[239] The Court referred to several examples of reference questions that were presented to it regarding the protection of minority language and culture in education.[240] Canada's tradition of respecting minorities is reflected in the Charter of Rights and in the Constitution Act, 1982.[241] This respect is a vital component of the Canadian constitutional structure.

The Court concluded Question 1 by combining the constitutional principals it had enumerated with the concept of succession. Secession of a province from the confederation would alter the governance of Canadian territory and would be inconsistent with current constitutional arrangements.[242] Thus, although the Canadian Constitution is silent on the issue of secession, it is not silent on territorial arrangements.[243] As such, Canada would be forced to make constitutional changes if secession were to occur.[244] According to the Court, the secession of a province from Canada would require a constitutional amendment and negotiations between the federal government and that of the seceding province.[245] The Court stated that since the Constitution was the expression of sovereignty of the people of Canada, it was within the power of the Canadian people to effect whatever constitutional arrangements were desired—including the secession of Quebec.[246]

The concept of unilateral secession means that Quebec could effectuate secession from the Confederation without first negotiating with the other provinces or the federal government.[247] The Court rejected this possibility because a referendum by the people of Quebec would have no legal or constitutional authority and could not itself bring about unilateral secession. A referendum would be the

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238. *See id.*
239. *See id.*
240. *See Reference re Secession of Quebec*, 1998 LEXIS 39, at *21; *see also* Reference re Bill 30, An Act to Amend the Education Act, [1987] 1 S.C.R. 1148; Reference re Education Act, [1993] 2 S.C.R. 377; Adler v. Ontario, [1996] 3 S.C.R 609.
241. *See* CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms).
242. *See Reference re Secession of Quebec*, 1998 LEXIS 39, at *22.
243. *See id.*
244. *See id.*
245. *See id.*
246. *See id.*
247. *See Reference re Secession of Quebec*, 1998 LEXIS 39, at *22.

first step towards independence from the Confederation, but not the final one.[248]

A clear vote by the people of Quebec would carry weight as a democratic expression of the people.[249] It would confer legitimacy on the efforts by the government of Quebec to secede through constitutional means.[250] The Court stated 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 changes to respond to that desire."[251] Thus, if a definitive majority voted for the secession by Quebec, the federal government and the other provinces would be required, under the constitutional principals of Canada, to enter into good faith negotiations for secession.

The Court held "that Quebec could not purport to invoke a right of self-determination such as to dictate the terms of a proposed secession . . . . The democracy principal, 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."[252] The reverse would also be true in that the rest of the provinces and the federal government could not ignore a clear expression of self-determination by the people of Quebec that they no longer wished to remain in Canada.[253]

The Court reflected on the necessity of the parties involved to negotiate in good faith and in accordance with the constitutional elements involved.[254] The clear majority of Quebecers would be represented by their political leaders as would the majorities from the rest of Canada.[255] No party could be considered more powerful or have a greater mandate than the other.[256] Each negotiating party would begin on equal ground.[257]

In conclusion, the Court proclaimed:

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248. *See id.*
249. *See id.*
250. *See id.*
251. *Id.* at 23.
252. *Reference re Secession of Quebec*, 1998 LEXIS 39, at *23.
253. *See id.*
254. *See id.* at 24.
255. *See id.*
256. *See id.*
257. *See Reference re Secession of Quebec*, 1998 LEXIS 39, at *24.

> the secession of Quebec from Canada cannot be accomplished by the National Assembly, the legislature or government of Quebec unilaterally, that is to say without principled negotiations, and be considered a lawful act. Any attempt to effect the secession of a province from Canada must be undertaken pursuant to the Constitution of Canada, or else violate the Canadian legal order. However, the continued existence and operation of the Canadian constitutional order cannot remain unaffected by the unambiguous expression of a clear majority of Quebecers that they no longer wish to remain in Canada.[258]

2. Question 2—Effect of International Law on Secession

The principal claim by many in the Quebec independence movement has been that secession is a matter of international law and is derived from the right of self-determination.[259] Because there is no definitive international law recognizing the right to secede, the Quebecers are forced to argue either that unilateral secession is not specifically prohibited in international law and so must be permitted; or that there is an implied duty of states to recognize secession brought by the legitimate exercise of the right of self-determination of the people.[260]

With the exception of colonial states, international law does not grant component parts of sovereign states a right to secede from the "parent."[261] Rather, a clear preference exists in support of territorial integrity and the unity of states.[262]

The Court distinguished this first argument by stating that, at international law, the creation of a new state should be governed by the existing state of which the seceding body presently forms a part.[263] The Court stated, "[W]here, as here, unilateral secession would be incompatible with the domestic Constitution, international law is likely to accept that conclusion subject to the right of peoples to self-determination."[264]

International law has recognized for many years the right of a people to self-determination.[265] The U.N. Charter states in relevant part, "[one of the purposes of the United Nations is] to develop

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258. *Id.* at 25.
259. *See id.* at 27.
260. *See id.*
261. *See* MacMauchlan, *supra* note 180, at 177.
262. *See id.*
263. *See Reference re Secession of Quebec*, 1998 LEXIS 39, at *27 (citing R.Y. JENNINGS, THE ACQUISITION OF TERRITORY IN INTERNATIONAL LAW 8-9 (1963)).
264. *Id.*
265. *See id.*

friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace."[266] This right to self-determination has been echoed in countless U.N. statements and agreements as well as in other international proclamations, such as the Conference on Security and Cooperation in Europe.[267] The Court also looked closely at the agreement issued in the Helsinki Final Act which stated in pertinent part:

> By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development.[268]

The majority of commentators on international law found that a right to external self-determination, which is analogous to secession, arises only in the most extreme cases and under carefully defined circumstances.[269] The U.N. Declaration of Friendly Relations defines external self-determination as the establishment of a sovereign and independent state, the free association or integration with an independent state, the free association or integration with an independent State or the emergence into any other political status freely determined by the people.[270] The Court found that in many of the international documents that supported the right of self-determination there was also a parallel statement that the exercise of such a right must be "*sufficiently limited to prevent threats to an existing state's territorial integrity or the stability of relations between sovereign states*."[271]

The Court found that the right to external self-determination has historically been bestowed upon two classes of people: those under colonial rule and those under foreign occupation.[272] Additionally, some commentators have concluded that external self-determination

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266. *Id.* (quoting U.N. CHARTER art. 1, para. 2.).

267. The participating states will respect the equal rights of peoples and their right to self-determination, acting at all times in conformity with the principals of the UN and the norms or international law relating to territorial integrity of States. *See id.*

268. *Reference re Secession of Quebec*, 1998 LEXIS 39, at *28 (quoting Final Act of the Conference on Security and Cooperation in Europe, 14 I.L.M. 1292 (1975)).

269. *See id.* at 29; *see also* MacMauchlan, *supra* note 180, at 177.

270. *See Reference re Secession of Quebec,* 1998 LEXIS 39, at *29 (citing Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation in Accordance with the Charter of the United Nations, GA Res. 2625 (emphasis added) (U.N. GAOR, 25th Sess., Supp. No. 28, at 124, U.N. Doc. A/8028) (1970)).

271. *Id.*

272. *See id.* at 30.

may be granted to people who are unable to exercise their rights to internal self-determination.[273] The justices of the Court determined that the rights of colonial peoples were not relevant to this reference and that the people of Quebec were not subject to an occupying power.[274] They referred to the fact that Quebecers have held the position of Prime Minister of Canada for forty of the last fifty years and many other Quebecers hold high positions in the federal government including three members of the Supreme Court.[275] With representation and access to the federal government on that level, there is no way Quebec can begin to approach the threshold to be considered an occupied or oppressed people.[276]

The Court concluded that Quebec could not claim to have been denied access to government and stated that in the terminology of the international agreements 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."[277] The inability of the provinces to agree on an amendment did not amount to a denial of self-determination.[278] Quebec did not possess the right to secede unilaterally under international law and any attempt to do so would be a violation of the Canadian Constitution.[279]

3. Question 3—Supremacy of Domestic or International Law with Regard to Secession

The Court dismissed this question based on the answers given to questions one and two.[280] The Court found that the Canadian Constitution was more than a written text, but rather a complete set of principles governing the operation of a democracy against a backdrop of federalism, the rule of law and respect for minorities.[281] These elements that constitute Canada and its provinces must be respected and addressed in any proposal for secession.[282] If these elements were not taken into consideration, any effort at unilateral secession would

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273. *See id.*
274. *See id.*
275. *See Reference re Secession of Quebec*, 1998 LEXIS 39, at *30.
276. *See id.*
277. *Id.* at 31.
278. *See id.*
279. *See id.*
280. *See id.* at 33.
281. *See id.*
282. *See id.*

be contrary to Canadian law and unlikely to garner support among the international community.[283]

The Court's decision has left the opportunity open for secession by Quebec, but not unilateral secession. The first step would be for passage of a referendum, on an unambiguous question by a clear majority of the people.[284] After that, the government of Quebec and the members of the federal government would have to negotiate the terms for secession.[285] If Canada is able to offer Quebec adequate concessions, it may stay in the union; if not, the discussions must focus on ensuring that the constitutional elements of federalism, the rule of law, and respect for minorities are taken into consideration in any negotiations.[286]

C. *Fallout from the Supreme Court Decision*

The PQ had asserted many times prior to the decision of Supreme Court that they would call a province-wide election in Quebec.[287] If the results of such an election were in support of the PQ, that would be a valid statement by the people in favor of separation.[288] Quebec has always asserted that the Supreme Court had no authority to hear the case and claimed that they had no jurisdiction in the matter.[289]

With the announcement of the decision, both sides were able to claim victory; however, it was the determination that unilateral secession would be illegal under Canadian and international law that was a true victory for the federal government.[290] The PQ claimed that a simple majority vote would be sufficient and the questions of the last two referendums sufficient to satisfy the Court's demand for a clear question.[291] The federal view was that the Court would not have repeatedly referred to the need for a clear majority when only a simple majority was needed to support secession.[292] In the end, the decision left many serious questions unanswered about Quebec's right

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283. *See id.* at 34.
284. *See Reference re Secession of Quebec*, 1998 LEXIS 39, at *33.
285. *See id.*
286. *See id.*
287. *See* Elizabeth Thompson, *Bouchard Waves Quebec Election in Court's Face*, OTTAWA CITIZEN ONLINE (December 1, 1997) <http://www.ottawacitizen.com/national/971201/1417330.html>.
288. *See id.*
289. *See* MacMauchlan, *supra* note 180, at 164.
290. *See* Joan Bryden, *Federalist, Separatist Camps Can Both Claim Victory*, OTTAWA CITIZEN ONLINE (Aug. 21, 1998) <http://www.ottawacitizen.com/national/980821/1946620.html>.
291. *Id.*
292. *Id.*

to secede: what was a clear majority? fifty-one percent or did there need to be more? could the federal government ignore any future referendum where it deemed the question presented to be too ambiguous? what would be the fate of aboriginal people in Quebec who wished to remain as part of Canada? Would their lands remain part of Canada?

The PQ called for an election in Quebec following the Court's decision.[293] A strong re-election of the PQ would undoubtedly be held as evidence that the people of Quebec supported its position that Quebec should be allowed to separate from Canada. Quebecers went to the polls in December of 1998 with a weighty decision to make: give the PQ a strong vote of confidence by electing them in large majorities and emboldening the secession movement, or vote the PQ out of power and affirm Quebec's place in a unified Canada. After all the votes were in, the PQ retained control of the provincial government with a seventy-six-seat majority in the 125-member legislature, but lost the total number of votes cast for the Liberal, anti-secession party by a count of 43.7% to 42.7%.[294] With a majority of the people voting against the PQ across the province, it is unlikely that the "winning conditions" exist for the PQ to call for a referendum on secession.[295] However, PQ leaders are optimistic and have several years before the next elections to build support for an independent Quebec.[296]

V. LEGITIMATE SECESSION CLAIMS AND THE FUTURE OF CANADA

Several differing theories have been promulgated on the issue of secession. With the exception of the "primary right" theory, all of them would require rejecting Quebec's bid for independence. Quebec resides in a wealthy liberal democratic nation. The people are not subject to discrimination or human rights abuses. Quebec's territorial claims are tenuous. In addition, Quebec receives $6 billion to $8 billion a year in benefits above what it contributes in taxes from the federal government.[297] Natives of Quebec hold some of the highest offices in the federal government, including the Prime Minister's

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293. *Cf. PQ Wins Seat, Loses Popularity Contest*, NEWSWORLD ONLINE (Dec. 15, 1998) <http://www.newsworld.cbc.ca/cgi-bin/templates/view.cgi?/news/199…/quebec298121>.

294. *See id.*

295. *See* Elizabeth Thompson, *PQ Has Referendum Mandate: Bouchard,* MONTREALGAZETTE.COM (Dec. 8, 1998) <http://www.montrealgazette.com/PAGES/981208/2086913.html>.

296. *See id.*

297. *See* Steven Pearlstein, *Separatists Win Quebec Elections*, WASH. POST (Dec. 1, 1998) <http://www.washingtonpost.com/wp-srv/inatl/longterm/canada/canada.html>.

seat.[298] What keeps this debate alive in Canada is Quebec's desire to be recognized as a distinct society inside Canada. A recent poll of anglophones outside of Quebec found that eighty-eight percent of the people questioned felt that French-Canadians have made significant contributions to Canada.[299] Furthermore, they were strongly in favor of children being taught French in school.[300]

In a world that remains infected by human rights abuses, ethnic cleansing and the suppression of democracy the claims of the people of Quebec seem misplaced. The fear of a group losing its cultural identity may be real, but with regard to Quebec, they are merely fears. One of the biggest hurdles that the people of Quebec face is the impression from the rest of Canada that they are anti-English. The enactment of French-only laws and the election of representatives to the parliament who campaign for the secession of Canada does not support an impression to the contrary. If the people of Quebec wish to preserve their heritage, which many argue they already do with the current structure, they should work to create understanding in their fellow Canadians of their special status. The people of Canada believe that Quebec is a part of them, the people of Quebec need to accept that they are part of Canada.

The secession movement in Quebec runs contrary to nearly every tenent in the United Nation's position on secession. Such a separation would significantly affect the territorial integrity of Canada. There is little support in the United Nations for secession claims from people who live comfortably in a liberal democracy. It is also unlikely that Quebec would get support, much less recognition, from any other states in the international community, including France. Their case simply is not compelling enough.

Unfortunately, the Supreme Court of Canada's decision left significant ambiguities for the political leaders to squabble over. However, this may have been blessing in disguise. By not holding outright that Quebec could not secede from Canada, the Court may have disarmed the PQ of a powerful weapon they could use to garner support for secession. According to the Court's decision, the PQ cannot claim that once again the federal courts have intervened in the business of their provinces, rather they must claim a partial victory for their position. The people will not support a secession vote as fervently as they did in the past.

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298. *See id.*

299. *See* Chris Cobb, *Anglos Outside Quebec Value French Culture: Poll*, MONTREALGAZETTE.COM (Dec. 22, 1998) <http://www.montrealgazette.com/PAGES/981222/2124815.html>.

300. *See id.*

Most Canadians feel that French language and culture are part of Canada as a whole, not just of one province, and thus an English-Canada does not want a separate Quebec. Canada faces many dilemmas, from economic stagnation and the falling value of their dollar to environmental concerns and high taxes. If the people were able to get past this secession debate that has lingered for decades and focus their energies on fixing the more tangible problems, Canadian quality of life could improve immensely. This debate has consumed countless resources in dollars and human capital. The people of Quebec are different from other Canadians; secession is not needed to prove this. Canada deserves to be lead into the next century united, not divided over language differences. It is time to close the secession chapter in Canadian history.