Canada:
The Supreme Court Sets Rules for the Secession of Quebec

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The Supreme Court of Canada ruled in 1998 that neither the Canadian constitution nor international law allows Quebec to secede from Canada unilaterally. Secession would require amending the constitution. However, if a clear majority of Quebeers unambiguously opts for secession, the federal government and the other provinces would have a constitutional duty to negotiate. This is an obligation that the court declared to be implicit in four principles that "inform and sustain the constitutional text"—federalism, democracy, constitutionalism and the rule of law, and respect for minorities. The same set of principles would govern the negotiations themselves. Accordingly, Quebec could not dictate the terms of secession, and one cannot assume that agreement would be reached. If negotiations fail, and Quebec declares independence unilaterally, the international community would have to decide whether Quebec's action was legitimate.

In August 1998, Canada became probably the only contemporary federation to have a constitutionally mandated process for bringing about the secession of one or more of its provinces or states. However, the process entails such intrinsic difficulties and would probably take so long to be brought to conclusion, that it might be of little avail to a province that invoked it. This is the grand paradox, or perhaps the balanced result, that has emerged from a judgment of the Supreme Court of Canada.

The court's decision came thirty years after the founding of the indépendantiste Parti québécois (PQ). The PQ held office from 1976 to 1985, won the 1994 election, and was reelected in 1998. Twice, in 1980 and in 1995, it has called a referendum aiming to take Quebec out of Canada; a third referendum is promised, perhaps as early as mid-2000, but evidently

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1To declare, in principle, a right of secession—as was the case, for example, with the former Soviet Union—is rather less than prescribing how to accomplish it.

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it will be held only if the Quebec government expects to win it.\(^2\) In both of the referendums already held, the PQ proposed replacing the federal tie with a bilateral economic association, supported by political arrangements evidently inspired by the European Community/Union. In the 1980 referendum, Premier René Lévesque sought a mandate to enter into negotiations with “Canada” on the basis of a “sovereignty-association” formula, following which the electorate would be consulted again; however, Quebecers rejected this proposal by a 60 percent majority. In the referendum of 30 October 1995, by contrast, Quebec Premier Jacques Parizeau asked the people of Quebec to authorize the national assembly (provincial legislature) to pass a bill declaring sovereignty. In fact, the bill had already been introduced. Once passed, it would have guided the transition process; in particular, Quebec would provisionally act as a Canadian province while drafting its constitution and conducting negotiations to create a Quebec-Canada “partnership.”\(^3\) Regardless of the outcome of those negotiations, Quebec would become independent in one year, unless the national assembly decided otherwise. The intent was that the transition period might be lengthened if that were needed to resolve outstanding issues, but it could also be shortened if partnership negotiations broke down.

However, the bill never came to a vote; it was withdrawn when the federalist forces won by a hair’s breadth, with only 50.6 percent of the vote.

The federal government did not challenge the legality of the referendum or the prospect of a unilateral declaration of independence that would have followed a “Yes” vote. Canadian Prime Minister Jean Chrétien had expected a much more resounding victory for the federalist side, and apparently believed that a decisive “No” would (as in 1980) severely weaken the separatist movement (“independence” and “sovereignty” are terms avoided by federal politicians). Chastened by the result, and under pressure

\(^2\) Quebec Premier Lucien Bouchard, whose government was re-elected in November 1998, but with a reduced majority and with fewer votes than the Quebec Liberal Party, is generally regarded as less strongly committed to sovereignty than most PQ militants. He has announced that his government will hold a new referendum on sovereignty during the latter half of its mandate, or perhaps as early as spring 2000, but only under “winning conditions.” The federalist strategy is to ensure that “winning conditions” never materialize, and that a referendum is never held.

\(^3\) The wording of the referendum question was: “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 the agreement signed on June 12, 1995?” This agreement was among the leaders of the PQ, the Bloc québécois (BQ, the PQ’s counterpart in federal politics; at the time, it formed the official opposition in parliament), and the Action démocratique du Québec (ADQ, a splinter party in provincial politics). The agreement, based on a discussion paper prepared by the ADQ and a BQ task force, envisioned a Quebec-Canada partnership with legislative powers vested in a ministerial council in which Quebec and Canada would each cast one vote. The partnership would be a customs union and monetary union; it would provide for free movement of goods, services, persons, and capital; and there would be common or dual citizenship. In the relevant areas, the two states would exercise a mutual veto. Mutual agreements could also be negotiated on various other matters, including international representation, transport, defense, financial institutions, fiscal policy, and environmental protection. There would be a secretariat, an assembly (with a consultative role) in which Quebec would have one quarter of the seats, and a joint dispute-settlement mechanism. See François Rocher, “Les ailes de la stratégie pré-référendaire.” *Canada: The State of the Federation* 1995, eds. Douglas M. Brown and Jonathan W. Rose (Kingston, Ontario: Institute of Intergovernmental Relations, 1995), pp. 19-45.
from an angry public in the rest of Canada, which blamed Chrétien for having nearly “lost the country,” the federal government now sought to have the legal situation clarified. Accordingly, it referred to the Supreme Court of Canada three questions about the legality of unilateral secession. The case is generally referred to as the Quebec Secession Reference. It was decided on the basis of a single set of reasons subscribed to by all nine Supreme Court justices.

Under the terms of the Supreme Court Act, the court is required to offer advisory opinions on matters referred to it by federal cabinet order. Some of the most important elements of Canada’s constitutional law have been established in this way. In particular, there is now a triad of closely interlocked decisions on constitutional change. The first of these is the Patriation Reference of 1981, declaring unconstitutional “in the conventional sense” the federal government’s intended procedure in bringing about a major constitutional revision. The second is the Quebec Veto Reference of

4 Re Reference by the Governor in Council concerning certain questions relating to the secession of Quebec from Canada, 161 D.L.R. (4th) 385. The reference was made by cabinet order (Order in Council) on 30 September 1996; arguments were heard 16-19 February 1998; judgment was rendered 20 August 1998. The paragraphs in the judgment are numbered, and references (below) to the judgment cite paragraphs rather than page numbers.

5 Reference Re Amendment of the Constitution of Canada, 125 D.L.R. (3rd) 1. Following the defeat of Quebec’s referendum on sovereignty-association in 1980, Canadian Prime Minister Pierre Trudeau launched negotiations with the provinces to make a comprehensive revision to the Canadian constitution, including changes to the division of powers, the adoption of a formula for amending the constitution in Canada (hitherto, amendments had to be made by the U.K. parliament), and the enactment of a Canadian Charter of Rights and Freedoms with constitutional status. The negotiations failed, but Trudeau proceeded, against the opposition of all but two provinces (Ontario and Prince Edward Island), with a stripped-down package consisting of the amending formula and the Charter. He introduced a resolution into parliament requesting the U.K. to pass the necessary legislation, which would be the last-ever exercise of British legislative power in relation to Canada—hence bringing about “patriation” of the constitution. In response, several provinces launched reference cases in their respective courts of appeal, questioning whether parliament could constitutionally proceed without provincial concurrence. In addition, the resolution faced a filibuster in parliament, leading Trudeau to promise that the government would await the outcome of the provincial reference cases, and the inevitable appeal to the Supreme Court of Canada. The court declared (28 September 1981) that the procedure was constitutional in the legal sense, but not in the conventional sense, because hitherto requests for major constitutional amendments had been forwarded to the U.K. only after (as the court determined) substantial provincial consent had been obtained. The court’s decision forced the federal government to resume negotiations with the provinces, as a result of which substantial changes were made. An amended resolution was adopted after gaining the support of all provinces but Quebec. It was subsequently incorporated into law by the U.K. parliament, becoming, in Canada, the Constitution Act, 1982.

6 Re Attorney-General of Quebec and Attorney-General of Canada, 140 D.L.R. (3rd) 385. On the initiative of the PQ government, and with the support of the federalist Liberal Party of Quebec, the national assembly decreed: “Quebec formally vetoes the [constitutional] resolution tabled in the House of Commons on November 18, 1981 by the federal Minister of Justice.” Parliament, however, ignored this decree, and the resolution proceeded. Quebec then submitted a question to the provincial court of appeal, asking whether parliament’s adoption of the constitutional resolution had been “unconstitutional in the conventional sense.” The court of appeal ruled on 7 April 1982 that the resolution was not unconstitutional, either in law or by convention. The matter was appealed to the Supreme Court of Canada; however, on 17 April, the Constitution Act, 1982 was proclaimed. The Supreme Court’s ruling on the appeal was delivered on 6 December 1982, almost nine months after the Act had come into force. In its decision, the court declared that there existed no general constitutional rule of unanimity applying to constitutional amendments. It also stated that there was no need to consider the claim by the national assembly that “within the Canadian federation Quebec forms a society distinct by its language, culture and institutions, one which possesses all the attributes of a distinct national community,” consequently, “the two founding peoples of Canada are fundamentally equal.” Having declared this matter to be irrelevant to the case at hand, the court ruled that Quebec did not have “a conventional power of veto over constitutional amendments such as those in issue in the present reference.”
1982, declaring that a decree by the national assembly, which purported to veto the federal constitutional initiative, was without effect. (A contrary decision would have invalidated the Constitution Act, 1982, or at the very least, destroyed its legitimacy.) The third is the *Quebec Secession Reference*.

**THE CASE**

The questions put to the court read as follows:

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 of 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 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?

The Quebec government denounced the federal government for turning to the court in this way, declaring that the matter was inherently political and was thus beyond the purview of any court. It refused to participate, in consequence of which the court enlisted the help of an *amicus curiae* to argue the case for Quebec’s right of unilateral secession. When the decision was rendered, however, it was welcomed by virtually everyone, including the Quebec government. Federalists and *independentistes* each found aspects favorable to their side, and each proceeded to put its own spin on the 65-page judgment.

Essentially, the federal government got what it wanted, a ruling that unilateral secession was not legal under either domestic or international law, in consequence of which the question of which would take precedence did not arise. However, the Quebec government, and *independentistes* generally, expressed deep satisfaction that the court had not stopped there; it had gone much farther, they said, than Ottawa had wanted it to. Specifically, the court had ruled that if ever a clear majority of Quebeckers voted in favor of secession, and the question itself was clear, negotiations on the issue of secession would have to ensue. However, the court did not define the term “clear majority”–the federal government has insisted that a majority greater than “50 percent plus one” would be required–nor did it state what might

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constitute a “clear question.” These, the court declared, are political matters, and cannot be resolved judicially.

Where indépendantistes highlighted “Canada’s” duty to negotiate, federalists highlighted the fact that negotiations would have to cover a range of issues that the PQ government has so far shown no inclination to open up. Thus, the court stated (para. 151) that in negotiations on secession, the parties would have to address “the interests of the other provinces, the federal government, Quebec, and indeed the rights of all Canadians both within and outside Quebec, and specifically the rights of minorities.” It even implied (para. 96) that Quebec’s boundaries might be challenged. In general, federalists delighted in the uncertainties flowing from the decision, as the potential for chaos stemming from a “Yes” vote in a future referendum has been presumed (perhaps wrongly) to frighten off “soft nationalists.”

The court noted (para. 97) that the outcome of negotiations could not be predicted, and it refused to speculate about what might happen if they collapsed or were never initiated. It did, however, acknowledge that an attempted secession, other than one brought about through constitutional amendment, might succeed or fail. In particular, it suggested that international recognition might depend on whether foreign states considered that Quebec on the one hand, and federalist forces on the other, were acting in accordance with Canadian constitutional principles, after a referendum in which a clear majority unambiguously opted for secession.

Numerous questions are raised by the Seccession case. Among them, the following are addressed below: constitutional principles, a secession referendum and the duty to negotiate, secession and the 1982 amending formula, secession and the international community, the Supreme Court and political controversy, and the realpolitik of secession.

CONSTITUTIONAL PRINCIPLES

As jurisprudence, the Quebec Secession Reference is remarkable for its enunciation of four basic principles that “inform and sustain the constitutional text [and] are the vital unstated assumptions upon which the text is based” (para. 49). The principles are: federalism, democracy, constitutionalism and the rule of law, and respect for minorities. None of these, the court said, is absolute; none can trump the others. The whole judgment is based on these four principles. They underlie the values of diversity and accommodation among cultural and political (provincial) communities, values that are given prominence in the court’s decision. By contrast, the concept of nationhood, except as (in the words of constitutional lawyer John D. Whyte) “an arrangement of market convenience,” is virtually absent from

[John D. Whyte, “Constitutionalism and Nation,” Canada Watch 7 (January-February 1999): 21. My discussion of constitutional principles and underlying values, including the references to Lincoln, has been strongly influenced by this paper.]

the judgment. In this sense, and in terms of American political discourse, the Supreme Court of Canada has chosen John C. Calhoun over Abraham Lincoln.

The affinities with Calhoun, while evident, are limited. Calhoun regarded the U.S. Constitution as a compact, from which any state could withdraw if its terms were altered through constitutional amendment, or if, in the view of that state, the Constitution “should fail to fulfil the ends for which it was established.” By contrast, in the Secession case, the Supreme Court of Canada rejected unilateral secession. At no time has the court contemplated the possibility of “interposition,” or the non-application of federal law within a province, by decision of the provincial legislature. Nonetheless, the philosophy underlying the decision may be interpreted as Calhounian, with an admixture of twentieth-century political science. This is evident in the principles expounded by the court.

First, federalism is described by the court as “a political and legal response to underlying social and political realities.” Federalism “recognizes the diversity of the component parts of Confederation, and the autonomy of provincial governments to develop their societies within their respective spheres of jurisdiction;” it also “facilitates the pursuit of collective goals by cultural and linguistic minorities which form the majority within a particular province” (paras. 57, 58, 59).

Second, democracy, “commonly understood as being a political system of majority rule,” is more than that. It is “fundamentally connected to substantive goals, most importantly, the promotion of self-government,” and it “accommodates cultural and group identities” (paras. 63, 64). Noting that “the democratic principle was . . . argued before us in the sense of the supremacy of the sovereign will of a people, in this case potentially to be expressed by Quebecers in support of unilateral secession” (para. 61), the court countered that democracy must be “taken in the context of the other institutional values.” In particular, “the relationship between democracy and federalism means, for example, 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 more or less ‘legitimate’ than the others as an expression of democratic opinion.” Democratic legitimacy is also counterbalanced by the rule of law and by moral values embedded in the constitutional structure (paras. 66, 67).

Third, constitutionalism and the rule of law also qualify or limit simple majority rule. The court states that under constitutional government, “The
political representatives of the people of a province have the capacity and the power to commit the province to be bound into the future by the constitutional rules being adopted. These rules . . . [define] the majority which must be consulted in order to alter the fundamental balances of political power (including the spheres of autonomy guaranteed by the principle of federalism), individual rights, and minority rights in our society.” The rules can be amended “only through a process of negotiation which ensures that there is an opportunity for the constitutionally defined rights of all the parties to be respected and reconciled” (para. 76).

Fourth, the protection of minorities is guaranteed under “a number of specific constitutional provisions protecting minority language, religion and education rights,” and those guarantees are “the product of historical compromises.” The judicial protection of minorities has become especially prominent since the enactment of the Canadian Charter of Rights and Freedoms in 1982. A special case is the “explicit protection for existing aboriginal and treaty rights” under the Constitution Act, 1982.

By contrast with its exposition of these principles, the concept of nationhood as an organic entity, or a Lincolnian “perpetual union,” does not appear in the court’s decision. Mutual obligation, however, does. Thus, the court cites the words of Britain’s Colonial Secretary in 1868, rejecting Nova Scotia’s efforts to undo the federal union entered into the year before: “vast obligations, political and commercial, have already been contracted on the faith of a measure so long discussed and so solemnly adopted . . . the Queen’s government feel that they would not be warranted in advising the reversal of a great measure of state, attended by so many extensive consequences already in operation.” As the court notes, the interdependence resulting from such “vast obligations” has “multiplied immeasurably in the last 130 years” (para. 42). The court also quotes, approvingly, the words of counsel for Saskatchewan, an intervenor in the case:

A nation is built when the communities that comprise it make commitments to it, when they forego choices and opportunities . . . when the communities that comprise it make compromises, when they offer each other guarantees, when they make transfers and perhaps most pointedly, when they receive from others the benefits of national solidarity. The threads of a thousand acts of accommodation are the fabric of a nation (para. 96).

What the court implicitly suggests is that no party to Confederation may lawfully tear the fabric into pieces, but it is nonetheless possible that the fabric may be unwoven in a way that takes account of past mutual commitments and compromises, as well as contemporary (and future) interests. Contrast Lincoln:
I hold, that in contemplation of universal law, and of the Constitution, the Union of these States is perpetual. Perpetuity is implied, if not expressed, in the fundamental law of all national governments. It is safe to assert that no government proper, ever had a provision in its organic law for its own termination.\footnote{First Inaugural Address, 4 March 1861. Don E. Fehrenbacher, ed., Lincoln, Speeches and Writings 1859-1865 (New York, NY: Library of America, 1989), p. 217.}

**A SECESSION REFERENDUM AND THE DUTY TO NEGOTIATE**

Invoking the four principles it enunciated, while denying that any of them was absolute, the court reached several significant conclusions. First, nationhood is not organic or indissoluble, at least not in Canada. Second, secession is a legitimate political objective, and may be accomplished without legal discontinuity by applying the 1982 amending formula. Third, “a clear repudiation by the people of Quebec of the existing constitutional order” (para. 88) would create an obligation upon the federal government and the other nine provincial governments to enter into negotiations, although not necessarily “to accede to . . . secession . . . subject only to negotiation of the logistical details” (para. 90).

There is no provision in the Canadian constitution for using the referendum procedure, either for constitutional amendment or any other purpose. In both British Columbia and Alberta, however, the law requires a referendum on proposed constitutional amendments; in Quebec and Newfoundland, there is legislation providing for referendums on constitutional and other matters, at the option of the provincial government. For the federal government, it might also be politically very difficult, given the precedent established by the Charlottetown Accord,\footnote{See below, note 16.} to avoid a Canadawide referendum if major constitutional change is being considered. Under the terms of the Constitution Act, 1982, the amendment process is launched when parliament or any provincial legislature passes a constitutional resolution. Evidence that there is broad public support adds weight to such an initiative.

In the Secession case, the Supreme Court noted that a referendum may provide a democratic method of ascertaining the views of the electorate on important political questions. Further, it stated that a referendum that was free of ambiguity in terms of the phrasing of the question, and in terms of the support it achieved, would confer legitimacy on the efforts of a Quebec government to secede (paras. 87, 88). Although Quebec “could not purport to invoke a right of self-determination such as to dictate the terms of a proposed secession to the other parties” (para. 91), nonetheless:

The rights of other provinces and the federal government cannot
deny the right of the government of Quebec to pursue secession, should a clear majority of the people of Quebec choose that goal, so long as in doing so, Quebec respects the rights of others. Negotiations would be necessary to address the interests of the federal government, of Quebec and the other provinces, and other participants [implicitly: the representatives of aboriginal peoples], as well as the rights of all Canadians both within and outside Quebec. . . . The negotiation process . . . would require the reconciliation of various rights and obligations by the representatives of two legitimate majorities, namely, the clear majority of the population of Quebec, and the clear majority of Canada as a whole, whatever that may be. There can be no suggestion that either of these majorities “trumps” the other. A political majority that does not act in accordance with the underlying constitutional principles we have identified puts at risk the legitimacy of the exercise of its rights (paras. 92, 93).

**SECESSION AND THE 1982 AMENDING FORMULA**

Amendments to the Canadian constitution require different processes, according to subject matter. The general rule is that there must be identical resolutions by parliament and the legislatures of seven provinces (i.e., two-thirds) representing at least half the Canadian population (the “7/50 rule”). However, there is also a “unanimity rule”; all provincial legislatures must concur in the case of certain classes of amendments. Included in this list are amendments in relation to the role of the lieutenant governor of a province (who exercises vice-regal powers at the provincial level), the composition of the Supreme Court of Canada, and the amending formula itself. All of these matters would be affected by secession, although it could be argued that an amendment to bring about the secession of a province was not truly in relation to them, and that its implications in this regard were of secondary importance.

The court studiously avoided saying what level of consent would be required for secession. Indeed, the court seemingly gave little importance to the amending formula in the event of a secession¹⁵ or of negotiations on secession. Instead, it emphasized constitutional principles, the negotiation process, and the requirements of democratic legitimacy. Donna Greschner, a constitutional lawyer from Saskatchewan, considers that the court’s emphasis on principles may undermine the position of Canada’s six small provinces (each with one million or fewer people; these are also the six poorest of the ten). She believes that the requirement of having to negotiate on the basis of the four constitutional principles enunciated by

the court could have the consequence that: “Small provinces may become lost in the shuffle among the big players, and they cannot [could not] expect the federal government to protect their interests.” Express legal guarantees under the Constitution Act, 1982 may be disregarded or violated: “If parties exercise their veto under s. 41, or withhold their consent under s. 38, for reasons that violate the principles, their action is unconstitutional.” She adds: “When small provinces agree to a [constitutional] provision, they will not know whether it will last beyond the next court decision that uncovers and applies principles.”

It is possible, and perhaps even likely, that secession may require the assent of fewer provinces, or less formally declared assent, than other classes of amendment. This may be implied in the court’s emphasis on good-faith negotiations in which, arguably, Canada has been enjoined to speak with a single voice. To understand why negotiations may be of such importance, perhaps even forcing the formal amending process into the background, it may be helpful to take note of some recent history. Twice since 1982, constitutional amendments agreed to by all governments—the Meech Lake Accord of 1987 and the Charlottetown Accord of 1992—have failed as public opposition subsequently built up. Furthermore, under federal legislation in 1996, the amendment procedure has become even more complicated. The law now prohibits the government from introducing a parliamentary resolution under the 7/50 rule, unless the amendment has already been consented to by a broad coalition of provinces. Taking note of the significance of this in the context of a proposed secession, José Woehrling comments: “By insisting on compliance with such a cumbersome procedure, the federal government was able to claim that it abstractly recognized the

14 Donna Greschner, “What Can Small Provinces Do?” Canada Watch 7 (January-February 1999): 24. In her oral comments at the York University symposium (see Author’s Note), Grescher also suggested that the Supreme Court may have invented a new amending formula applicable to secession. See also Donna Greschner, “The Quebec Secession Reference: Goodbye to Part V?” Constitutional Forum 10 (Fall 1998): 19-25.

15 Woehrling, “Unexpected Consequences,” 19. For a criticism of this aspect of the court’s decision, note the argument of Alan Cairns, that while one successor-state (Quebec) would be at the table, the other (“new Canada,” or Canada without Quebec) would not. The federal government, elected in part by Quebecers, would be there; so would all provinces of the present-day federation; but not, perforce, the new state that would emerge after secession. See Alan C. Cairns, “The Quebec Secession Reference: The Constitutional Obligation to Negotiate,” Constitutional Forum 10 (Fall 1998): 28-30.

16 The Meech Lake Accord was ratified by parliament and by all provincial legislatures except Manitoba (though Newfoundland, having passed it, withdrew its approval after a provincial election). The Charlottetown Accord was submitted to a Canada-wide referendum, where it was rejected by 54 percent of the voters, and was approved only in three of the Atlantic provinces and (barely) in Ontario; it was not thereafter proceeded with. See Patrick J. Monahan, Meech Lake: The Inside Story (Toronto: University of Toronto Press, 1991); Kenneth McRoberts and Patrick Monahan, eds., The Charlottetown Accord, the Referendum, and the Future of Canada (Toronto: University of Toronto Press, 1993); and various articles in Ronald L. Watts and Douglas M. Brown, eds., Canada: The State of the Federation 1993 (Kingston, ON: Institute of Intergovernmental Relations, 1993).

17 The assent of the following provinces is required: Ontario, Quebec, British Columbia, two Atlantic provinces, and two Prairie provinces—in both of the latter two cases, with a majority of the population in the region. Note that this is ordinary legislation, amendable by parliament; however, while it remains on the statute books, it has constitutional significance.
right of Quebecers to decide their own constitutional future while, at the same time, denying such a right on a practical and political level.” He goes on to say:

The court brings this scheme to ruin by establishing a sequence of events that leaves only a secondary role for the amending formula. . . . [If negotiations succeed] it is difficult to see how a province or the federal government [or rather, parliament-PL] could then refuse its formal approval, and thus negate the political agreement arrived at. However, should this happen, the court recognizes that Quebec could then try the UDI [uni-lateral declaration of independence] route and that such a course would be subject to evaluation by the international community.18

SECESSION AND THE INTERNATIONAL COMMUNITY

Whether to complement its reasoning about constitutional principles or to take account of raw political realities, the court gave considerable importance to the response of the international community to an attempted secession. It may have done so because it evidently did not wish to regard either the constitutional status quo, or secession, as the default outcome if Quebecers voted for secession but negotiations failed or were not seriously attempted. In this respect, one might say that the court refused to follow either Calhoun or Lincoln. Unable or unwilling to identify either an arbitral process or a domestic arbiter if secession is approved by provincial referendum, the court turned to the international community as the ultimate authority on the legitimacy of secession. It suggested that foreign powers would be guided by their own interpretation of Canadian constitutional principles and the good-faith adherence of various parties to those principles. Its scenario-building went as follows:

After 131 years of Confederation, there exists, inevitably, a high level of integration in economic, political and social institutions across Canada. . . . there are regional economic interests, which sometimes coincide with provincial boundaries, [and] there are also national interests and enterprises (both public and private) that would face potential dismemberment. There is a national economy and a national debt. Arguments were raised before us regarding boundary issues. There are linguistic and cultural minorities, including aboriginal peoples, unevenly distributed across the country who look to the Constitution of Canada for the protection of their rights (para. 96).

While the negotiators would have to contemplate the possibility of secession, there would be no absolute legal entitlement to it

18Woehrling, “Unexpected Consequences,” 18.
and no assumption that an agreement reconciling all relevant rights and obligations would actually be reached (para. 97).

At this point, the court declared that it, itself, could not be expected to arbitrate the outcome if negotiations broke down: “The Court has no supervisory role over the political aspects of constitutional negotiations. . . . reconciliation can only be achieved through the give and take of the negotiation process. . . . it would be for the democratically elected leadership of the various participants to resolve their differences” (paras. 100, 101). Leaving unstated the possibility that the goal of secession might be abandoned, and implicitly presuming a unilateral declaration of independence, the court then suggested that the international community would arbitrate the outcome:

To the extent that a breach of the constitutional duty to negotiate in accordance with the principles described above undermines the legitimacy of a party’s actions, it may have important ramifications at the international level. . . . 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 (para. 103).

The role of the international community was also addressed by the court in a different sense, when it stated that international law did not offer Quebec a right to unilateral secession. While affirming that the right of a people to self-determination is now an acknowledged principle of international law (para. 114), the court stated that this right is normally fulfilled through “internal self-determination—a people’s pursuit of its political, economic, social and cultural development within the framework of an existing state” (para 126). An exception arises with colonial or oppressed peoples, but as “the population of Quebec cannot plausibly be said to be denied access to government,” the exception does not apply to Quebec (paras. 131-138).

Finally, the court acknowledged that although Quebec might secede unlawfully, in terms of both domestic and international law, its independence might eventually be accorded legal status through foreign recognition (including by Canada). Such action—in accordance with “the effectivity principle”—represents adaptation to “empirical fact,” but does not confer legality retroactively (paras. 140-146).

THE SUPREME COURT AND POLITICAL CONTROVERSY

The Secession case has an obvious bearing on the legitimacy of the court itself, and more broadly on the legitimacy of the Canadian constitutional order, both within Quebec and within Canada as a whole. The court has been walking a very fine line in its triad of constitutional judgments. It would strain the imagination to suppose that the justices of Canada’s highest
court took no notice of the prospective or probable reaction of various publics to their decisions on such politically sensitive matters. Surely, constitutional jurisprudence in Canada is the result of political calculation, as much as it is the austere product of human reason applied to observable facts.

In the Secession case, the Supreme Court struck political gold. Its ruling has been lauded by federalists and indépendantistes alike. There has been criticism, of course. Among some federalists, there has been unease about the court’s thin sense of nationhood, and its apparent readiness to subordinate written constitutional rules to general principles, which the court itself has formulated in a way that suits the conclusions it apparently felt compelled to draw. Among some indépendantistes, there appears to be a desire to prepare the ground for future attacks on the legitimacy of the court in a new phase of constitutional crisis. For example, political scientist Guy Laforest criticizes the court for undue reliance, when it considered whether Quebecers have been able to achieve self-determination within Canada, on the brief presented by the amicus curiae appointed by the court itself. Laforest also revisits “the struggles of 1981-82, [when] the Supreme Court of Canada supported with all its authority a constitutional coup d’état.”

The consistency of the Quebec Secession Reference with these two earlier cases may reasonably be questioned. Although opinions will differ on this, it is plausible to argue that the present decision incorporates and extends the Patriation Reference of 1981, but amounts to repudiation of the Quebec Veto Reference of 1982. The court’s decision in the Veto case seems difficult to sustain on any grounds other than its unwillingness to overturn a major constitutional amendment, widely supported outside Quebec and, more ambiguously, within Quebec as well. Denying Quebec a veto, the court explicitly refused to consider Quebec’s particular place within Confederation. By contrast, in the opinion of constitutional lawyer Jean Leclair, a self-declared federalist, “the Court recognized [in the Secession Reference] the need to take into account Quebec’s specificity in Confederation. In other words, in the eyes of the Court, the federal principle is not an ethereal concept universally applicable in federations; it is historically contextualized.”

19Polls taken in November 1981 and March 1982 indicated that a plurality of Quebecers were critical of the provincial government’s refusal to sign the agreement reached among the other governments, but a majority disapproved of the federal government’s action in proceeding without Quebec’s consent. I am grateful to my colleague Matthew Mendelsohn for information on these polls.
It is doubtful that, if negotiations on secession do occur, the Supreme Court would be able to maintain Olympian detachment from politics. The court, as noted, has disclaimed a supervisory role over the political aspects of such negotiations. However, having declared a constitutional duty to negotiate, could the court escape obligation to decide whether the parties were negotiating in good faith? Could it determine adherence to—or violation of—constitutional principles without itself making the sorts of judgment that it has explicitly declared only “political actors” have the capacity to make? It is hard to see how the court could, in such a situation, convincingly draw a line between the legal and the political. Its recent judgments, not only in the constitutional revision triad, but also in many Charter cases, have blurred that line if not (as some insist) erased it altogether. Perhaps a clear distinction cannot be established or maintained. Be that as it may, it is hard to see how a future court, in a crisis over an intended secession, could avoid being drawn into the political vortex—unless events were to move so rapidly as to make court action irrelevant.

CONCLUSION: THE REALPOLITIK OF SECESSION

I close with a final comment on what may well be a fundamental lack of political realism by the court, and, in this light, a comment on the overall significance of the case. In declaring a duty to negotiate, and in identifying many of the incredibly complex and difficult issues to be resolved in negotiations over a proposed secession, the court implicitly assumes that no significant time constraints apply. How could that be?

Several commentators have suggested that a referendum endorsing secession would precipitate a crisis that would demand almost immediate resolution. Political scientist Robert Young speculated during the lead-up to the 1995 referendum that if there were a strong “Yes” vote, the prime minister would be compelled to announce immediately that the verdict would be accepted. Economic pressure, sporadic violence, and pressure from foreign governments (notably the United States) would ensure that negotiations began very soon—in three or four days—and that in the course of a few weeks, “the shape of secession will [would] clarify.”23

Other commentators, including Stanley Hartt, a former political chief of staff to then-Prime Minister Brian Mulroney, have predicted an unavoidable financial crisis, and thus a political one as well. Hartt argues that the prime

23Robert A. Young, *The Secession of Quebec and the Future of Canada*, rev. and expanded ed. (Montreal and Kingston: McGill-Queen’s University Press, 1998): 159, 169, 176. These pages were evidently written before the 1995 referendum. In a subsequent section of the book, clearly written after the referendum (pp. 380-96), Young reviews six possible post-“yes” scenarios, indicating a much wider range of possible outcomes from a “yes” vote, even a decisive one, than earlier seemed likely. For another commentary on these issues, written before the 1995 referendum by a political scientist who subsequently became the federal Minister of Intergovernmental Affairs, see Stéphane Dion, “The Dynamic of Secessions: Scenarios after a Pro-Separatist Vote in a Quebec Referendum,” *Canadian Journal of Political Science* 28 (September 1995): 533-551.
minister would be unable to make the commitment envisioned by Young, because—as the court’s decision has made clear—he would not have the authority to do so. The danger of chaos would be considerable because the issues requiring resolution could not be settled within a year or so, as envisioned by the PQ, let alone in weeks: “There does not exist as yet any comprehensive academic study of the components of the economic union that would need to be laboriously stitched back together by constructive cooperation between two sovereign states. . . . Five to ten years seems to be a reasonable time-frame to restructure the severed economic union.”

Hartt believes that the markets would punish governments, which could not tell them how existing debts would be serviced and paid; he also predicts that internal trade would be disrupted, imposing substantial economic losses both in Quebec and in the rest of Canada. Where Young believes that mounting economic costs may force governments to reach early agreement on political arrangements that would preserve the economic union, Hartt considers that the problems to be resolved are too complex for this. He writes: “In the event that negotiations [on secession] fail, amidst charges of bad faith on both sides, a unilateral declaration of independence will have contested legitimacy, which maximizes the chances of a chaotic outcome.” He does not exclude the possibility that Quebec might be forced to abandon an attempted secession.

Whether Young is right, or Hartt is, the realpolitik of secession is that after a “Yes” vote, principle would recede before the urgency of decision. It is hard to imagine that interested parties—including investors, employers, the employed, the retired, and the indigent, to say nothing of those who quite simply love their country—would sit back and await the outcome of the negotiations mandated by the court. Either the negotiations would suppress issues the Supreme Court has said would need to be resolved, and would ride roughshod over the interests of non-powerful players, or they would be, in Hartt’s words, “acrimonious, slow, and unable, before the damage inflicted by uncertainty has actually occurred, to settle the intractable issues including borders, first nation rights, minority protection, asset division, currency, debt, citizenship, trade relations and others.” Either way, the Supreme Court’s decision would be of little relevance if Quebec ever opts for secession.

The Secession case actually resolved almost nothing, in the sense of removing any critical questions from the realm of political controversy. Even the “obligation to negotiate,” highlighted by so many commentators (certainly by the indépendentistes), left in place almost all the existing ambi-

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25Hartt, “Next Steps,” 9; and private correspondence with the author.

26Ibid.
guities and uncertainties surrounding the process that could lead to secession. Member of Parliament Daniel Turp, from the Bloc québécois, notes that the court’s decision “will allow sovereignists to oppose any pre-emptive argument that the rest of Canada will not negotiate with Quebec following a “Yes” vote in a Quebec referendum, such as those made during past referendum campaigns by federalist leaders such as [former Canadian prime minister] Pierre Elliott Trudeau or [Ontario Premier] Mike Harris.” Turp’s statement is indicative of the political use to which the court’s decision in the Secession case will be put, and indeed is already being put. However, affirmations that negotiations will take place if there is a “Yes” vote, whatever the reluctance or the tactical maneuvers of the federal government, resolve none of the practical difficulties that will come to the fore.

It is doubtful, to say the least, that the court reduced uncertainty about the negotiation process or its outcome; few if any of the critical questions have been taken off the table. First, the court indicated that, for there to exist a duty to negotiate, there would have to be a clear question and a clear majority in favor of secession, but it also indicated that the meaning of “clear” will have to be decided politically. Second, the court did not specify (and surely could not have specified) the composition of a future negotiating team that might have authority to speak for the rest of Canada. This has been the problem highlighted by those who have said that there would be no one to sit on the other side of the table from Quebec in the negotiations that Quebec envisioned in both referendums. The federal government (representing the whole of Canada, including the 25 percent of the population that lives in Quebec) would lack authority to commit the nine other provinces; the provinces, on the other hand, would lack the capacity to marginalize the federal government. In its judgment, the court referred to both the federal government and the provinces as being involved in the negotiations it mandated; it also referred to the many and varied interests that would have to be taken into account, but it avoided specifying the roles to be played by each of the parties, and it did not say how such a broad range of interests could all be effectively represented in the negotiations. Third, the court avoided saying what the scope of the negotiations would be, and in particular, it did not say whether they could be expected to lead to the creation of a new form of economic union, or to full independence for Quebec, or indeed to any agreed conclusion. Fourth, it did not say what would happen if negotiations took place, and the parties reached an agreement that legislatures refused to incorporate into a constitutional resolution providing for secession. It is scarcely any wonder, then, that a former Quebec vice-premier under the PQ, Jacques-Yvan Morin, has summarized the court’s ruling as follows: “In theory, sovereignty is for Quebec

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27Daniel Turp, “Globalizing Sovereignty,” Canada Watch 7 (January-February 1999): 4. Turp is a constitutional lawyer, on leave from the Université de Montréal.
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a legitimate goal to pursue, and the right to secede cannot democratically be denied; in practice, however, the federal power is entitled to raise obstacles and difficulties that are important and numerous enough so as to negate any attempt to achieve sovereignty and to throw off track any negotiation on the issue.”

The real significance of the Secession case is more political than jurisprudential. It may have some bearing on a future referendum outcome, or on a PQ decision to hold a referendum or postpone it indefinitely. After the judgment was handed down, both federalists and indépendentistes began to interpret the decision as having palpable advantages for their own side. This may be taken as an indication of the court’s political finesse in the short run, and perhaps as forewarning of political controversies that a future court may be unable to avoid if the PQ holds and wins a referendum. No doubt, though, the court’s judgment will be significant in another way as well: as a shaper of Canadian political norms, which it surely will be, if it stimulates reflection on the interrelationship between federalism, democracy, constitutionalism and the rule of law, and the protection of minorities—and on the meaning of nationhood.

Jacques-Yvan Morin, “A Balanced Judgment?” Canada Watch 7 (January-February 1999): 3 (emphasis in the original). Morin, like Turp, is a constitutional lawyer; he formerly taught at the Université de Montréal.