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The Quebec Secession Reference:
The Constitutionalization of Quebec Secession

By
Alec Morrison

Thesis submitted to
the School of Graduate Studies and Research
in partial fulfilment of the requirements for the
M.A. degree in History.

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ABSTRACT

THE QUEBEC SECESSION REFERENCE: THE CONSTITUTIONALIZATION OF QUEBEC SECESSION

Alec Morrison
University of Ottawa, 2004

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Dr. Michael Behiels

The purpose of this thesis is to explain why the government of Canada decided to refer three questions related to whether or not the government of Quebec could unilaterally effect the secession of Quebec from Canada, to the Supreme Court for a judicial opinion in 1996. To do so, this thesis will address two important questions related to the objectives that the government of Canada had in initiating the Quebec Secession Reference. First, why did the government of Canada wait until 1996 to clarify how a province could be removed from the federation when there was a significant secessionist movement in Quebec in 1968, a secessionist government of Quebec in 1976, a referendum on the secession of Quebec from Canada in 1980, and another in 1995? Second, when the government of Canada did decide to establish a position on how Quebec could leave the federation, why did it use the Supreme Court of Canada to do so?

Chapter Two will demonstrate that because the principle secessionist party in Quebec, the Parti Québécois (P.Q.), was committed to achieving secession through negotiations and only after they received a mandate from the voters of Quebec, the government of Canada had the option of waiting for the government of Quebec to receive a mandate for secession before weighing in on how it could happen. The government of

Canada chose to do this, leaving its position on the matter in abeyance, because it was politically advantageous to do so between 1968 and 1984. As a result, the government of Canada did not establish a position on *how* Quebec could leave the federation during this time.

Chapter Three will demonstrate that between 1991 and 1996, the government of Quebec changed its approach, and maintained that if it received a mandate to do so, it could achieve secession by making a unilateral declaration of independence (UDI), because secession was a “purely political” act that neither the Constitution of Canada nor Canadian rule of law would apply to. Because the government of Canada did not challenge this “Politicalization” of Quebec secession prior to or during the 1995 sovereignty-partnership referendum, it found itself in a difficult Catch-22 after the referendum when the Quebec courts, because of a citizen’s litigation against the government of Quebec, forced them to take a position on the matter. On one hand, if it did not establish that all political acts, including secession, had to conform to the Constitution of Canada, then the courts were planning to do it for them. On the other hand, if it did “constitutionalize” Quebec secession on its own, it risked having such a move painted by secessionists as a retaliatory, political attack on the secessionist option for Quebec. This chapter will conclude that by referring the matter to the Supreme Court, the government of Canada could constitutionalize Quebec secession and have it viewed as a constitutional clarification, instead of a partisan political attack.

Finally, Chapter Four will argue that the government of Canada had two procedural objectives and one political objective, in the Quebec Secession Reference, to deal with its post-referendum Catch-22. The first procedural objective was to have the

court establish that the secession of a province from the federation could only legally occur through negotiations and an agreement to amend that province out of the Constitution via the constitutional amending formula contained in the *Constitution Act, 1982*. The second procedural objective was to limit the Court's examination to the constitutionalization of Quebec secession, and to ensure that the court did not open a debate over many of the controversial and specific issues related to the secession of a province from the federation. The political objective of the Reference initiative was to have the Court's opinion accepted by Francophone voters in Quebec as a clarification of the constitution, and not as a political tactic aimed solely at making secession impossible to achieve. This chapter will conclude that all three of these objectives were met when the Supreme Court constitutionalized Quebec secession with little backlash from the voters of Quebec.

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Janice Beverly Withers Morrison
(Gram Jan)

For Helping Me to Understand the Importance of Politics

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CHAPTER ONE

INTRODUCTION

On October 31, 1995, the government of Quebec held a province-wide referendum on the secession of Quebec from Canada. To the shock of many, only a slight majority of Quebecers voted against the secessionist option, with 50.58 per cent voting “No” and 49.4 per cent voting in favour of secession. Immediately following the vote, commentators in the media, Canadian politicians and even leaders of other countries began criticizing then Prime Minister Jean Chrétien for his campaign strategy of refusing to comment on what would happen after a “Yes” vote, leaving unchallenged secessionist claims that secession would be a quick and easy process that would be effected unilaterally, without negotiations, by the government of Quebec. They urged the Prime Minister to be better prepared for a potential third referendum, which secessionist leaders were promising would be held in the not so distant future. Although commentators urged the Prime Minister to try to address the discontent that Franco-Quebecers obviously had with the federation, they also urged Jean Chrétien to take a hard-line approach towards clarifying the negative consequences for Quebecers if they voted Yes in a future referendum.

Journalists and academics soon adopted the terms “Plan A” and “Plan B” to describe this proscribed two-pronged approach towards the secessionist movement in Quebec. Coined by B.C. political commentator, Gordon Gibson, in June of 1994, the “Plan A,” “Plan B” strategy called upon the government of Canada to adopt a two-

pronged approach towards the secessionist threat in Quebec.¹ On one hand, “Plan A” would be the traditional federalist approach of defeating support for secession by addressing the sources of Quebec’s alienation from the federation. On the other hand, “Plan B” would entail the establishment of comprehensive federal rules and “conditions” in advance of a future referendum that would detail what the government of Canada would demand of the government of Quebec before Quebec could leave the federation.² These tough “conditions” varied from proponent to proponent, but often included establishing rules for negotiating secession and a detailed account of what was “on the table” for these negotiations. One example was the potential partition of Quebec into federalist and non-federalist territories to be met by the government of Quebec before the province could become independent.

On September 26, 1996, when the government of Canada announced its intentions to refer three questions related to the secession of Quebec to the Supreme Court of Canada for a judicial opinion, in what is now known as the *Quebec Secession Reference*, many “Plan B” proponents were disappointed to discover that the questions were narrowly focused on one issue: the government of Quebec’s claim that it could unilaterally effect the secession of Quebec from Canada.³ The questions asked whether or not the government of Quebec could unilaterally effect the secession of Quebec from

¹ Gordon Gibson, *Plan B and the future of the rest of Canada* (Vancouver: Fraser Institute, 1994).

² In an article he wrote after the *Quebec Secession Reference*, Gibson summarized the main elements of “Plan B.” “‘Plan B’ has become the shorthand for the stonewall, scorched earth, ‘You can’t do it’ stance, which argues that the separation of Quebec would be politically, economically, and legally very unwise, and virtually impossible to achieve. ‘Plan A’ (or ‘plan C’ in some formulations) addresses a different agenda - namely, ‘What acceptable amendments to the Canadian federal structure, if any, would reduce sovereigntist support and secure the union?’” Gordon F. Gibson, “A Court for all Seasons,” *Canada Watch*, 7 (1999) Endnote #1 Found online at the York University, Roberts Center for Canadian Studies Website, available from http://www.yorku.ca/robarts/canadawatch/vol_7_1-2/gibson.htm; accessed January 15, 2004.

³The Court’s opinion is found in *Reference Re Secession of Quebec*: 2 S.C.R. 217 [1998] File no. 25506 (herein the *Quebec Secession Reference*)

Canada under domestic law; whether it had a right to do so under international law; and asked which law would prevail if there was a conflict between the two. Almost two years later, on August 20, 1998, the Supreme Court released a unanimous and unequivocal opinion: No, the government of Quebec could not unilaterally effect the secession of Quebec from Canada under domestic law, nor did it have a right to do so under international law.

The Court answered the Reference questions exactly how the government of Canada had submitted they should, and in the process had managed to avoid discussion of many controversial matters related to the secession of Quebec from Canada. These included questions to determine whether or not secession required the approval of Aboriginals in Quebec; what majority in a referendum would be needed for a mandate for secession; and whether or not federalist regions in Quebec could remain a part of Canada. The limited scope of the *Quebec Secession Reference* raises an interesting question. Why did the government of Canada narrowly focus the Reference questions on the legality of a unilateral declaration of independence and not weigh in on many of the other issues related to the secession of Quebec that would be necessary to clarify in order to establish comprehensive “Plan B” contingency legislation?

The purpose of this thesis is to explain why the government of Canada referred three questions focused on whether or not the government of Quebec could unilaterally effect the secession of Quebec from Canada under domestic or international law in 1996, while avoiding other issues related to the secession of Quebec from Canada. To do so, this thesis will also attempt to place the *Quebec Secession Reference* in its proper historical context by addressing two important questions that, as of yet, have not been

adequately explained by writers on this subject. First, why did the government of Canada wait until 1996 to establish a position on *how* Quebec could be removed from the federation since the secessionist movement in Quebec was well established in 1968, had managed to form a government of Quebec in 1976 and had managed to hold referendums on secession in 1980 and 1995? Second, why did it use a reference to the Supreme Court of Canada to do so?

In Chapter Two, this thesis will explain why the government of Canada did not establish a position on *how* Quebec could be removed from the federation at the outset, when the Parti Québécois (P.Q.) was formed in 1968, or when it rose to power: forming the government of Quebec in 1976; and holding a referendum on secession in 1980. Chapter Two will demonstrate that because the P.Q. was committed to achieving secession through negotiations and only after they received a mandate from the voters of Quebec to do so, the government of Canada had the option of waiting for the government of Quebec to receive a mandate for secession before weighing in on how it could happen. The government of Canada chose to do this, leaving its position on the matter in abeyance, because it was politically advantageous to do so between 1968 and 1984. As a result, the government of Canada did not establish a position on *how* Quebec could leave the federation during this time.

In Chapter Three, this thesis will explain why the government of Canada broke its silence in 1996, and finally established a position on *how* Quebec could be removed from the federation. It will also explain why the government of Canada used the Supreme Court of Canada to establish this position. This chapter will first demonstrate that the government of Canada was forced to establish a position on *how* Quebec could leave the

federation in 1996, after a Quebec citizen initiated court proceedings against government of Quebec legislation which purported to give the government of Quebec a right to unilaterally effect the secession of Quebec from Canada. Between 1991 and 1996, the government of Quebec had maintained that if it received a mandate to do so, it could achieve secession by making a unilateral declaration of independence (UDI) because secession was a “purely political” act that neither the Constitution of Canada nor Canadian rule of law would apply to. It, in short, politicized Quebec secession. This position contradicted the Constitution of Canada, which required all changes that would effect the Constitution to be made via one or more of the constitutional amending formulae contained in the *Constitution Act, 1982*.⁴

This chapter will also demonstrate that the government of Canada had an obligation to challenge the government of Quebec’s position on a UDI, but chose to remain silent, for political reasons, and left the government of Quebec’s claim that secession was above the law unchallenged. The government of Quebec was warned by the courts, in the Superior Court of Quebec’s ruling in *Bertrand c. Bégin et al. [1996] R.J.Q. 2393*, not to hold the 1995 referendum on legislation that included provisions for a UDI, but this warning was ignored.⁵ When a Quebec citizen took the government of Quebec to court after the fact, the government of Canada found itself in a political/legal Catch 22. If it maintained its silence and did not establish a position itself on *how* Quebec could be removed from the federation, the government of Canada risked having the courts establish rules for the secession of a province from the federation without the participation of the federal government. In other words, the courts would do what the

⁴ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [herein after the *Constitution Act, 1982*].

⁵ *Bertrand c. Bégin et al. [1996] R.J.Q. 2393*[herein after *Bertrand c. Bégin, 1996.*]

government of Canada would not; they would end the abeyance over *how* a province could be removed from the federation. On the other hand, if the federal government did break its silence and declare that the government of Quebec could not achieve secession through the use of a UDI then the government of Canada risked creating a backlash from the voters of Quebec and perhaps help the secessionists achieve a third referendum.

This chapter will conclude that the best way out of this Catch-22 was through a reference to the Supreme Court of Canada. With the reference procedure, the government of Canada could limit the focus of the court to concentrate on constitutionalizing Quebec secession without prematurely opening a debate on some of the more controversial issues related to the secession of Quebec. Once it was established that negotiations and an agreement to amend the Constitution was necessary for Quebec to be removed from the federation, the other issues could be left in abeyance until after a Yes vote. Secondly, by having the Supreme Court constitutionalize Quebec secession, the government of Canada could portray it as a legal clarification and thereby avoid the perception that the constitutionalization of secession was a retaliatory political response to the close result of the 1995 referendum.

Chapter Four will then explain what the specific objectives of the government of Canada were in initiating the *Quebec Secession Reference*, and then determine whether or not those objectives were met. Chapter Four will argue that the government of Canada had two procedural objectives and one political objective in the *Quebec Secession Reference* in order to deal with its post-referendum Catch-22. The first procedural objective was to have the court establish that the secession of a province from the

federation could only legally occur through negotiations and an agreement to amend that province out of the Constitution via the constitutional amending formula contained in the *Constitution Act, 1982*. The second procedural objective was to limit the Court's examination to the constitutionalization of Quebec secession, and to ensure that the court did not open a debate over many of the controversial and specific issues related to the secession of a province from the federation. The political objective of the Reference initiative was to have the Court's opinion accepted by Francophone voters in Quebec as a clarification of the constitution, and not as a political tactic aimed solely at making secession impossible to achieve. This chapter will conclude that all three of these objectives were met when the Supreme Court constitutionalized Quebec secession with little backlash from the voters of Quebec.

Analysis of the *Quebec Secession Reference* has come primarily from legal scholars and political scientists. For the most part, legal scholars have not attempted to explain the political objectives of the government of Canada behind the Reference, but have instead focused on analyzing the arguments used by the court in formulating its decision, and on explaining the potential judicial consequences of the Court's opinion. For example, Sujit Choudhry and Robert Howse, two legal professors from the University of Toronto and the University of Michigan respectively, raised concerns over the Supreme Court's use of constitutional conventions in formulating its ruling.⁶ Although legal scholars have provided some insight into how the Supreme Court crafted its opinion, they

⁶ Sujit Choudhry & Robert Howse, "Constitutional Theory and The *Quebec Secession Reference*," *Canadian Journal of Law and Jurisprudence* Vol. XIII, No. 2 (July 2000)

have not attempted to explain the Chrétien government's goals in making the Reference in the first place.⁷

Political scientists and other political commentators, on the other hand, have made more of an effort to explain the political objectives behind the Reference. Most of these writers have argued that in initiating the Reference, the Chrétien government was adopting a "Plan B" strategy. They disagree, however, on whether or not "Plan B" objectives were met. "Plan B" commentators can thus be divided into three groups, according to their assessment of the outcome of the Reference initiative.

Writers like journalist Gordon F. Gibson argue that the Court's opinion undermined the federal "Plan B" strategy.⁸ Gibson argues that the federal government's strategy in initiating the Reference proceedings was to focus on "Plan B."

"Unfortunately for the proponents of this approach—who in a delicious irony were responsible for the Supreme Court reference in the first place—the court delivered a great deal more than it was asked to." Gibson argues that the court's classification of Quebec's

⁷ Other legal analyses of the *Quebec Secession Reference* include: Peter W. Hogg, "The Duty to Negotiate." *Canada Watch*. 7 (1999). Found online at the York University, Roberts Center for Canadian Studies Website, http://www.robarts.yorku.ca/canadawatch/vol_7_1-2/hogg.htm; accessed 15 January 2004. Paul Joffe, "Quebec's Sovereignty Project and Aboriginal Rights." *Canada Watch*. 7 (1999). Found online at the York University, Roberts Center for Canadian Studies Website, http://www.robarts.yorku.ca/canadawatch/vol_7_1-2/joffe.htm; accessed 15 January 2004. Michael Mandel, "Solomonic or Mulronic?" *Canada Watch*. 7 (1999) Found online at the York University, Roberts Center for Canadian Studies Website, http://www.robarts.yorku.ca/canadawatch/vol_7_1-2/mandel.htm; accessed 15 January 2004. Warren Newman, a lawyer for the Attorney General of Canada in the *Secession Reference*, published a book analyzing how the Court crafted its opinion. Warren J. Newman, *The Quebec Secession Reference: the rule of law and the position of the Attorney General of Canada*. (Toronto: York University, 1999). Mary Dawson, another government of Canada advisor during the *Reference*, also commented on the Court's findings in her article "Reflections on the Opinion of the Supreme Court of Canada in the *Quebec Secession Reference*" *National Journal of Constitutional Law*. (1999) 11 NJCL 5. Also, three papers were produced from a legal round table on the Reference at the School of Law at Murdoch University in Australia. Another legal advisor for the Government of Canada in the *Secession Reference*, Greg Craven's paper "The Quebec Secession Reference: The Law Of Politics Or The Politics Of Law?", Ralph Simmonds' paper "Why Québec Secession Matters," and Dr James Thomson's paper "Getting Out: Secession and Constitutional Law," *Murdoch University Electronic Journal of Law*; available from http://www.murdoch.edu.au/elaw/issues/v6n1/craven61_text.html; accessed 15 January 2004.

⁸ Gibson, "A Court for all Seasons," *Canada Watch*.

quest for secession as a legitimate political project and its opinion that Canada could not ignore a clear mandate to negotiate secession in Quebec made secession easier to achieve in that province. Assuming that the purpose of the Reference was to “stonewall” secession, Gibson, and others, concluded that the Reference was a failure for the federal government.⁹

Writers such as Law Professor and political commentator Michael Mandel, on the other hand, insist that the federal government received everything it could have hoped for from the *Quebec Secession Reference*. By not addressing the question of what constitutes a “clear majority” of Quebec’s population, Mandel insists, the Supreme Court gave the federal government a way to ignore a democratically won referendum. As for Quebec, Mandel explained that, “...in place of the democratic right to independence after an affirmative vote by a majority of the population, Quebec got an unenforceable right to negotiations, with all the obstacles the rest of Canada could raise at negotiations...and no promises about the outcome.” Because the Supreme Court insisted that secession must be achieved through negotiation, Mandel and others point out that the federal government could veto secession on many grounds.¹⁰

⁹ See the following articles for similar opinions to those of Gordon Gibson. Ted Morton, “Liberal Party Wins, Canada Loses.” In *The Quebec Decision: Perspectives on the Supreme Court Ruling on Secession*, ed. David Schneiderman (Toronto: James Lormier & Company Ltd., 1999), 120. Stephen Clarkson, “Anglophone Media and the Court’s Opinion.” *Canada Watch* 7 (1999) Found online at the York University, Roberts Center for Canadian Studies Website, http://www.robarts.yorku.ca/canadawatch/vol_7_1-2/clarkson.htm; accessed 15 January 2004. Alan C. Cairns, “The Constitutional Obligation to Negotiate,” in *The Quebec Decision*, ed David Schneiderman (Toronto: James Lormier & Company Ltd., 1999), 143. José Woehrling, “The Quebec Secession Reference: Some Unexpected Consequences of Constitutional First Principles,” in *The Quebec Decision*, ed. David Schneiderman (Toronto: James Lormier & Company Ltd., 1999), 124.

¹⁰ Other writers who claim “Plan B” success for the federal government include the following. Jacques-Yvan Morin, “A Balanced Judgement?” *Canada Watch* 7 (1999). Found online at the York University, Roberts Center for Canadian Studies Website, http://www.robarts.yorku.ca/canadawatch/vol_7_1-2/morin.htm; accessed 15 January 2004. Alain C. Cairns, “The Constitutional Obligation to Negotiate,” in *The Quebec Decision*, ed. David Schneiderman (Toronto: James Lormier & Company Ltd., 1999), 143.

A third group of “Plan B” writers insist that neither the federalists nor the separatists gained from the *Quebec Secession Reference*. Robert A. Young, for example, argued that the Supreme Court, in an effort to preserve its legitimacy in the eyes of Canadians on both sides of the debate, broadened the scope of the Reference so that it could render an opinion acceptable to both federalists and separatists. Although the court insisted that secession could not be achieved unilaterally, it also insisted that the other members of the federation could not refuse to negotiate secession in the event that a clear majority of Quebecers voted clearly for that option. “So, while the Supreme Court had encouraged moderation in the debate about secession, the decision had shifted its substance very little.” He also insisted that by leaving controversial questions related to secession for the political actors to decide, including what would constitute a “clear question” and a “clear majority” in a referendum to trigger a “duty to negotiate” secession, the Supreme Court avoided taking sides.¹¹

What these writers seem to miss is the fact that the government of Canada had a very specific objective in initiating the *Quebec Secession Reference*, and that was to constitutionalize Quebec secession without causing a backlash from the voters of Quebec. In this light the Reference initiative could be viewed as an unqualified success because the Court indeed constitutionalized Quebec secession, without causing a backlash from the voters of Quebec. By focusing their analysis on determining which “Plan B” objectives were met and which were not, these writers are missing the point. Before the

Josée Legault, “How to Deny Quebec’s Right to Self-Determination,” in *The Quebec Decision*, ed. David Schneiderman (Toronto: James Lormier & Company Ltd., Publishers, 1999), 113.

¹¹ Robert A. Young, “A Most Politic Judgement,” in *The Quebec Decision*, ed. David Schneiderman (Toronto: James Lormier & Company Ltd., 1999), 107. Other “balanced judgment” writers include the following. Peter Leslie. “Canada: The Supreme Court Sets Rules for the Secession of Quebec,” *Publis*. (Spring, 1999.) David Schneiderman ed, *The Quebec Decision*, (Toronto: James Lormier & Company Ltd., 1999), 1.

success of the Reference initiative for the government of Canada can be measured, the objectives of the government of Canada in initiating the Reference must be understood. By explaining why the government of Canada referred questions specifically related to a UDI to the Supreme Court in 1996, this thesis will clarify the objectives of the government of Canada in the *Quebec Secession Reference*, and in so doing, shed some light on the debate over the outcome of this federal initiative.

Before exploring the evidence, two concepts should be reviewed. The first concept, “Sovereign Authority,” is one of the most basic concepts in British common law, reaching as far back as Thomas Hobbes in 1651.¹² The powers of the Sovereign were at one point absolute. However, over time, these powers became limited by both written and unwritten laws.¹³ When Canada was formed in 1867, it was formed as a constitutional monarchy. Thus, while sovereign authority, or the “Executive Authority,” over Canada was vested in the Queen and her representatives in 1867, that power was to be exercised within a constitutional framework of written and unwritten rules.¹⁴ One of these unwritten rules was the principle of “responsible government,” which required the Queen’s representative in Canada, the Governor General, to always act upon the advice of the elected representatives. To facilitate this process the executive is formed by the majority party in the legislative assembly, or House of Commons, and the leader of that party becomes the leader of the executive. In other words, the leader of the party with the most seats in the House of Commons would become prime minister, who gives “advice” which is never rejected to the Governor General. He, and his chosen cabinet ministers,

¹² Thomas Hobbes, *Leviathan*, (London: Penguin Classics, 1968), 227.

¹³ See Faith Thompson, *Magna carta; Its role in the making of the English Constitution, 1300-1629* (New York: Octagon Books, 1972).

¹⁴ Patrick Malcolmson & Richard Myers, *The Canadian Regime: An introduction to Parliamentary Government in Canada* (Peterborough: Broadview press, 2002), 110.

thus form the government of Canada and assume control over both the powers and the responsibilities of the Sovereign, or Crown.

One of the most important responsibilities of the Crown, or central government, was established in section 91 of what was then the *British North America Act, 1867*. (renamed the *Constitution Act, 1867*)

It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces;¹⁵

Section 91 gave the Crown authority over any matter not specifically allocated to provincial governments in section 92 of the Act. The “Peace, Order and Good Government” section also conferred specific responsibilities upon the Crown, including the responsibility to maintain its own sovereign authority over Canada. Canadian common law had established that the “Peace, Order and Good Government” is generally used by the Government of Canada in three different situations: to fill gaps in the distribution of federal and provincial powers; to centralize jurisdictions that are of a national concern; and to deal with emergencies.¹⁶ It was from this emergencies branch of “Peace, Order and Good Government,” that legislation emerged that spelled out how the Crown would protect and maintain its authority in Canada.

The first extension of the emergency branch of “Peace, Order and Good Government,” was the *War Measures Act, 1914*.¹⁷ The *War Measures Act* gave the government of Canada special powers to deal with emergency situations. The *Act* could

¹⁵ *British North America Act, 1867*. Statutes of Great Britain (1867), 30 & 31 Victoria, Chapter 3

¹⁶ Peter Hogg, *Constitutional Law of Canada* (Scarborough: Carswell, 1998). See Chapter 17 “Peace, Order, and Good Government.”

¹⁷ *An Act to confer certain powers upon the Governor in Council in the event of War, Invasion, or Insurrection*. Statutes of Canada (1914) Chapter 2. (*War Measures Act, 1914*)

be activated if the government of Canada determined that there was conclusive evidence that "...war, invasion, or insurrection, real or apprehended, exists."¹⁸

In 1988, the *War Measures Act* was replaced with the *Emergencies Act* which was even clearer concerning the Ottawa's responsibility to maintain peace and order in Canada.¹⁹ The first preamble of the *Emergency Act* stated: "WHEREAS the safety and security of the individual, the protection of the values of the body politic and the preservation of the sovereignty, security and territorial integrity of the state are fundamental obligations of government."²⁰ The *Emergencies Act* defined a "national emergency" "as an urgent and critical situation that (a) "seriously endangers the lives, health or safety of Canadians and is of such proportions or nature as to exceed the capacity or authority of a province to deal with it," or; (b) "seriously threatens the ability of the government of Canada to preserve the sovereignty, security and territorial integrity of Canada."²¹ Thus by the late 1980's, the constitutional obligation of the Crown, or government of Canada, to address any threats, real or perceived, to its sovereign authority was clearly established in federal law.

The second concept that should be explained is that of "prime ministerial" government.²² The executive functions of the government of Canada are in practice exercised by the prime minister and his cabinet. "As leader of the government, or chief executive, the Prime Minister assumes the principle prerogative powers of the Governor

¹⁸ *War Measures Act, 1914*. Section 2.

¹⁹ "An Act to authorize the taking of special temporary measures to ensure safety and security during national emergencies and to amend other Acts in consequence thereof." (*Emergencies Act*) R.S., 1985, c. 22 (4th Supp.)

²⁰ *Ibid.*

²¹ *Ibid.* Section 3 (a) & (b)

²² See Donald Savoie, *Governing From the Centre: The Concentration of Power in Canadian Politics* (Toronto: University of Toronto Press, 1999).

General.”²³ As such, the prime minister chooses Cabinet ministers, assigns ministerial portfolios and chairs cabinet meetings. These prerogatives give the prime minister significant political influence over the actions of the government. While he must share the executive’s responsibilities with the other members of Cabinet, when the prime minister feels strongly about a certain issue, he has the power to assert his authority. Operating in a “prime ministerial,” or “command mode” approach towards cabinet government, the prime minister can see that his point of view prevails.²⁴ The three long-term prime ministers of Canada between 1968 and 1996 each maintained tight control over how the government of Canada dealt with the secessionist movement in Quebec.²⁵ Thus, in explaining the position of the government of Canada, this thesis will rely extensively upon primary sources related to these prime ministers.

There are also three terms that should be explained at the outset of this study. The first term, “mega constitutional politics,” was coined by Peter Russell, a political science professor at the University of Toronto, in his book *Constitutional Odyssey: Can Canadians Become a Sovereign People?* He uses this term to explain political debate over the very nature of a political community:²⁶

Constitutional politics at the mega level is distinguished in two ways from normal constitutional politics. First, mega constitutional politics goes beyond disputing the merits of specific constitutional proposals and addresses the very nature of the political community on which the constitution is based. [Second], precisely because of the

²³ Peter Aucoin, “Prime minister and Cabinet: Power at the Apex,” in *Canadian Politics*, ed. James Bickerton & Alain-G. Gagnon (Ottawa: Dept. of the Secretary of State Canada, 1992), 112.

²⁴ Ibid. Page 123.

²⁵ For an understanding of how Pierre Trudeau, Brian Mulroney, and Jean Chrétien each personally crafted their government’s approach towards the secessionist movement in Quebec, see the testimonies of some of their ministers. See Pat Carney’s book *Trade Secrets* (Toronto: Key Porter Books Limited, 2000), for a look at Mulroney’s approach. See Gérard Pelletier’s book *Years of Choice, 1960-1968* (Toronto: Methuen, 1987), for a look at Trudeau’s approach. See Brian Tobin’s book *All in Good Time*, (Toronto: Penguin Canada, 2002), for Chrétien’s approach.

²⁶ Peter H. Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?* (Toronto: University of Toronto Press, 1993).

fundamental nature of the issues in dispute – their tendency to touch citizens' sense of identity and self-worth – mega constitutional politics is exceptionally emotional and intense.²⁷

Russell argues that several rounds of “mega constitutional” negotiations occurred between the early 1960’s and the early 1990’s. These negotiations, including those leading to the *Constitution Act, 1982* and to the 1987 Meech Lake Accord, were aimed at making significant reforms to the Constitution of Canada. The second and third terms that should be explained are the terms “politicalization” and “constitutionalization.” When the Constitution of Canada was crafted in 1867, the drafters neither provided for the secession of a province nor did they forbid it. It was one of the “gaps” mentioned above. Prior to 1982, there was no formal constitutional process for amending the Constitution of Canada. To make amendments to the Constitution of Canada, the government of Canada had to send a resolution to the British Parliament requesting that it amend the *British North America Act, 1867*. Although secessionists and federalists alike had positions on how they believed a province could be removed from the federation, a public debate over *how* Quebec could leave the federation never occurred, and the answer to that question was left in abeyance. After 1982, the government of Canada’s position on the matter was essentially set. No changes to the federation that would alter the Constitution of Canada could be made without amending the Constitution of Canada, which required negotiating an agreement and using the amending formulae contained in the Constitution Act, 1982. However, because the question was left in abeyance by the government of Canada, the government of Quebec went ahead and told its voters that the Constitution would not apply to secession because it was a purely political process. I will argue that this campaign to

²⁷ Russell, *Constitutional Odyssey*, 75.

convince the voters of Quebec that secession was a “purely political” process in effect politicized Quebec secession. When the government of Canada finally decided to end its silence on the matter in 1996, it had to establish that the constitution did indeed apply to the secession of Quebec from Canada. In other words, it had to constitutionalize Quebec secession.

CHAPTER TWO

THE GOVERNMENT OF CANADA'S RESPONSE TO THE RISE OF THE PARTI QUÉBÉCOIS: LEAVING THE LEGAL QUESTION OF SECESSION IN ABEYANCE

It was not until 1968 that a secessionist organization in Quebec could be said to have had significant, mainstream support from Quebec voters. It was in 1968 that the popular Quebec politician René Lévesque left the Liberals to form the Parti Québécois (P.Q.), the first mass based secessionist political party in Quebec. Although the P.Q. and their secessionist option for Quebec were well established by the late 1960's, it was not until the *Quebec Secession Reference* in 1996, nearly thirty years later, that the government of Canada decided to clarify the legal process for removing a province from the federation. Why did the Government of Canada not go to the courts to clarify the legal process for removing a province from the federation at the outset: when it was clear that significant support for secession existed in Quebec with the formation of the P.Q. in 1968; or during later crises, when the F.L.Q. executed a politician to promote secession; when the P.Q. was able to form the government of Quebec in 1976; or when the government of Quebec held the first referendum on removing Quebec from Canada in 1980?

This chapter will argue that there were two primary reasons why the government of Canada did not clarify the legal process for removing a province from the federation in 1968, when the P.Q. was formed, or during the three unity crises that followed. First, during this time, the P.Q. was committed to effecting secession only after receiving a mandate to do so from the voters of Quebec, and then through negotiating with the government of Canada the creation a new association of independent states, between

Quebec, on one hand, and what was left of Canada, on the other. Because of the P.Q.'s commitment to this "sovereignty-association" plan, the government of Canada was under no pressure to clarify the legalities of *how* Quebec could leave the federation, in advance of the government of Quebec receiving a mandate to begin secession negotiations.

Second, the government of Canada did not *want* to engage in a legal debate in advance of a mandate because to do so would have undermined its own strategy for defeating support for secession in Quebec. By the late 1960's, the government of Canada recognized that Franco-Quebecers felt alienated from the federal government and from the federation at large, and believed that if this alienation was addressed, then any significant support for the creation of a Franco-Quebecer nation state would disappear. Between 1968 and 1982, the government of Canada mounted a political campaign to end this alienation, through strengthening official bilingualism in the federal government, and through constitutional reform. It maintained that it was these reforms, and not independence, that the voters of Quebec wanted. Entering into a legal debate to settle how Quebec could leave the federation would have run counter to this political strategy. As a consequence, the government of Canada left questions related to how Quebec could legally leave the federation in abeyance, at the outset, when the P.Q. was formed, and through several crises during their campaign to address Franco-Quebecer alienation.

2.1 Sovereignty-Association as a Neo-Nationalist Option for Quebec

When the P.Q. was formed in 1968, the government of Canada already had in place its strategy for defeating support for secession in Quebec. This strategy had

actually been designed to defeat support for neo-nationalism, an ideology that aimed to transform the province of Quebec into a Franco-Quebecer nation state, either within or outside of the Canadian federation. Because the P.Q.'s secessionist option for Quebec was based on, and justified for, achieving neo-nationalist objectives, defeating support for those objectives would in turn undermine support for secession. Therefore, to understand the government of Canada's strategy to defeat support for secession in Quebec between 1968 and 1982, the relationship between neo-nationalism and the secessionist option promoted by the P.Q. should first be understood.

2.1.1. The Rise of Neo-Nationalism in Quebec

Neo-nationalism developed between 1940 and 1960 to address the shortcomings of the French-Canadian ideology that had been dominant in Quebec since Confederation, *la survivance*. Proponents of *la survivance* had argued that the survival of the French language and culture from assimilation into the dominant Anglophone language and culture in North America depended upon the maintenance of a traditional French-Canadian, Roman Catholic, lifestyle in Quebec. This lifestyle was rural and agrarian based and included a strong leadership role for the Roman Catholic Church. As far as the Church was concerned, the urban, materialistic professions of Quebec's cities, such as commerce and industry, and their accompanying lifestyles, were meant for Protestant Anglophones.²⁸ Consequently, proponents of this traditional nationalism encouraged the government of Quebec to allow American and Anglo-Canadian ownership of Quebec's

²⁸ See Mgr L.-A. Pâquet, "A Sermon on the Vocation of the French Race in America," in *French Canadian Nationalism: an anthology*, ed. Ramsay Cook, (Toronto: Macmillan, 1969).

economy, and to allow the Church to run most of the social, cultural, educational, and health-related aspects of Francophone society, by operating a laissez-faire style of governance.

Prior to 1900, the vast majority of Francophones lived in rural communities and identified strongly with the Catholic Church. While traditional nationalism addressed the needs of rural Franco-Quebecers, it left urban Franco-Quebecers living “un-French Canadian” lifestyles to fend for themselves. During the early 1900’s, this group of undefended Francophones rose at an impressive rate. In 1901, 60 per cent of the population of Quebec lived in rural areas while 40 per cent lived in cities. By 1951, this trend was reversed with 67 per cent of Quebec’s population living in the cities and 33 per cent in rural areas.²⁹ By 1961, the city of Montreal alone accounted for 40 per cent of the population of Quebec.³⁰

This widespread rural depopulation coincided with a rapid growth in Quebec’s economy. While traditional manufacturing sectors such as food, textiles and wood increased their productions, it was in the newly created high-technology and capital intensive industries (such as transportation, electrical appliances, and petrochemical products), that experienced the strongest growth in production and employment between 1946 and 1956.³¹ Franco-Quebecers faced several disadvantages in the newly dominant service sector. Many of the service sector jobs required a degree of education that was not available in most rural Francophone communities. Also, because Anglo-Canadian and American industrial and commercial elite controlled these jobs, higher paying

²⁹ Ramsay Cook, *Canada and the French-Canadian Question*, (Toronto: Macmillan of Canada, 1966), 83.

³⁰ Michael D. Behiels, “Quebec: Social Transformation and Ideological Renewal, 1940-1976,” in *Quebec Since 1945: Selected Readings*, ed. Michael D. Behiels, (Toronto: Copp Clark Pitman, 1987), 22.

³¹ Behiels, “Quebec,” 22.

managerial and administrative positions in this sector required an understanding of the English language. With over half of Quebec's labour force working in the service sector by the early 1950's, Francophones, as a collectivity, ranked near the bottom of Quebec's income scale.

Another consequence of Anglophone dominance of commerce and industry was that the language of business, and to a certain degree social intercourse, was English. If urban Franco-Quebecers hoped to compete for the middle and high-level positions in this sector, they had to first develop a command of the English language. Even for Francophones who could speak English, they also had to fight stereotypes, in part fostered by traditional nationalism, that labelled Francophones unfit for these urban vocations. Only the Government of Quebec could intervene to force industry to accommodate Francophone workers. However, the elite proponents of traditional nationalism controlled the government of Quebec, and maintained its laissez-fair approach towards governance.³²

Throughout the 1950's, intellectuals from Quebec's urban Francophone middle-class intensified opposition to the traditionalist policies of the Union Nationale led government of Quebec. This intellectual opposition came from two primary sources. One source was a group of intellectuals from the Francophone Catholic Labour movement in Quebec who wanted to end the influence of traditional nationalism over their provincial government. Centered around the Catholic labour journal *Cité libre*, these reformers, or Citélibristes, argued that the established clerical and professional elite were using the ideology of la survivance to retain their control over Francophone society in

³² Behiels, "Quebec," 24.

Quebec.³³ They believed that only by ridding itself of nationalism, and by making use of the provincial powers at its disposal to create an open, pluralistic and democratic society, could the government of Quebec tackle the issues of Francophones living in a modern Quebec.³⁴

The other source was a group of Francophone intellectuals influenced by nationalist academics in Quebec's universities who promoted the reform of traditional nationalism to better reflect the needs of a modernized Quebec. For these intellectuals, there was only one solution. The government of Quebec, as the only government controlled Francophones in North America, had to offer similar services for the protection and development of a Francophone culture and identity. In short, the government of Quebec needed to do for Francophones what the Government of Canada was doing for Anglophones. As the national government of Francophones, the government of Quebec would need taxation powers to provide a Francophone equivalent to Anglo-Canadian programs such as: the 1949 Royal Commission on National Development in the Arts, Letters and Science; the 1946 Canadian Citizenship Act (which gave preference to Anglo-British immigration); and the Bank of Canada, established in 1934.

To do this, the government of Quebec had to gain from Ottawa the political means (through a transfer of some jurisdictions to the government of Quebec) and economic means (through a transfer of taxation powers to the government of Quebec) of maintaining the independence of their culture. Only if the government of Quebec took full responsibility for the social and economic development of its Francophone culture,

³³ Behiels, "Quebec," 25.

³⁴ See Michael D. Behiels, *Prelude to Quebec's Quiet Revolution: Liberalism Versus Nationalism, 1945-1960*, (Montreal: McGill-Queen's University Press, 1985), 230-236.

would Francophones survive as a distinct society in North America.³⁵ Because these intellectuals were promoting a new identity for French Canadians in Quebec, their ideology became known as neo-nationalism. Because under neo-nationalism the government of Quebec was the national government for Francophones, the term “Quebecois” gradually replaced the term “French Canadian” as the name that neo-nationalists would use to describe themselves

Neo-nationalists were divided over the best way for Quebec to be transformed into a Francophone nation state. During the 1950’s, most neo-nationalists believed that it could be accomplished through redesigning the federation to reflect two nations. However, a growing number of neo-nationalists were supporting a second option, as Jean-Marc Léger argued in his 1964 article “Where does neo-nationalism lead?” “The other [option] would naturally consist of Quebec’s complete sovereignty, matched with strict and friendly co-operation with English Canada”³⁶

The dominance of traditional nationalism in Quebec ended when Jean Lesage and the Liberal Party, made up of a mix of reformers from each persuasion, formed the government of Quebec in 1960. Within his first month of office, Premier Lesage initiated sweeping reforms of Quebec’s social and political institutions. He oversaw the separation of Church and State by shifting control over education and health care from the Church to the provincial government. Also, the addition of health and education to the responsibilities of the government of Quebec required the expansion of the existing bureaucracy, which was also modernized. Because of the speed and the scope of the

³⁵ Behiels, *Prelude*, 37-60.

³⁶ Jean-Marc Léger, “Where Does Neo-Nationalism Lead?” in *French Canadian Nationalism: An Anthology*, ed. Ramsay Cook, (Toronto: Macmillan, 1969), 321.

reforms initiated by Lesage during his first month in office, media pundits referred to this period as the beginning of Quebec's Quiet Revolution.³⁷

At first, it seemed as if the government of Quebec had finally rid itself from the control of nationalism. Policy decisions were no longer geared towards a specific Franco-Quebecer identity. However, towards the end of 1962, after the excitement of Lesage's initial reforms began to wear down, it became clear that neo-nationalists were gaining influence over the Government of Quebec. In September of 1962, Premier Lesage and his Liberal cabinet decided to hold an election on the privatization of Quebec's hydroelectric industry. It was not the nationalization of this industry, per se, that signalled a growing influence of neo-nationalism. After all, other provinces had nationalized their hydroelectricity industry years earlier. What signalled the strengthening of neo-nationalism in Quebec was the way that the Government of Quebec decided to sell this project to its voters.

Above and beyond the economic benefits of the nationalization of hydroelectricity, including the lowering of rates and the improvement of service, the government of Quebec sold this project as the first step towards the "economic emancipation" of Franco-Quebecers. In short, if the government of Quebec controlled hydroelectricity, the major source of energy in Quebec, it would be a first step towards control over the whole economy of Quebec. Specifically, it would create jobs for university educated Franco-Quebecers in an industry operating completely in French. During the campaign, the Liberals referred to the nationalization of hydroelectricity as the key to making Quebecers masters of their own house. "Maître chez nous" became the campaign slogan.

³⁷ See René Lévesque, *Memoirs*, (Toronto: McClelland and Stewart, 1986), 161.

The Liberals received the mandate that they were looking for by winning the 1962 election, capturing 63 seats. It was clear in the wake of the election, however, that the nationalistic tone used during the campaign was not only a campaign strategy. After the election, the Government of Quebec made it a practice to refer to Quebec as the State of Quebec, instead of the Province of Quebec. In a memo sent to journalists by the government of Quebec's Office de Langue Française in late December of 1962, the government of Quebec went as far as to urge newsmakers not to use the word "province" when describing Quebec.³⁸ When questioned on the memorandum, Premier Lesage agreed that the term state better expressed Quebec's unique role in Confederation than did province.³⁹ By the beginning of 1963, there were thus signs that the government of Quebec had bought into the neo-nationalist project of turning Quebec into a Franco-Quebecer nation state.

Between 1963 and 1965, the influence of neo-nationalism over the government of Quebec became even clearer in the realm of federal/provincial relations. One example of this was Premier Lesage's failure to sign the Fulton-Favreau formula in 1964. Although Canada was in practice an independent country, one of the remaining colonial aspects of the federation was that it did not have its own constitutional amending procedure. Amendments to the Constitution of Canada had to still be ratified by British Parliament. In the fall of 1964, all of the provinces and the federal government had agreed on a formula for amending the Constitution. The formula gave Quebec a veto over any proposed changes to its own provincial powers and the protected status of the French language in the federation. Neo-nationalists were concerned, however, that the

³⁸ As reported in *The Globe and Mail*, "Lesage Denies Quebec to Drop Province in Favour of L'Etat," January 17, 1963, 10.

³⁹ Ibid.

agreement would make it difficult for Quebec to gain new powers. Premier Lesage reflected these concerns in a letter he wrote to Prime Minister Lester Pearson in 1965 backing out of the deal that he had signed on to. “It is contended, in fact, that under the formula any province could prevent the extension of the powers of another province. Needless to say...the evolution of our constitutional system in the direction desired by Quebec might become very difficult.”⁴⁰

Although the idea of creating some sort of Franco-Quebecer nation state within the Canadian federation found acceptance in the government of Jean Lesage, it was not until the election of Daniel Johnson in 1966 that the other neo-nationalist option for Quebec, secession, was promoted by the government of Quebec as a potential course of action. In 1965 Daniel Johnson, leader of the Union Nationale party in Quebec, published *Egalité ou Indépendance*.⁴¹ In this book he proposed that the Union Nationale adopt a two-pronged strategy to transform Quebec into a Franco-Quebecer nation state. First, the party would attempt to reform the Canadian federation so that it better reflected a neo-nationalist vision of the federation, “...de deux nations égales en droit et en fait.”⁴² For Johnson, the status quo of the federation was not acceptable for Quebec. The only other option besides reforming the federation along two-nations lines was independence. “[L’égalité] ou l’indépendance, une nouvelle constitution ou la séparation.”⁴³ If the other governments did not agree with his “two-nations” proposal, and secession became the

⁴⁰ Letter from Premier Jean Lesage to Prime Minister Pearson, January 20, 1966. As reprinted in Government of Quebec, *Québec's Positions on Constitutional and Intergovernmental Issues: From 1936 to March 2001*, (Québec: Secrétariat aux affaires intergouvernementales canadiennes, 2001), 253.

⁴¹ Johnson, Daniel, *Egalité ou Indépendance*, (Union Nationale Party Convention, Montreal, 1965)

⁴² Johnson, *Egalité ou Indépendance*, 116.

⁴³ Johnson, *Egalité ou Indépendance*, 105.

only option for Quebec, he argued that he and the Union Nationale would negotiate secession.⁴⁴

After he formed the government of Quebec in 1966 Johnson made it clear that “égalité” was the preferred option. However, other neo-nationalist organizations in Quebec were already convinced that the “égalité” that Quebec needed could never be achieved from within the Canadian federation. In 1960, the Rassemblement pour l’Indépendance Nationale (R.I.N.) had been formed and held that the objectives being promoted by neo-nationalists could only be achieved if Quebec was independent from the Canadian federation.⁴⁵ In 1962, some of the more radical R.I.N. members left the organization and established the Front de libération du Québec (F.L.Q.). While the R.I.N. promoted achieving the independence of Quebec through established political institutions, the F.L.Q. advocated a violent, revolutionary overthrow of the federal authorities in Quebec, and was responsible for periodic mailbox bombings.

While the F.L.Q. was dismissed as a criminal organization, by the time of the 1966 Quebec provincial election two secessionist organizations, the R.I.N. and the Ralliement National (R.N.), began to work within the political system to promote secession and presented candidates to the Quebec electorate. Although they combined for only 8.8% of the popular vote and won no seats, their efforts attracted more prominent and moderate Quebec politicians to the secessionist cause. One such politician was René Lévesque.

⁴⁴ Johnson, *Egalité ou Indépendance*, 110.

⁴⁵ François-Pierre Gingras & Neil Nevitte, “The Evolution of Quebec Nationalism,” in *Quebec: State and Society*, ed. Alan G. Gagnon, (Toronto: Methuen Publications, 1984), 9.

2.1.2 René Lévesque's Option for Quebec

René Lévesque was a popular radio and television reporter who had been the Minister of Natural Resources in the government of Jean Lesage between 1960 and 1966. After the election of Daniel Johnson, Lévesque became convinced that the only way for Quebec to become a Franco-Quebecer nation state was for it to be removed from the Canadian federation.⁴⁶ Although Lévesque believed that Quebec had to leave the federation to become a Franco-Quebecer nation state, he did not agree with other neo-nationalists advocating complete independence from the Canadian federation. For example, while the R.I.N. believed that the government of Quebec should simply declare independence from the federation, and go it alone, Lévesque was convinced that the only way that Quebec could flourish as an independent country was by maintaining a strong economic association with what would be left of the Canadian federation. He thus rejected the clean, hard independence promoted by the R.I.N. as an unworkable option for Quebec, and argued that what Quebec truly needed was a sovereignty-association with the rest of the Canadian federation.

At a Liberal convention in October of 1967, Lévesque proposed to his colleagues that the Liberals adopt a platform based on removing Quebec from the federation to beat Johnson in the next provincial election. He proposed that a future Liberal-led Government of Quebec should negotiate Quebec out of the federation, while maintaining an economic association between it and what was left of the Canadian federation. His Liberal colleagues, many of whom were ardent federalists, were outraged by Lévesque's proposal and he and his plan were rejected outright. Lévesque and a few supporters left

⁴⁶ Lévesque, *Memoirs*, 212.

the Liberals and formed a new political party based on his defeated proposal, which he called “sovereignty-association.” To promote the cause of his party, the Mouvement Souveraineté-Association (MSA), Lévesque published a book entitled *An Option for Quebec*.⁴⁷

In his book, Lévesque explained that giving Quebec a special status would not solve the problems of Francophones living in Quebec, or Québécois, who he insisted constituted a people distinct from Anglophones inside Quebec and Francophones outside of their province. He insisted that the other governments in the federation would never agree to the minimum amount of decentralization that they needed to transform Quebec into a Franco-Quebecer nation state. Quebec would need complete control over all matters related to citizenship & immigration, international relations, the administration of justice, social security and commerce. “We would be dreaming if we believed that for the rest of the country our minimum can be anything but a frightening maximum.”⁴⁸ Lévesque insisted that “English Canada” would rightly reject such an excessive weakening of the federation. Because any deals less than this minimum would only lead to future demands from Quebec, Lévesque insisted that a “special status” would only delay the inevitable realization that Quebec needed independence from the federation.⁴⁹

Lévesque insisted that there was only one way to make Quebec the nation state of Franco-Quebecers. “Quebec must become sovereign as soon as possible.”⁵⁰ However, there was a catch. Lévesque insisted that secession would not be possible without first reaching an agreement to maintain an economic association between Quebec and the

⁴⁷ René Lévesque, *An Option for Quebec*, (Toronto: McClelland and Stewart, 1967).

⁴⁸ Ibid, 24.

⁴⁹ Ibid, 25.

⁵⁰ Ibid, 26.

other governments of the federation. This association would not be much different from the “current common market formula” that Quebec had as a province in the federation.⁵¹ Lévesque insisted that the economic limitations that both an independent Quebec and the entity formed by the other provinces would face without a strong economic association would be a serious threat to the well-being to citizens from both countries.⁵² Lévesque clearly believed that sovereignty would not be feasible without an association.

Lévesque also believed that independence was a purely political option for the “people” of Quebec. Lévesque assumed that the citizens of Quebec constituted a single “people” and that they therefore had a right to a nation-state of their own should they choose to have one. His team made this clear in *An Option for Quebec*. “Of all the rights that are recognized-or at least proclaimed-by twentieth-century man, is there a more fundamental one than the right to a genuine homeland...the right to take part in the concert of nations freely and directly? This is known as freely choosing and creating one’s destiny: it is known as independence.”⁵³ Lévesque’s group extended the internationally accepted concept that all peoples should have a right to control and have their interests represented by their own governments (the right to self-determination), to include a right to their own independent, nation state. As will be explained in Chapter 3 of this paper, the international right to self-determination did not include a right for all groups identifying as a “people” to their own, independent, nation-state. Nevertheless, Lévesque argued that Quebecers had a right, as a “people,” to make Quebec independent if a majority of Quebecers gave the government of Quebec a mandate to secede. “It is based on the moment when a clear majority will have taken form to weigh and choose

⁵¹ Lévesque, *An Option for Quebec*, 39.

⁵² Ibid., 39.

⁵³ Ibid., 116.

Quebec's new direction, with a government at its head that will represent its will and implement its decision as perfectly as possible."⁵⁴

How Quebec left the federation was therefore also up to the people of Quebec. Although he did not prefer it, Lévesque believed any process, including a unilateral declaration of independence, was a valid option for Quebec. "I didn't agree with that, not that "clean, hard" independence didn't represent a valid option, or that it was excessive in itself in a world where, since 1945, dozens of peoples, small, middle-sized, and numerous, had acceded to full, absolute sovereignty."⁵⁵ Indeed, Lévesque used the separation of Norway from Sweden in 1905, and the economic union that they formed later on, as an example for Quebec to learn from in *An Option for Quebec*.⁵⁶ In this case, Norway declared independence unilaterally, and when it became clear to the King of Sweden that he could not maintain his authority over Norway, he agreed on establishing certain trade relations.⁵⁷

Although Lévesque believed that unilateral secession was a valid option for the voters of Quebec, he insisted that it was unfeasible for two reasons. First, "sovereignty-association" would not be possible without the cooperation of the other governments in the federation. Lévesque argued that sovereignty-association required that certain associations that Quebec enjoyed as a Canadian province be maintained during and after the transformation of Quebec into an independent Franco-Quebecer nation state.⁵⁸ Thus, unilateral secession was not compatible with sovereignty-association. Secondly, Lévesque wanted to avoid "Pakistanizing" Canada by unilaterally cutting off the

⁵⁴ Lévesque, *An Option for Quebec*, 32.

⁵⁵ Lévesque, *Memoirs*, 201

⁵⁶ Lévesque, *An Option for Quebec*, 95.

⁵⁷ *Ibid.*, 95.

⁵⁸ *Ibid.*, 35-47.

Maritimes from the rest of the federation. He insisted that such a move would lead to long political quarrels at best, and at worst, violence.⁵⁹ He feared creating this animosity and transforming Quebec into an independent country surrounded by a hostile Ontario and group of Maritime provinces.⁶⁰ Thus for practical reasons, Lévesque ruled out achieving secession unilaterally as a feasible option for Quebec.

Lévesque explained that his option for Quebec would take several years to accomplish. Once the voters of Quebec gave him a mandate to achieve sovereignty-association by electing a majority of his party candidates to the National Assembly in Quebec (he would later change this and use a referendum to determine whether or not Quebecers wanted him to negotiate sovereignty-association), there would then be a transition period of two or three years during which representatives would negotiate the transfer of powers from the federal government to the government of Quebec and the government of Quebec would put in place measures to finance the state, retain investment and prevent the flight of capital.⁶¹ Lévesque insisted that this transitional phase of negotiations would go smoothly, because it would be in the interests of neighbouring provinces to adjust to an independent Quebec with as little economic uncertainty as possible.⁶² Thus, Lévesque predicted that after receiving a mandate from a majority of Quebecers to do so, the government of Quebec would become an independent nation state with an economic association with what was left of Canada within three years, and with little transitional economic hardship for the people of Quebec.

⁵⁹ Lévesque, *Memoirs*, 202.

⁶⁰ René Lévesque, *My Quebec*, (Toronto: Methuen, 1979), 68.

⁶¹ Lévesque, *An Option for Quebec*, 47-56.

⁶² *Ibid.*, 38.

Shortly after founding the MSA in November of 1967, Lévesque entered into negotiations with the R.I.N. and the R.N. to see if he could not attract them to his option for Quebec. The R.N. was open to the idea of sovereignty-association, but the more hard line R.I.N. was not. Many of the R.I.N.'s "pur et dure" members did not want to link the independence of Quebec to the success of negotiating an association with what would be left of the Canadian federation. This was not acceptable for Lévesque.⁶³ "Until further notice, I told myself on leaving them, we just weren't meant to get along."⁶⁴

On the weekend of October 12-14, the MSA and R.N. joined, without the RIN, to form a new secessionist political party, the Parti Québécois (P.Q.). However, less than two weeks after the formation of the P.Q., the membership of the R.I.N. had a change in heart and decided that the P.Q. was the best hope for an independent Quebec. They folded their organization, and urged all members to join the Parti Québécois. With the inclusion of the R.I.N. members, by the fall of 1968 the Parti Québécois united practically all currents of secessionist thinking under the sovereignty-association cause.⁶⁵ Although these organizations agreed to support Lévesque's approach, the hard-line members that came with them did not necessarily abandon their views that secession should be achieved in a more unilateral or revolutionary way. The inclusion of these members meant that Lévesque had to work extra hard to ensure that his approach remained the approach of the P.Q. Nevertheless, from 1968 onwards the P.Q., and its neo-nationalist objective of sovereignty-association, would almost exclusively represent the secessionist movement in Quebec.

⁶³ Lévesque, *Memoirs*, 201.

⁶⁴ Lévesque, *Memoirs*, 202.

⁶⁵ Lévesque, *My Quebec*, 22.

2.2 The Government of Canada's Approach towards the Secessionist movement in Quebec: Leaving the Legal Issue of Secession in Abeyance

As mentioned above, by the time that René Lévesque formed the P.Q. in 1968, the government of Canada already had its strategy for defeating support for neo-nationalism and secession in Quebec well in place. This was due to the fact that in 1965 Pierre Trudeau, one of the most well known federalists in Quebec and a staunch opponent of neo-nationalism and secessionism, became a member of the government of Canada and brought with him several well-developed ideas on how to combat support for neo-nationalism. The strategies developed by Trudeau and subsequently adopted by the government of Canada, formed the core of a unity strategy that would remain for over fourteen years. It was because of the political objectives of this unity strategy that questions relating to *how* Quebec could leave the federation were left in abeyance by the federal government through three major unity crises that the government of Canada faced between 1968 and 1982.

2.2.1 The Position of Pierre Trudeau

The first Canadian Prime Minister to make an effort to address the growing support for neo-nationalism in Quebec was actually Prime Minister Lester Pearson, during the early 1960's. As the leader of the Official Opposition in the House of Commons, in 1962, Pearson had recognized the unequal status that Francophones had in the federation compared to their Anglophone counterparts. This was evident, for example, from the

poor level of use that the French language had in the federal civil service and Canadian military, and the resulting alienation that Franco-Quebecers had from the federal government and the federation at large.⁶⁶ In response he made the search for answers to end this inequality and alienation a focus of his 1963 election campaign.⁶⁷

After winning the 1963 election and becoming Prime Minister, Pearson immediately undertook measures to better understand Franco-Quebecer alienation and how to address it. On July 19th, 1963, Pearson established a Royal Commission on Bilingualism and Biculturalism (B & B Commission) to “...inquire into and report upon the existing state of bilingualism and biculturalism in Canada and to recommend what steps should be taken to develop the Canadian Confederation on the basis of an equal partnership between the two founding races...”⁶⁸ He also went to great lengths to find compromises between the neo-nationalist demands of the government of Quebec and the interests of federal and other provincial governments in the federation. However, it was his decision to bring three new francophone politicians into his cabinet in 1965 that would have the biggest effect on forming the government of Canada’s strategy for dealing with the growth of neo-nationalism in Quebec.

Pearson enlisted three Franco-Quebecers, Jean Marchand, Gerard Pelletier and Pierre Trudeau, to present themselves as Liberal candidates in the 1965 federal election. Marchand, a popular union leader, and Pelletier, a journalist and editor of the reformist journal *Cité libre*, were both well-known federalists in Quebec. However, it was Pearson’s third newcomer, Pierre Trudeau, a prominent federalist lawyer, who would

⁶⁶ Lester B. Pearson, *Mike*, (Toronto: University of Toronto Press, 1972), 68.

⁶⁷ Pearson, *Mike*, 68.

⁶⁸ The Government of Canada. *A Preliminary Report of the Royal Commission on Bilingualism and Biculturalism*. (Ottawa: Queen’s Printer and Controller of Stationery, 1965), 151.

become the architect of the government of Canada's strategy to defeat support for neo-nationalism in Quebec. By 1967, Trudeau had managed to rise through the ranks to become Pearson's Minister of Justice, and was placed in charge of the Quebec file. Also by 1967, Trudeau had developed a strong position on neo-nationalism, and what needed to be done to defeat support for it, through a series of articles he had written prior to and during his short time in office. Trudeau shaped the government of Canada's approach towards neo-nationalism in accordance with the views he developed in these works.

According to Trudeau, the Canadian federation was made possible by the formation of a national consensus, which was articulated in what was then the *British North America Act, 1867*. For Trudeau, the 1867 Canadian national consensus established a country where French Canadians could compete on an equal basis with English Canadians. Both groups had been invited to consider the whole of Canada their country and field of endeavour.⁶⁹ However, over time the central government came to consider and promote the federation as an Anglophone nation state. The Government of Canada projected itself as a British nation state, gave preferential treatment to immigrants from the British Isles, and limited its Francophone identity to the province of Quebec. Because the educational and political rights of French Canadians were nearly always disregarded throughout the country, Trudeau argued that Franco-Quebecers came to believe themselves secure only in Quebec.⁷⁰ Because of this alienation, Franco-Quebecers began arguing that if "Canada" was to be the nation-state of Anglophone Canadians, then Quebec should be the nation-state of Francophone Canadians.

⁶⁹ Pierre Elliott Trudeau, "Quebec and the Constitutional Problem," in *Federalism and the French Canadians*, ed. Pierre Elliott Trudeau (Toronto: Macmillan, 1968), 47.

⁷⁰ Ibid. Page 47.

Trudeau believed that the only way to stop Franco-Quebecer alienation was to demonstrate that Francophones were welcome outside the province of Quebec by creating a new national consensus. This required what Trudeau called an immense change in attitude towards the national identity projected by the government of Canada.⁷¹ The central government and its institutions had to become fully bilingual. While he noted that members of Parliament should not be required to understand both languages, Trudeau argued that “everywhere else, and notably in the civil service and the armed forces, the two languages must be on a basis of absolute equality.”⁷² Further, federal and provincial governments had to protect and promote the French language and culture just as much as they protected and promoted the English language and culture. “[When] either the federal or provincial governments intervene in the economy to protect cultural values, they must apply the same rules of equity toward the French as Quebec has always applied toward the English segment of its population.”⁷³ Only by guaranteeing these rights could Francophones feel welcome outside of Quebec.

To ensure that this change in attitude was not temporary, Trudeau insisted that these reforms had to be entrenched in the Constitution. “The reforms I am proposing must therefore be written into the constitution itself, and must be irrevocably binding upon both the federal and provincial governments.”⁷⁴ Trudeau proposed that linguistic rights could be included in a constitutionally entrenched Bill of Rights that would protect the linguistic and individual rights of all Canadians. With their rights secure, and with the central government promoting Francophone culture on an equal basis as Anglophone

⁷¹ Trudeau, “Quebec and the Constitutional Problem,” 50.

⁷² Ibid., 49.

⁷³ Ibid., 50.

⁷⁴ Ibid.

culture, Trudeau was confident that Francophones could then identify with this new bilingual, polyethnic national consensus. Trudeau argued that if Canadians were able “...to reach an agreement on this vital aspect of the...problem, we will have found a solution to a basic issue facing Canada today. A constitutional change recognizing broader rights with respect to the two official languages would add a new dimension to Confederation.”⁷⁵

Finally, Trudeau was clear that federations would last only as long as the constituent parts wanted them to last. He argued that the national consensus of a federation was generally reached under a particular set of circumstances. If those circumstances changed, the national consensus must change with them or else risk becoming unacceptable to a region or group in the federation. To meet these changes, the terms of the federative pact must be altered through administrative practice, judicial decision, and constitutional amendment, taking “great care to preserve the delicate balance upon which the national consensus rests.”⁷⁶ If an important group becomes alienated from this national consensus, Trudeau argued one of two things could happen. First, if a large minority believed it could make a goal of total independence, it would be inclined to dissociate itself from the national consensus that it could no longer identify with. Second, this minority could be tempted to use its bargaining strength to obtain advantages that make the national consensus unacceptable to other cohesive minorities or

⁷⁵ Pierre Elliott Trudeau, “A Constitutional Declaration of Rights,” in *Federalism and the French Canadians*, ed. Pierre Elliott Trudeau (Toronto: Macmillan, 1968), 56.

⁷⁶ Pierre Elliott Trudeau. “Federalism, Nationalism, and Reason,” in *Federalism and the French Canadians*, ed. Pierre Elliott Trudeau (Toronto: Macmillan, 1968), 194.

the majority of the federation. “Thus a crucial point can be reached in either direction beyond which separation takes place, or a civil war is fought.”⁷⁷

2.2.2 *Unveiling the Government of Canada’s New Approach towards Neo-Nationalism*

By 1967, many of the premiers had become just as concerned as Pearson was over the increasing influence of neo-nationalism in Quebec. After the failure of the Fulton-Favreau formula and after Daniel Johnson was elected on the platform “Egalité ou indépendance” in the Fall of 1967, Ontario Premier John Roberts called a meeting of the provincial leaders to get to the bottom of exactly what Quebec wanted in terms of constitutional renewal.⁷⁸ At the “Confederation of Tomorrow” conference, Premier Johnson made it clear that the minimum Quebec needed was recognition of Quebec as the homeland of Francophones in Canada.⁷⁹ The premiers agreed that they would ask the government of Canada to convene a new round of constitutional negotiations, and that the constitutional concerns of Quebec could be dealt with in tandem with other constitutional concerns, including the establishment of a Canadian amending formula.

Prime Minister Pearson agreed to host the Constitutional Conference proposed by the premiers, and placed Pierre Trudeau in charge of developing the government of Canada’s position on both Francophone alienation and constitutional renewal. What Trudeau developed was a unity strategy that the government of Canada would use for the next fourteen years. The unity strategy that Prime Minister Pearson unveiled during the 1968 Constitutional Conference had two primary objectives. First, the government of

⁷⁷ Ibid. Page 194.

⁷⁸ Russell, *Constitutional Odyssey*, 77.

⁷⁹ Lévesque, *Memoirs*, 212.

Canada had to introduce reforms so that Francophones could better identify with both the federal government and the federation at large. Secondly, the government of Canada had to maintain the position that it also spoke on behalf of Franco-Quebecers, and that Quebecers wanted these reforms, and not the neo-nationalist options for Quebec, as a response to Franco-Quebecer alienation. It was a result of this latter objective that questions relating to how Quebec could be removed from the federation were left in abeyance between 1968 and 1982.

During his opening address to the Constitutional Conference on February 5, 1968, Prime Minister Pearson acknowledged the “deep dissatisfaction” that French Canadians felt concerning their status within the federation, and agreed that their feelings were justified. Pearson then added that it was within the power of the federal and provincial governments to remove the causes of this discontent, by initiating a process of constitutional renewal “...so that Quebec and French Canada may have the largest possible scope for the development of its own society, its own destiny, and its own culture in Canada.”⁸⁰ Pearson then explained two reform projects, one administrative and one constitutional, that the government of Canada would undertake to address Francophone alienation.

First, Pearson announced that the government of Canada would adopt the recommendations made in the interim report of the Royal Commission on Bilingualism and Biculturalism, which was released in 1965 and called on the federal government to adopt both English and French as Canada’s official languages, and promote the equal use of English and French in the federal Civil Service, Foreign Service, and in the Canadian

⁸⁰ Government of Canada. *First Meeting of the Constitutional Conference*, (Ottawa: February, 1968), 12.

military.⁸¹ “We accept these and we will proceed to implement them as quickly as we can.”⁸² Pearson also committed federal assistance to provinces that adopted the Commission’s provincial recommendations. “We hope that the provinces will find it possible to accept them. For our part we stand ready to offer such help as may be necessary.”⁸³

Second, Pearson announced that the government of Canada would make efforts to entrench the equality of French and English, along with a bill of individual rights, into the Constitution. Pearson argued that entrenching French and English as official languages for the federal government, and for any province wishing to do so as well, into the Constitution was fundamental “...if we are to establish and to ensure the basic principle of equality for the communities of people speaking our two official languages.”⁸⁴ Pearson also explained that entrenching the individual rights of Canadians into the Constitution would add an important quality to what it meant to be Canadian. “What we will be aiming at, if we can agree here in principle, is to provide a firmer, wider and more secure basis for the freedom of all Canadians as a people, not only as a people and as individuals but also as members of particular societies within a larger unity.”⁸⁵

Later on in the Conference, Trudeau was asked to expand on the benefits of entrenching a charter of rights into the Constitution. Trudeau argued that on top of the evident protections that constitutionally entrenched individual rights would bring to

⁸¹ The Government of Canada, *A Preliminary Report of the Royal Commission on Bilingualism and Biculturalism*, (Ottawa: Queen’s Printer and Controller of Stationary, 1965), 133.

⁸² Government of Canada, *Constitutional Conference*, 11.

⁸³ *Ibid.*, 11.

⁸⁴ *Ibid.*, 13.

⁸⁵ *Ibid.*, 13.

Canadians, an entrenched charter of rights would also help to foster a Canadian identity that Franco-Quebecers, Anglo-Canadians and all Canadian citizens could identify with. Borrowing the words of New Brunswick Premier Louis Robichaud, Trudeau explained that the rights of the citizen, "...conjoined with those rights of language and culture that are the important theme of this conference, reach to the core of our national purpose."⁸⁶ Trudeau had made it clear in his writings that a state could not survive for long if its national consensus was not acceptable to a large segment of the state's population. Trudeau was explaining that a constitutionally entrenched charter of rights and linguistic equality would create a national consensus acceptable to both Franco-Quebecers and all other Canadians. "Knowing, whether they be Manitobians, Quebecers or Prince Edward Islanders, that they have common values; that they are united in these respects as Canadians-not divided provincially by differences. This is the strength of Canada."⁸⁷

Pearson explained that these proposed administrative and constitutional reforms were ultimately designed to "...create conditions – with all possible speed – so that French-speaking Canadians may feel that every part of this country is their homeland."⁸⁸ Pearson believed that these changes would address Francophone alienation from the federation. For Pearson, entrenching linguistic duality and individual rights into the Constitution would give the federation an identity that would be attractive Francophones and all other Canadians. After that, he was willing to discuss constitutional reform between the provinces and Ottawa, such as the division of powers, an all-Canadian amending formula for the Constitution and reform of the Supreme Court of Canada.⁸⁹

⁸⁶ Government of Canada, *Constitutional Conference*, 267.

⁸⁷ Ibid. 277.

⁸⁸ Ibid. 9.

⁸⁹ Ibid. 13.

For Pearson and Trudeau, however, these latter reforms would have nothing to do with addressing French Canadian discontent, but with provincial discontent.⁹⁰ To address both the immediate reforms for Francophone Canadians and the longer-term projects for constitutional renewal, the first ministers agreed that future Constitutional Conferences would be held to hammer out details.⁹¹

When it was his turn to speak, Quebec Premier Daniel Johnson made several attempts to undercut Pearson and Trudeau's argument that these administrative and constitutional reforms would address Franco-Quebecer alienation from the federation. First, Johnson reiterated the neo-nationalist argument that the federal government could never represent the interests of Franco-Quebecers. "If there is a lesson to be learned from our history, it is this: French Canadians in Quebec, who make up eighty-three per cent of Canada's French-speaking population, cannot be expected to entrust the direction of their social and cultural life to a government in which their representatives are in the minority."⁹² Because the federal government could not represent the interests of Franco-Quebecers, Johnson insisted that as part of any constitutional renewal package, the federal government should transfer all significant jurisdictions related to the social and cultural lives of Franco-Quebecers to the government of Quebec. As a consolation to the other provinces, Johnson added that he had no problem if the federal government transferred to the other provinces the same authorities that it transferred to Quebec.⁹³

Next, Johnson argued that that Pearson and Trudeau's strategy for ending Franco-Quebecer alienation from the federation would not work. Although he agreed that the

⁹⁰ Government of Canada, *Constitutional Conference*, 32-36.

⁹¹ *Ibid.* 515.

⁹² *Ibid.* 61.

⁹³ *Ibid.* 63.

French language had to be treated better outside of Quebec, he insisted that it was not linguistic equality but the establishment of a Canadian federation based on the equality of two founding nations that would end Franco-Quebecer alienation. He argued that it “...would be a serious error to believe that Quebec will be content once people elsewhere are able to speak French.”⁹⁴ He explained that the “...equality to be established between our two cultural communities depends not only on extending bilingualism territorially but even more on extending the jurisdictions of Quebec, the homeland of the French-Canadian nation.”⁹⁵ In short, Johnson maintained his neo-nationalist position that what Quebecers really wanted was the establishment of a Franco-Quebecer nation state.

It was in response to these attacks that Pierre Trudeau revealed the second objective of the government of Canada’s unity strategy, which focused on maintaining the position that the federal government also spoke on behalf of the voters of Quebec. First, in response to the claim that the government of Canada did not represent the interests of Franco-Quebecers, Trudeau made it clear to Johnson, and to any Canadians watching the televised proceedings, that he and the other Quebec Members of Parliament represented and spoke for the interests of the voters of Quebec in areas of federal jurisdiction. “In other words, the concept of federalism which the federal delegation supports states that the Quebec community in regard to all subjects that come under federal jurisdiction is protected in Ottawa by the Quebec members; its protection is not afforded by the Quebec government but by the representation of Quebec here in

⁹⁴ Government of Canada, *Constitutional Conference*, 237.

⁹⁵ Lester B. Pearson, *Federalism for the future : a statement of policy by the Government of Canada : the Constitutional Conference, 1968*, (Ottawa : Queen's Printer, 1968), 69.

Ottawa.”⁹⁶ Trudeau then went on to explain why the voters of Quebec actually did support the unity reforms being proposed by Pearson, and why they did not support the neo-nationalist goal of creating a Franco-Quebecer nation-state.

Trudeau argued that there were two reasons why Franco-Quebecers did not support the types of “two-nations” reforms being advocated by neo-nationalists like Johnson. First, he insisted that Franco-Quebecers did not support ending Franco-Quebecer representation in Ottawa, which would occur if all significant jurisdictions pertaining to the lives of Franco-Quebecers were transferred to the Government of Quebec. Trudeau argued that if this happened, “...no [Quebec] politician worth his salt would want to come to Ottawa; he would want to get to Quebec where the decisions on these matters are taken.”⁹⁷ Trudeau insisted that Quebecers did not want to diminish the role that their federal representatives played in Ottawa.

Secondly, Trudeau insisted that Franco-Quebecers did not support the argument that the government of Quebec should have extra powers simply because it was a government is controlled by a minority group. He argued that if Franco-Quebecers needed their provincial government to have special powers because they constituted one of “two nations,” then what was stopping the Anglophone minority group in Quebec from making an equal claim for a special status from the government of Quebec. “Twenty per cent of the population of Quebec is English-speaking. What does “two nations” in Quebec mean? Must they also have certain political institutions? I think that to put the problem is to answer it.”⁹⁸ Moreover, Trudeau argued that the only reason why support for a special status grew in Quebec was because Francophones were not able to identify

⁹⁶ Government of Canada, *Constitutional Convention*, 229.

⁹⁷ *Ibid.*, 228.

⁹⁸ *Ibid.* 235-236.

with the federal government, which he argued they would be able to do after they implemented this unity strategy. Trudeau insisted that once French Canadians "...have language rights that are equal throughout the country, from the time when they will enjoy those rights within a system of constitutional guarantees...I think the French Canadians will not need special powers."⁹⁹

The political objective of Pearson and Trudeau's unity strategy was, then, to remind neo-nationalists and Canadians that through Franco-Quebecer M.P.'s, the government of Canada represented the will of Franco-Quebecers in federal areas of jurisdiction. To counteract claims by Johnson that the voters of Quebec wanted a neo-nationalist solution for Franco-Quebecer alienation from the federation, Trudeau simply maintained his position that not only did he speak for Quebec, but that he knew otherwise. He knew what Quebecers wanted. They wanted to be able to identify with the federal government and the federation at large. His reforms would allow them to do that. In short, the voters of Quebec would support his unity strategy because they did not support the neo-nationalist solution, which was isolation in Quebec. Denying that Quebecers wanted the isolationist, neo-nationalist option for Quebec was a key element of the unity strategy of Pearson and Trudeau, and under this strategy, questions related to *how* Quebec could be removed from the federation were to be avoided.

2.2.3 *Avoiding a Legal/Constitutional Debate*

Notwithstanding Lévesque's arguments that Sovereignty-Association would be a purely political process, the government of Canada actually had a constitutional (thus

⁹⁹ Government of Canada, *Constitutional Conference*, 235.

legal) obligation to protect both its sovereign authority in Quebec and the territorial integrity of the entire federation. In other words, the government of Canada would have had a constitutional obligation to prevent any group, including a P.Q. led government of Quebec, from unilaterally overthrowing the federal government's authority in Quebec.¹⁰⁰ Thus Pearson and Trudeau would have been obliged to challenge any attempt by the government of Quebec or a revolutionary movement to unilaterally remove Quebec from the federation. These facts presented an interesting question for the secessionist cause in Quebec: if the government of Canada was obliged to oppose unilateral secession attempts, then what process *could* be used to allow Quebec to leave the federation?

The *British North America Act, 1867*, neither provided for nor forbade the secession of a province from the federation.¹⁰¹ However, while he accepted that it could happen, Trudeau did not, in his writings or during the 1968 Constitutional Conference, adopt a position on *how* the province of Quebec could leave the federation. Would the election of a secessionist government suffice for a mandate for secession? Who would negotiate on behalf of Canada in secession negotiations? Would Quebec have to secure

¹⁰⁰ This is not to say that the federal government would necessarily act upon this obligation.

¹⁰¹ However, there was a Canadian precedent set during the late 1860's suggesting the exact opposite, that a province could not be removed from the federation. The first provincial government to attempt to remove their province from the federation was the Government of Nova Scotia, in 1868. During the 1867 federal and provincial elections in Nova Scotia, held shortly after London approved of Confederation in March of 1867, the voters of Nova Scotia registered their anger over their inclusion in the Dominion by electing a secessionist government provincially, and electing eighteen secessionist Members of Parliament to send to Ottawa. The voters were upset that their former premier, Charles Tupper, had agreed to Confederation in spite of overwhelming opposition to it from across the province. In June of 1868 Joseph Howe, the new Premier of Nova Scotia, went to London to ask the British Parliament to separate Nova Scotia from Canada. To Howe's disappointment, the Colonial Secretary, the Duke of Buckingham, made it clear that secession was simply not an option. In the Supreme Court's opinion in the *Quebec Secession Reference*, the justices highlighted the Duke's reasoning. "The neighbouring province of New Brunswick has entered into the union in reliance on having with it the sister province of Nova Scotia; and the vast obligations, political and commercial, have already been contracted on the faith of a measure so long discussed and so solemnly adopted...I trust that the Assembly and the people of Nova Scotia will not be warranted in advising the reversal of a great measure of state, attended by so many extensive consequences already in operation." As cited in *Reference Re the Secession of Quebec*.

the agreement of its provincial neighbours before it could leave, or just the federal government? What would happen if some groups in Quebec wanted to remain Canadian? Would Quebec retain the borders it enjoyed as a province? While Lévesque continued to advocate the vision of a smooth, Quebec-led process for removing Quebec from Canada developed in *An Option for Quebec*, Trudeau, as Minister of Justice, remained silent in public.

The reason why Trudeau remained silent was because there was no clear directive setting out *how* Quebec could legally be removed from the federation, and he preferred not to open a debate on the matter prematurely. In his memoirs published in 1993, Trudeau explained that opening a debate over *how* Quebec could leave the federation, when it was not constitutionally necessary to do so, would only lend legitimacy to the secessionist option for Quebec. He argued, "...I think that people who are in government today must not in any way recognize in advance the legitimacy of that process: their ultimate duty is to ensure that the constitution is obeyed."¹⁰² In other words, as long as the P.Q. did not threaten to overthrow the federal government's constitutional sovereignty in Quebec, Trudeau could avoid the matter all together, leave it in abeyance, and concentrate on the political battle against neo-nationalism and the campaign for Sovereignty-Association in Quebec.

Thus, although Trudeau disagreed with Lévesque's arguments that it was entirely up to the government of Quebec to decide *how* Quebec could leave the federation, Trudeau did not *want* to challenge Lévesque's claims for two reasons. First, there was no clear process in the Constitution as to *how* a province could be removed from the federation. This meant that it could take long debates, judicial interventions and appeals

¹⁰² Trudeau, *Memoirs*, 361.

to British Parliament (which, prior to 1982, was still responsible for amendments to the Constitution of Canada) to settle the question. Secondly, a key element of the government of Canada's strategy to defeat support for neo-nationalism in Quebec was to maintain that Franco-Quebecers did not actually want a nation-state of their own. Because establishing a federal position on how Quebec could leave the federation would contradict this position, it was in the interests of the federal government to *avoid* addressing those arguments as long as it could, leaving them in abeyance, so as not to indirectly promote secession as a feasible option for Quebec. Finally, because Lévesque was committed to achieving independence for Quebec through negotiations, and not insurrection, the government of Canada was under no pressure to set the record straight in advance of the P.Q. forming the government of Quebec with a mandate for sovereignty-association.

2.3 Three threats to the Abeyance on Quebec's Secession Process

In April of 1968 Pierre Trudeau won the federal Liberal leadership race and replaced Lester Pearson, who had decided to retire from politics, as Prime Minister of Canada. Immediately after the election Trudeau set out to implement the key objectives of his unity strategy which was set out during the 1968 Constitutional Conference. While it would take him under three years to achieve his administrative objectives, it took Trudeau fourteen years to achieve his constitutional ones. During this period of time, Trudeau faced three unity crises which threatened to blow open the debate over *how* Quebec could leave the federation. However, in each case, because Lévesque remained

committed to his sovereignty-association option, Trudeau was able to remain committed to his unity strategy. As a result, although the extent to which Trudeau and Lévesque disagreed on this matter became increasingly clear, questions related to *how* Quebec could be removed from the federation legally remained in abeyance.

In October of 1968 Trudeau unveiled the Official Languages Act, making English and French equal before the law.¹⁰³ It established that every citizen had the right to be served by the federal government in English or French, which meant that much of the federal civil service, which had for so long been English only, had to become bilingual. To monitor these requirements, the Act also established a Commissioner of Official Languages. Trudeau also appointed scores of Francophones to administrative positions in government. Trudeau then, in line with his quest to protect individual rights, established a multiculturalism policy for Canada. In 1971, his government was able to pass the Canadian Multiculturalism Act, which affirmed the value and dignity of all Canadians regardless of their racial or ethnic origins, their language or their religious affiliation. Trudeau had thus managed to implement many of the key legislative and administrative changes for his unity strategy within three years of becoming prime minister.

The constitutional objectives of Trudeau's unity strategy would take much longer to achieve. The Constitutional Conference of 1968 was meant to be a starting point for ongoing negotiations to bring about Constitutional renewal. As will be explained in the next section of this paper, although the first ministers had come close to reaching an agreement during the early 1970's, it would take Trudeau over fourteen years to achieve

¹⁰³ *Act respecting the status of the official languages of Canada*, (Ottawa: Queen's Printer for Canada, c1970, 17-18 Elizabeth II, Chapter 0-2).

the constitutional objectives of his unity strategy. It was during this period of delay that Trudeau had to face three unity related crises: the F.L.Q. crisis; the election of a P.Q.-led government of Quebec; and the 1980 sovereignty-partnership referendum, which threatened to blow open the debate over *how* Quebec could leave the federation.

2.3.1 The F.L.Q. Crisis: The Threat of a U.D.I.

The first crisis that threatened to open the debate over the legality of Quebec secession came in 1970 when increased terrorist tactics by the secessionist organization the Front de liberation du Québec (F.L.Q.) prompted the government of Quebec to take drastic measures to bring its terrorist members to justice. From 1963 to 1967, the F.L.Q. had planted 35 bombs. Between 1968 and 1970, they planted over 50 and by the fall of 1970 had been responsible for many injuries and the loss of six lives. Between October 5 and October 10, the F.L.Q. upped the ante by kidnapping two politicians, British Trade Commissioner James Cross, and Liberal MNA Pierre Laporte. They demanded the release of 23 F.L.Q. members in jail along with \$500,000 dollars and safe-conduct for all F.L.Q. cells out of Canada to Cuba so that they could regroup and learn revolutionary tactics to be used in the liberation of Quebec.¹⁰⁴

After several days of failed searches, Robert Bourassa, the Premier of Quebec, informed Prime Minister Trudeau that they were “facing a concerted effort to intimidate and overthrow the government and the democratic institutions of this province through

¹⁰⁴ See Claude Bélanger. “Readings in Quebec History, ‘October Crisis.’” *Marianopolis College, Quebec History Website*; available from <http://www2.marianopolis.edu/quebechistory/readings/october.htm>; accessed 15 January 2004.

planned and systematic illegal action, including insurrection.”¹⁰⁵ Bourassa asked Trudeau to invoke the *War Measures Act*, which would allow provincial authorities to make arrests without warrants; to detain suspects without bail; to search and seize property without warrant; and to provide for a general suspension of individuals rights. With these powers, Quebec police forces could outlaw the F.L.Q., find the kidnappers of Laporte and Cross, and hopefully pre-empt any F.L.Q. plans to take more hostages. Reluctantly, Trudeau agreed to Bourassa’s request, and invoked the *War Measures Act* early in the morning on October 16, 1970.

Later in the day, Trudeau appeared on national television to explain to Canadians why he agreed to the government of Quebec’s request to impose the *War Measures Act*.¹⁰⁶ During his speech to Canadians, Trudeau made it clear that it was the illegal and revolutionary methods of the F.L.Q. that were under attack by the government of Canada and not their goal of separating Quebec from the Canadian federation. Trudeau insisted that there was no need in Canada for groups to resort to acts of violence and disorder in the belief that it was the only way that they could accomplish change.

There may be some places in the world where the law is so inflexible and so insensitive as to prompt such beliefs. But Canada is not such a place...[Those] who would defy the law and ignore the opportunities available to them to right their wrongs and satisfy their claims will receive no hearing from this government. We shall ensure that the laws passed by Parliament are worthy of respect. We shall also ensure that those laws are respected.¹⁰⁷

¹⁰⁵ Letter to Prime Minister Pierre Trudeau from Premier Robert Bourassa, October 16, 1970, available from <http://www2.marianopolis.edu/quebechistory/docs/october/letters.htm>; archived in “Documents in Quebec History,” at the *Marianopolis College Quebec History Website*; accessed 15 January 2004.

¹⁰⁶ Pierre Elliot Trudeau’s Televised Statement on the *War Measures Act*, October 16, 1970, available from <http://www2.marianopolis.edu/quebechistory/docs/october/trudeau.htm>; archived in “Documents in Quebec History,” at the *Marianopolis College Quebec History Website*; accessed 15 January 2004.

¹⁰⁷ Pierre Elliot Trudeau’s Televised Statement on the *War Measures Act*, 1970.

Trudeau reminded Canadians that it was the elected representatives of all Canadians, and not “kidnappers, revolutionaries and assassins,” who made and changed laws in Canada. Moreover, and without naming them specifically, Trudeau warned secessionists that regardless of the process they used to promote the secession of Quebec from Canada, that process would have to respect the rule of law in order to be tolerated by Canadians. “Yet those who disrespect legal processes create a danger that law-abiding elements of the community, out of anger and out of fear, will harden their attitudes and refuse to accommodate any change...”¹⁰⁸ Although he admitted that secession was possible, Trudeau insisted that the government of Canada would always act “...to maintain the rule of law without which freedom is impossible.”¹⁰⁹

The F.L.Q. crisis would have been a good opportunity for the government of Canada to set down the legal rules for secession. Prior to the enactment of the *War Measures Act*, Trudeau had warned that no attempt to end the sovereignty of any elected officials in Quebec would be tolerated. “Yes, I think the society must take every means at its disposal to defend itself against the emergence of a parallel power which defies the elected power in this country and I think that goes to any distance.”¹¹⁰ However, Trudeau did not go as far as to open the debate over how Quebec could be removed from the federation. This may have been due to the fact that Lévesque also spoke out against the actions of the F.L.Q.

¹⁰⁸ Letter to Prime Minister Pierre Trudeau from Premier Robert Bourassa, October 16, 1970.

¹⁰⁹ Ibid.

¹¹⁰ Trudeau’s ‘Just watch me Interview,’ from an interview between Peter Reilly of CJON-TV and Pierre Trudeau, October 13, 1970, available from <http://www2.marianopolis.edu/quebechistory/docs/october/watchme.htm>; archived in “Documents in Quebec History,” at the *Marianopolis College Quebec History Website*; accessed 15 January 2004.

Lévesque had objected to the government of Quebec's request for the imposition of the *War measures Act*, preferring to negotiate longer with the terrorist members of the F.L.Q. He was outraged by the sight of soldiers controlled by the federal government patrolling the streets of Quebec. However, Lévesque made it clear to Trudeau and the Canadian people that the actions of the F.L.Q. were unacceptable. Lévesque would only pursue sovereignty-association through established democratic institutions. Writing for *the Journal de Montréal* on October 17, 1970, Lévesque practically repeated Trudeau's comments on effecting change through established democratic systems. "We have said it before countless times, neither bombs, nor even less kidnappings, are morally, humanly, or politically justifiable in a society which, until yesterday, permitted the expression and organization of all kinds of desire for change."¹¹¹ It was perhaps because of Lévesque's decision to clearly and publicly reject the methods of the F.L.Q. that Trudeau was content to leave the abeyance on *how* Quebec could leave the federation untouched.

2.3.2 *The Election of a Parti Québécois Government of Quebec*

The second major unity crisis that Pierre Trudeau had to face came in 1976 when René Lévesque and the P.Q. won the provincial election to form the Government of Quebec. Although they had been the first secessionist party to elect representatives to the Quebec legislature, the P.Q. did not receive the breakthroughs they were hoping for during the provincial elections of 1970 and 1973. They won only seven seats in 1970, with 23.1 percent of the popular vote and won only six seats in 1973, with 30.2 percent of the popular vote. During these elections, the P.Q. had insisted that the election of a P.Q.

¹¹¹ Lévesque, *Memoirs*, 250.

government would be considered a mandate for it to begin sovereignty-association negotiations. However, Lévesque knew he needed a change in approach after these poor results.

At their 1974 convention Lévesque encouraged delegates to adopt a stage-by-stage, or *étapiste*, approach towards secession. Instead of using the election of a P.Q. government as a mandate to negotiate sovereignty-association, a province wide referendum, after the P.Q. had formed the Government of Quebec, would be used to determine the will of the voters of Quebec. If a majority of voters voted yes, the P.Q.-led government of Quebec would begin negotiations for a sovereignty-association with what would be left of Canada. A vote for the P.Q. would no longer mean a vote for independence, but a vote for good governance and the consideration of independence.¹¹² The strategy worked, and on November 15, 1976, the P.Q. became the first secessionist party to form the government of Quebec, with 41.7 per cent of the popular vote and 71 seats.¹¹³ On election night, René Lévesque promised that the Government of Quebec would not make any moves towards secession until the voters of Quebec gave them a clear mandate to do so, via a provincial referendum. He announced that for the next two years, his government would act like a “normal” provincial government and concentrate on good governance, as it had promised during the referendum.¹¹⁴ Lévesque made it clear that as Premier of Quebec he would maintain his past commitment to effecting secession through negotiations after receiving a mandate to do so.

¹¹² Graham Fraser, *PQ: René Lévesque and the Parti Québécois in Power* (Toronto: Macmillan of Canada, 1984), 65.

¹¹³ Ibid. 370.

¹¹⁴ As reported in *The Globe and Mail*, “Levesque had words of reassurance for his ‘Canadian compatriots,’” Wednesday, November 17, 1976 A1

Trudeau's response to the P.Q.'s election victory was in line with the unity strategy he unveiled in 1968. During a speech after the P.Q. victory, Trudeau pointed out that the P.Q. was elected on a platform of good governance, and not on a mandate to negotiate sovereignty-association. "If we are to take a face value the assurances of the Parti Québécois leader, reiterated during the campaign, we must conclude that the people of Québec did not vote on constitutional but on economic and administrative issues."¹¹⁵ Trudeau insisted that the Quebec voters had tired of the Bourassa Liberal government and had no real other option than the P.Q. Indeed, at a meeting of international business leaders months prior to the election, in May of 1976, Trudeau had explained to them and to the press that the P.Q.'s shift to "good governance" was a good sign that separatism was dead in Quebec.¹¹⁶ He told them that support for secession was the "evil fruit" of years of unbalanced treatment for Francophones in Canada.¹¹⁷ However, he insisted that this limited support was drying up already due to English-Canada's positive response to his new national consensus. The P.Q.'s shift in policy to holding a referendum, he insisted, was proof of this.¹¹⁸

After the P.Q. victory, Trudeau explained to Canadians that his solution for Franco-Quebecer alienation remained the same.¹¹⁹ Trudeau confirmed that he was continuing preparations for a federal-provincial conference on the constitution in the spring, where he would once again attempt to secure a new national consensus. He argued that the answer to separatism remained in making French-speaking Canadians feel

¹¹⁵ As reported in *The Globe and Mail*, "Even PQ Stunned by Majority," Tuesday, November 16, 1976.

¹¹⁶ As reported in *The Globe and Mail*, "PQ would hold referendum: Quebec separatism dead, Trudeau says," Tuesday, May 11, 1976 A2.

¹¹⁷ Ibid.

¹¹⁸ Ibid.

¹¹⁹ As reported in *The Globe and Mail*, "Even PQ Stunned by Majority," Tuesday, November 16, 1976 A1

at home in every town and city in Canada through enshrining a polyethnic and bilingual national consensus in the Constitution.¹²⁰

Also keeping in line with his 1968 unity strategy, Trudeau refused to discuss any matters related to *how* Quebec could leave the federation. During Question Period in the House of Commons on November 16, Trudeau made it clear that his government did “not intend to negotiate any form of separation with any province.”¹²¹ Not only that, but Trudeau also encouraged opposition party M.P.’s to follow his leadership and adopt a code of silence on all matters pertaining to *how* Quebec could be removed legally from the federation. “I believe the best way of making sure that no panic reaction takes place is to refrain from speculating upon it or asking hypothetical questions as the Leader of the Opposition has just done.”¹²² Lévesque promised not to do anything until he won a referendum on sovereignty-association, so Trudeau was happy to leave these questions in abeyance.

While Trudeau left questions related to how Quebec could be removed from the federation in abeyance, he was as clear as he had ever been on the role that the law would play in any process advanced by the P.Q. On election night Trudeau affirmed that Quebecers would not be forced to stay in Canada against their will. “I am one of those who believe that Canada cannot, that Canada must not survive by force. The country will only remain united if its citizens want to live together in one civil society.”¹²³ Yet, Trudeau was clearer than ever when he argued that regardless of the mandate given to the

¹²⁰ Ibid.

¹²¹ As reported in *The Globe and Mail*, “Will not be negotiating on separatism, PM says,” Wednesday, November 17, 1976 A1

¹²² Ibid.

¹²³ As reported in *The Globe and Mail*, “Canada-wide vote on Quebec’s future is favored by PM,” Thursday, November 25, 1976 A1

government of Quebec, they could only effect change in respect of the Canadian Constitution and rule of law. “I can only assume that Quebec’s new government intends to follow both the letter and the spirit of the Canadian constitution.”¹²⁴ Trudeau would wait to begin debating *how* Quebec could legally be removed from the Constitution and the federation until the negotiations that followed a positive referendum in favour of secession began.

2.3.3 *The 1980 Sovereignty Association Referendum*

The third major unity crisis that Trudeau faced before he could achieve the constitutional objectives of his unity strategy came in 1980 when the Government of Quebec held a referendum on the secession of Quebec from Canada. Trudeau had retired from politics in 1979 after losing a federal election to Joe Clark and the Progressive Conservative Party. During this time, Premier Lévesque unveiled his plans for a referendum on sovereignty-association. Ultimately, Trudeau was able to stick to the unity strategy that he had developed in 1968 by arguing that the sovereignty-association referendum question would not give the government of Quebec a mandate for anything but another referendum.

In November of 1979, the government of Quebec laid out its proposal for secession and for the establishment of an offer for partnership with what was left of Canada. Entitled *Québec-Canada: A New Deal: The Québec government proposal for a new partnership between equals: sovereignty association*, the plan argued that the only way to reach an agreement between the government of Quebec and the other

¹²⁴ As reported in *The Globe and Mail*, “Even PQ Stunned by Majority.” Tuesday, November 16, 1976.

governments in the federation was to “replace federalism by another constitutional formula.”¹²⁵ In *Québec-Canada: A New Deal*, the government of Quebec went further than it ever did before to link secession to negotiations with the other governments in the federation. Quebec simply could not survive as an independent country, the plan argued, without some sort of economic association with what was left of Canada. “From the beginning of our fight we have continually reiterated that geography and a whole series of obvious interests prescribe that association with Canada must be parallel with the independence of Quebec.” The P.Q. admitted that achieving independence without cooperation from the other provinces and the federation was simply not an option. “Even if we wanted to, we could probably not do it.”¹²⁶ In short, Lévesque admitted that unilateral secession was neither possible nor desirable.

When Premier Lévesque announced the referendum question that he would submit to the voters of Quebec on December 20, 1979, questions were raised over whether or not a positive referendum vote would clearly express the will of Quebecers to leave the federation. The question was over one hundred words long, and was based on the proposals contained in *Québec-Canada: A New Deal*. In short, the question asked whether or not the voters of Quebec wanted to give the Government of Quebec a mandate to negotiate sovereignty-association.¹²⁷ The problem was that the question was based

¹²⁵ Government of Quebec, *Québec-Canada: A New Deal: The Québec government proposal for a new partnership between equals: sovereignty-association* (Québec City: Éditeur officiel du Québec, 1979), 47.

¹²⁶ Lévesque, *My Quebec*, 73.

¹²⁷ “The Government of Québec has made public its proposal to negotiate a new agreement with the rest of Canada, based on the equality of nations; this agreement would enable Québec to acquire the exclusive power to make its laws, levy its taxes and establish relations abroad—in other words, sovereignty—and at the same time, to maintain with Canada an economic association including a common currency; no change in political status resulting from these negotiations will be effected without approval by the people through another referendum; on these terms, do you give the Government of Québec the mandate to negotiate the proposed agreement between Québec and Canada?” As reprinted in Government of Quebec, *Québec’s*

upon a hypothetical, new relationship that the Government of Quebec assumed it would have with what would be left of the Canadian federation. Thus, the vote would not be focused on whether or not Quebecers wanted to remove Quebec from the federation, but whether or not they wanted this new “sovereignty-association” with Canada. The “association” aspect of Lévesque’s option for Quebec may have made secession appear to be less risky to the voters of Quebec. However, it became the Achilles heel of Lévesque’s referendum plans.

The Conservative-led government of Canada did not last long. Infighting caused Prime Minister Clark to lose a vote of confidence only months after taking office. Trudeau was convinced to return to politics and lead the Liberals into another federal election.¹²⁸ On February 18, 1980, the Liberals were returned to power in Ottawa and Prime Minister Trudeau immediately shifted into campaign mode. Trudeau’s referendum campaign strategy was based somewhat upon the unity strategy that he had developed in 1968. First, Trudeau would remind Quebecers that he and other elected federalists from Quebec also spoke for the province, and that he and the other Quebec elected M.P.’s (every seat in Quebec but one) had just received a mandate to continue to improve Quebec’s place in the federation and not to destroy it. He would also argue that there was no real support for secession, and that the referendum, which was meant to secure more powers from Ottawa, would fail. Second, Trudeau would attack the referendum question because it was based upon an association that could not be achieved. These tactics were

Positions on Constitutional and Intergovernmental Issues: From 1936 to March 2001 (Québec: Secrétariat aux affaires intergouvernementales canadiennes, 2001), 292.

¹²⁸ Stephen Clarkson & Christina McCall, *Trudeau and out Times, Volume One: The Magnificent Obsession* (Toronto: McClelland & Stewart Inc., 1991), 185.

fully deployed during one of his campaign speeches on May 14, 1980, at the Paul Sauvé Arena in Montreal.¹²⁹

During his televised speech, Trudeau first reminded Quebecers that he also spoke for Quebec. Trudeau first noted that regardless of the outcome of the referendum, he did not have a mandate to negotiate any form of secession. “[We] were elected on February 18, scarcely a couple of months ago- for the specific purpose of making laws for the province of Québec. So don’t ask me not to make any, don’t ask me to give full powers to Québec.”¹³⁰ Trudeau argued that Quebecers would overwhelmingly shoot down Lévesque’s option for Quebec and criticized his referendum question as being a deceitful attempt to trick Quebecers into voting for an ambiguous type of political reform. He insisted that if Lévesque had posed a direct question on secession, “Do you want to leave Canada, yes or no?” then Quebecers would have rejected it with a large majority.¹³¹

Trudeau then explained what a No vote would mean for the voters of Quebec. Trudeau insisted that what he could promise was immediate constitutional renewal if Quebecers voted No. He insisted that a No vote in the referendum would not be an indication that everything was fine and could remain the same.

It is not only the nine premiers of the other provinces saying this. It is also the seventy-five MPs elected by the Quebecers to represent them in Ottawa...who are saying that a NO means change. And because I spoke to these MPs this morning, I know that I can make a most solemn commitment that following a NO vote, we will immediately take action to renew the Constitution and we will not stop until we have done that.¹³²

Trudeau made it clear that a NO vote meant constitutional change.

¹²⁹ Pierre Elliott Trudeau, Transcript of a speech given by the Right Honourable Pierre Elliott Trudeau at the Paul Sauvé Arena in Montreal on May 14, 1980 (Ottawa: Office of the Prime Minister, 1980).

¹³⁰ Ibid.

¹³¹ Ibid.

¹³² Trudeau, Transcript of a speech, May 14, 1980.

Trudeau attacked the idea that the federal government or the provincial governments would be willing, or able, to negotiate an “association” with an independent Quebec. During the campaign, Trudeau had convinced several premiers to publicly announce that they would not be willing to enter into an economic association with an independent Quebec. Premier Peter Lougheed from Alberta announced that Quebec would have to pay international prices for its oil. Premier William Davis from Ontario made it clear that his province would refuse any economic association with Quebec.¹³³ In short, Trudeau maintained that he did not have a mandate to negotiate an association, and likewise the provinces refused to do so. Association was simply not an option for Quebec. Trudeau said that if the answer was Yes, then he would invite Lévesque to Ottawa and “If you knock on the sovereignty-association door, there will be no negotiations possible”¹³⁴

Trudeau then went on to explain that because “association” was not possible by Lévesque’s own logic, a second door, straight out independence, was also not open. “Now, if you want to speak...of sovereignty, let me say that you have no mandate to negotiate that, because you did not ask Quebecers if they wanted sovereignty pure and simple. You said: Do you want sovereignty on the condition that there is also association?” Trudeau insisted that because Lévesque’s referendum question was based on an association that was not possible, a Yes vote in the referendum would not give the government of Quebec a mandate for anything. “That’s what we have to say to the YES side: if you want independence, if you vote YES, you won’t get independence because you made it conditional on there being an Association, an Association being achieved

¹³³ Clarkson & McCall, *Trudeau and out Times*, 225.

¹³⁴ Ibid.

along with independence.”¹³⁵ In short, Trudeau explained that at best, a Yes vote would lead to another referendum with a clear question on secession alone, while a No vote meant immediate constitutional renewal.

Because Trudeau insisted that he would not consider a Yes vote a mandate for secession, he did not have to weigh into the question of *how* Quebec could be removed from the federation. Trudeau had Lévesque in a tight bind. Lévesque had maintained that sovereignty was only possible with an association with what was left of Canada, and Trudeau and the Premiers made it clear that an “association” was out of the question. On May 20, 1980, the question became moot. While the Yes side received 40.44% of the valid cast ballots, the No side received 59.56% of the ballots, halting Lévesque’s long string of successes. Trudeau made good on his promise for immediate action on the constitutional front by sending his intergovernmental affairs minister, Jean Chrétien, less than 24 hours after the referendum, on a cross-Canada tour to begin negotiations on constitutional reform.¹³⁶ Meanwhile, the process for removing Quebec from the federation remained in abeyance.

2.4 Completing Trudeau’s National Consensus

For over fourteen years, and through these three unity crises, Trudeau had tried but failed to reach an agreement with the provinces on the constitutional objectives of his unity strategy. The 1968 Constitutional Conference negotiations had come to a complete halt in 1971 when Quebec Premier Robert Bourassa reneged on his promise to ratify the

¹³⁵ Trudeau, Transcript of a speech, May 14, 1980.

¹³⁶ Jean Chrétien, *Straight from the Heart* (Toronto: McClelland and Stewart-Bantam Limited, 1986), 144.

Victoria Charter, which was an agreement that proposed to entrench linguistic and individual rights, along with a constitutional amending formula, into the Constitution. During subsequent mega-constitutional negotiations between 1971 and 1980, the provinces refused to agree to Trudeau's constitutional objectives of an entrenched Charter of Rights and an all- Canadian amending formula, until they were promised, in return, a level of decentralization that the government of Pierre Trudeau was not willing to give.¹³⁷

After the 1980 referendum, however, Trudeau was ready to use the No vote in Quebec as a mandate to reform the federation. After several months of negotiations, the government of Canada was ultimately able to convince every provincial government, except the P.Q.-led government of Quebec, to reform the Constitution, entrenching a Charter of Rights and Freedoms, linguistic equality and an all-Canadian amending formula into the Constitution. This agreement met Trudeau's 1968 constitutional objectives to establish a new national consensus.

The entrenchment of an amending formula into the Constitution, which was ratified in 1982, had a significant consequence for the question of *how* a province could be removed from the federation. Although the matter would not be clarified until 1998, there was only one way to legally alter the Constitution of Canada after 1982, and that was through the constitutional amending formulae contained in the Constitution itself. The secession of a province from the federation could only occur through mega-

¹³⁷ For a good look at the mega-constitutional politics between 1968 and 1980, see Russell's Book *Constitutional Odyssey*. Also, for a Quebec nationalist perspective on the failure of the negotiations leading to the Victoria Charter, see Claude Morin's book *Quebec versus Ottawa: The Struggle for Self-Government, 1960-72* (Toronto: University of Toronto Press, 1976).

constitutional negotiations, and by reaching an agreement on amending the Constitution via the amending formulae contained in the Constitution.

2.4.1 *The Constitution Act, 1982*

Immediately after the 1980 referendum, Prime Minister Trudeau sent his Minister of Justice, Jean Chrétien, from province to province to cobble together a base for a new round of mega-constitutional negotiations. Trudeau made it clear in the House of Commons the day after the referendum that his constitutional priorities had not changed. He announced that the federal government would have two primary positions. First, that the balance of power between the federal and provincial governments remained relatively unchanged. “Second, that a charter of fundamental rights and freedoms be entrenched in the new constitution and that it extend to the collective aspect of these rights, such as language rights.”¹³⁸ These were not negotiable. Both Trudeau and Chrétien were quite sure that these negotiations would fail, and simply wanted to demonstrate that they were once again willing to negotiate reforms before taking a decisive step by breaking convention and reforming the constitution without the consent of the provinces.¹³⁹

On June 9, 1980, the first ministers met in Ottawa to discuss the approach they would take towards renewing the Constitution. Prime Minister Trudeau proposed to deal with constitutional reform in two phases. First, they would use the momentum of the Quebec referendum to pass what he called the “peoples package.” This package would include patriation of the constitution with an amending formula, a preamble, an

¹³⁸ Roy Romanow et al., *Canada...Notwithstanding: The Making of the Constitution 1976-1982* (Toronto: Carswell/Methuen, 1984), 60.

¹³⁹ Jean Chrétien, *Straight from the Heart*, 142.

entrenched charter of rights with language provisions, and entrenched provisions for equalization and regional development.¹⁴⁰ Trudeau insisted that matters related to the contentious issue of sharing of government powers would be addressed in a “politicians package” after the “peoples package” was complete. The “peoples package” would entrench Trudeau’s national consensus, this completing his solution for Franco-Quebecer alienation. The provincial leaders, however, were not impressed. They argued that the “peoples package” and the “politicians package” should be discussed at the same time..

Between June 17, 1980 and October 2, 1980, the first ministers exchanged plan after plan without reaching an agreement. On October 2, Prime Minister Trudeau gave up on building an agreement with the provinces, and announced that he was going to unilaterally amend the Constitution, and entrench his “Peoples Package.”¹⁴¹ The premiers of New Brunswick and Ontario agreed with Trudeau’s unilateral approach. However, the premiers of Newfoundland, Manitoba and Quebec referred the question of whether or not the federal government could unilaterally make constitutional amendments that would affect provincial jurisdictions to the courts for a judicial opinion. In early February of 1981, the Manitoba Court of Appeal found, three judges to two, that Ottawa could not unilaterally amend the provincial jurisdictions in the Constitution. On March 31, the Newfoundland Supreme Court unanimously ruled against Ottawa, with the Quebec Court of Appeal ruling in favour of Ottawa, four judges to one, in favour of Ottawa. In response, Trudeau placed his unilateral plans on hold and referred the matter to the Supreme Court of Canada for a final decision.

¹⁴⁰ Roy Romanow et al. *Canada...Notwithstanding*, 65.

¹⁴¹ Ibid. 106.

On September 28, 1981, the Supreme Court ruled that although legally, the federal government could indeed amend the constitution unilaterally. It was a Canadian convention that no constitutional changes that would affect the powers of the provinces would be made without a substantial degree of provincial consent.¹⁴² Although he disagreed with the Court's opinion on the existence of a convention, Trudeau decided to hold one last constitutional conference to see if he could not bring more provinces on side. A final constitutional conference for the first ministers was consequently held on November 2, 1981, and after a marathon of meetings and debate, all of the first ministers, except René Lévesque, were able to agree on a constitutional package.

What became the *Constitution Act, 1982*, entrenched a Charter of Rights and Freedoms, including linguistic equality rights making English and French the official languages of Canada and New Brunswick. An amending formula, effectively giving each province of the country a veto over future constitutional reforms, was also entrenched. Trudeau was satisfied with his results. "On the whole, the Constitution Act largely enshrined the values I had been advocating since I wrote my first article in *Cité libre* in 1950."¹⁴³ Only time would tell, however, whether or not Trudeau's solution for Franco-Quebecer alienation would work.

2.4.2. *New Rules of the Game*

Although Trudeau had managed to entrench his solution for Franco-Quebecer alienation without weighing in on *how* a province could be removed from the federation,

¹⁴² Russell, *Constitutional Odyssey*, 118.

¹⁴³ Trudeau, *Memoirs*, 328.

it is important to understand that his 1982 changes had significant consequences for those very questions he left in abeyance. The *Constitution Act, 1982* effectively bound the actions of the government of Canada and the provincial governments to the Constitution. No longer could the government of Canada effect constitutional change via a unilateral appeal to London. Now, both levels of government in Canada were limited by the Constitution, which included a Charter of Rights and Freedoms for Canadian citizens. Prior to 1982, there was no clear process for how the government of Canada could proceed with its own dismemberment, but after the *Constitution Act, 1982*, the government of Canada was legally bound, in dealing with any proposed alterations to the Constitution, including the secession of a province, to the provisions of the Constitution and the amending formulae contained therein.

Section 52. (1) of the *Constitution Act, 1982* clearly stated that all federal and provincial government policy and law was subjected to the Constitution of Canada. “The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.” Section 52. (3) explained the only way that this supreme law could be changed. “Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada.” As mentioned above, it was in Section 38 of the *Constitution Act, 1982* that the five procedures for amending the Constitution were outlined.

The constitutional supremacy clause and amending formula contained in the *Constitution Act, 1982* meant that while Trudeau had avoided weighing in on how a province could be removed from the federation, the final step of his political strategy to

defeat support for secession actually limited how the government of Canada could deal with a provincial request to secede from the federation. The government of Canada was now constitutionally obliged to ensure that all of its political actions were in accord with the Constitution. This meant that should the government of Canada have decided to weigh in on how Quebec could leave the federation in the future, there was really only one process that the government of Canada could follow- the Constitutional process. With the *Constitution Act, 1982*, the government of Canada was legally bound to ensure that secession occur through negotiating an amendment to the Constitution of Canada. While Trudeau chose to leave this matter in abeyance through to his retirement in 1984, (in line with Lévesque's decision to continue the P.Q.'s commitment to sovereignty-association until he retired in 1985) the *Constitution Act, 1982* made it clear that the Constitution would now limit how the government of Canada could react to a mandate for secession.

CHAPTER THREE

THE POLITICALIZATION OF QUEBEC SECESSION AND A LEGAL/POLITICAL CATCH 22

The abeyance over *how* Quebec could be removed from the Canadian federation lasted well into the mid-1990's. Through the election of a new P.Q.-led government of Quebec in 1994 and through a second referendum on secession in 1995, the government of Canada refused to establish a position on *how* Quebec could be removed from the federation. Less than a year after the 1995 referendum, however, the government of Canada suddenly changed this approach. In August of 1996, the government of Canada announced its intentions to refer three questions to the Supreme Court of Canada aimed at clarifying how Quebec could be legally removed from the federation. Through this Reference, the government of Canada adopted the position that the secession of Quebec could only occur through negotiations and an agreement to use the amending formula in the Constitution to remove Quebec from the federation. The government of Canada's decision to initiate the *Quebec Secession Reference* in 1996, after years of leaving the matter in abeyance, raises two important questions. First, why did the government of Canada decide to break its code of silence and establish a position on *how* Quebec could be removed from the federation in 1996? Second, why did the government of Canada use the Supreme Court of Canada to do so?

This chapter will first demonstrate that the government of Canada was forced to establish a position on *how* Quebec could leave the federation in 1996 because, by this time, the courts were threatening to establish this position for them. Between 1990 and

1995, the government of Quebec had adopted the position that the Constitution of Canada and Canadian rule of law would not apply to the process of removing Quebec from Canada; that a Yes vote in favour of secession would give them a mandate to unilaterally declare independence. During this time, and through the 1995 secession referendum, the government of Canada remained silent on the matter and left its position in abeyance, notwithstanding its constitutional obligation to ensure that any alteration of the federation's structure took place through the use of the constitutional amending formula. Following the 1995 referendum, however, when a Quebec court agreed to examine a Quebec citizen's claim that the unilateral secession process which the government of Quebec based its referendum legislation on during the 1995 referendum threatened his constitutionally guaranteed rights as a Canadian citizen, the government of Canada had to either engage in the debate over *how* Quebec could leave, or allow the courts to potentially decide, on their own, *how* Quebec could legally be removed from the federation.

Second, this chapter will explain that the Supreme Court's reference jurisdiction offered a good way to manage the establishment of a federal position on *how* Quebec could leave. Between 1990 and 1996, the government of Quebec maintained, unopposed by the government of Canada, that secession was a purely political process, to which neither the Canadian Constitution nor Canadian rule of law would apply. According to the government of Quebec, if a majority of Quebecers gave their provincial government a mandate to remove Quebec from the Canadian federation, they could immediately and unilaterally declare independence, regardless of what the other governments in the federations said. Because the government of Canada did not openly contest this

politicization of Quebec's secession process between 1990 and 1995, it found itself in a difficult position to do so only months after almost losing a referendum on Quebec secession in 1995. This chapter will demonstrate that one major advantage of asking the Supreme Court to establish that secession had to occur within the framework of the Canadian Constitution was that it could minimize the chances of a backlash in support for secession from the voters of Quebec, who in this constitutionalization process would be denied a right to unilateral secession which, for over five years, they were told that they had.

3.1 The Radicalization of the Parti Québécois: Adopting a Unilateral Approach towards Quebec Secession

While Pierre Trudeau had been satisfied that the *Constitution Act, 1982* had addressed the major sources of Francophone alienation from the government of Canada and the federation at large, Quebec neo-nationalists and secessionists were outraged over the fact that the Constitution was finally amended without the consent of the government of Quebec.¹⁴⁴ They were, moreover, insulted over the fact that the 1982 changes were made without the approval of the government of Quebec, the government they saw as representing half of the two-nation Canada. After the deal was announced, the government of Quebec immediately set out to establish that the 1982 changes were illegitimate because they excluded the government of Quebec. Although several attempts by the government of Quebec to have the 1982 changes overruled failed, these efforts

¹⁴⁴ For the purposes of this Chapter I will be using the term "neo-nationalists" to describe all proponents of a Franco-Quebecer nation state, even though these groups varied, as demonstrated in the previous chapter, in what exact status they wanted Quebec to have either within or outside of the Canadian federation.

helped to reinforce the neo-nationalist's claim that the people of Quebec were "excluded" by the other governments in the federation; a claim that became accepted by the leadership of the Liberal Party in Quebec and the Progressive Conservative Party in Ottawa, and ultimately led to a new round of mega-constitutional negotiations aimed at undoing the national consensus that the *Constitution Act, 1982* aimed to establish.

3.1.1 Growing Divisions in the P.Q.

For over 15 years Lévesque had managed to keep the hard-liners in his party at bay. He had maintained his party's commitment to achieving sovereignty-association through negotiations with the other governments in the federation. However, in the wake of the failed referendum effort in 1980, and in the wake of the ratification of the 1981 constitutional reforms without the approval of the government of Quebec, hard-liners in the P.Q. became more assertive.

When debate broke out over how Quebec would leave the Canadian federation at the P.Q. convention on December 5, 1982, the membership's discontent with Lévesque's option for Quebec became apparent. One motion proposed to delete all references to "association" in the party program. Speakers complained that after 1980, "...people will think we are real dummies if we keep on talking about association."¹⁴⁵ Although this motion was defeated, a later motion presented by René Lévesque and calling on the membership to reaffirm their commitment to linking any proposals for secession to an offer of establishing an economic association with Canada, was also defeated. It was the

¹⁴⁵ As reported in Graham Fraser, *PQ: René Lévesque & the Parti Québécois in Power* (Macmillan of Canada, 1984), 307.

defeat of this motion that showed the true extent of the rift between the *étapistes* and hard-liners in the P.Q. after the events of 1980 and 1981.

One delegate speaking against the motion insisted that declaring independence unilaterally was the only option after Trudeau and the Premiers refused to negotiate in 1980. “We’ll get independence first, and then we’ll see. It would be masochistic, even obscene, to suggest an association now, after what happened in Ottawa.”¹⁴⁶ Speaking in favour of his motion, Lévesque made it clear to all of the delegates that if the P.Q. abandoned sovereignty-association, then he would leave the party.

If we have worked for thirteen years for sovereignty-association, it is because it is the best way to do it. That’s why we scuttled the RIN. That’s why we formed the Mouvement Souveraineté-Association. That’s why we created the Parti Québécois. If we defeat this motion, we are going back to the RIN, and we’re saying that we should have never created the Parti Québécois.¹⁴⁷

Lévesque insisted that it would be “suicidal” to try to achieve independence without an economic association with what would be left of the federation.¹⁴⁸ After he spoke on the motion to maintain association in the party program, Lévesque made it known to many delegates that if this motion failed, he would resign. “I am not going to stay if the party becomes the RIN.”¹⁴⁹

Notwithstanding Lévesque’s warnings, the resolution for maintaining sovereignty-association was soundly defeated by the delegates. Lévesque was infuriated, and several days after the convention announced that there would be an internal party referendum with a question asking members whether or not they agreed to re-establish the policy of negotiating an “economic association with Canada,” as part of the P.Q.’s

¹⁴⁶ Fraser, *PQ*, 308.

¹⁴⁷ Ibid. 308.

¹⁴⁸ Ibid. 306.

¹⁴⁹ Ibid. 308.

secession process.¹⁵⁰ If a majority of members voted in favour of this policy, then Lévesque would stay. Otherwise, he would leave. Although many P.Q. members were bitter over being forced to reject changes they had just made, in the end, 48 percent of the P.Q. members participated in the mail-in referendum, and 95 percent voted to in favour of “association” or “Lévesque.” While Lévesque had regained control over his party, the convention was clear evidence of the growing division among P.Q. members over *how* Quebec would leave the Canadian federation.¹⁵¹

3.1.2 *A Parting of Ways*

The uneasy truce between the hard-liners and the *étapistes* in the P.Q. did not last for long. With support for secession dropping in the polls and the Quebec Liberal’s fortunes on the rise, René Lévesque decided that the only way for the P.Q. to remain in power was to not make achieving secession a central element in the P.Q. campaign platform for the 1985 provincial election.¹⁵² On Monday, November 19, 1984, Lévesque informed the party executive that he would propose the change at the next P.Q. policy conference. “We must surely resign ourselves, in my humble opinion, at least for the next election, to the fact that sovereignty must not be at stake, neither in totality, nor in parts more or less disguised.”¹⁵³ This was the last straw for many hard-liners in the party, including several high-profile ministers in Lévesque’s government. On Thursday,

¹⁵⁰ Fraser, *PQ*, 312.

¹⁵¹ Ibid. 313.

¹⁵² Opinion polls in November of 1984 had the P.Q. at 23 per cent popularity with the Liberals at 58 per cent. In *The Globe and Mail*. “2 Lévesque ministers quit, 3 more may go.” Friday, November 23, 1984. A3.

¹⁵³ As reported in *The Globe and Mail*, “Sovereignty out as primary issue in Quebec vote,” Tuesday, November 20, 1984. A1.

November 23, 1984, Jacques Parizeau, who was at that time Lévesque's Minister of Finance, along with Transport Minister Jacques Léonard, Camille Laurin of Social Affairs and Women's Minister Denise Leblanc-Bantey, submitted their resignations.¹⁵⁴ In his resignation letter, Parizeau called Lévesque's decision to ignore secession in the next provincial election "a sterile and humiliating route."¹⁵⁵

Although Parizeau decided to resign his seat as a MNA, he decided to remain active in the P.Q. and led a hard-liner campaign to take over its leadership. Lévesque remained in control, however, until his retirement from politics on October 10, 1985.¹⁵⁶ His replacement, a fellow *étapiste* Pierre-Marc Johnson, led the P.Q. into the provincial election held on December 2, 1985 and lost to the Liberals, who won 99 of the 122 seats in the National Assembly.¹⁵⁷ Although Johnson found ways to manage internal party strife between hard-liners and *étapistes* for almost two years, an unrelenting rebellion from hard-liners opposed to the Meech Lake Accord during the fall of 1987 forced him to resign as leader on November 10, 1987.¹⁵⁸ Just over a month later, on December 21, 1987, Jacques Parizeau announced his candidacy for the leadership of the P.Q.¹⁵⁹ Parizeau promised that as leader he would ensure that the P.Q. was a "sovereigntist party

¹⁵⁴ As reported in *The Globe and Mail*, "Two Lévesque ministers quit, thee more may go," Friday, November 23, 1984. A1.

¹⁵⁵ Ibid.

¹⁵⁶ For a good overview of Lévesque's long-term battles against the radical or militant elements of his party, see Fraser, *PQ*.

¹⁵⁷ As reported in *The Globe and Mail*, "Quebec Liberals win in landslide," Tuesday, December 3, 1985. A1.

¹⁵⁸ As reported in *The Globe and Mail*, "Parizeau touted to replace Johnson," Wednesday, November 11, 1987. A5.

¹⁵⁹ The Meech Lake Accord will be explained in the next section. As reported in *The Globe and Mail*, "Parizeau plans to run for leadership of PQ on separatist platform," Tuesday, December 22, 1987. A1.

before, during and after the election.”¹⁶⁰ As it turned out, no one else challenged Parizeau and he was acclaimed leader of the P.Q. on March 18, 1988.¹⁶¹

With Jacques Parizeau at its head, hard-line secessionists controlled the P.Q. for the first time since it was formed in 1968. Jacques Parizeau was one of the early members of the P.Q. and had served as Lévesque’s Minister of Finance between 1976 and 1984. While Lévesque had chosen to effect secession through negotiations, Parizeau believed that there was no way to guarantee that negotiations would lead to secession and therefore favoured a more revolutionary style of liberating Quebec from the Canadian federation unilaterally, with negotiations if possible.¹⁶² The experience of the 1980 referendum only strengthened these convictions.¹⁶³

Parizeau understood that effecting secession via a unilateral declaration of independence would require international recognition to be legitimate, especially because the government of Canada would probably not recognize Quebec as being independent after a UDI. He believed that the only way to force the government of Canada to recognize UDI made by the Government of Quebec would be to have the most influential country in the world, the United States of America, recognize the independence of

¹⁶⁰ As reported in *The Globe and Mail*, “Parizeau refuses to spell out plans for winning sovereignty,” Monday, January 18, 1988. A5.

¹⁶¹ As reported in *The Globe and Mail*, “Unopposed Parizeau takes over PQ leadership,” Friday, March 18, 1988. A5.

¹⁶² Lévesque, *Memoirs*, 300. Also, Parizeau was convinced that the other governments in the federation would not negotiate the secession of Quebec in advance of a clear mandate from the voters of Quebec anyways. Jacques Parizeau, *Pour un Québec souverain*, (Montreal: VLB Éditeur, 1997), 48. “Cela étant, j’ai alors la profonde conviction que personne au Canada ne voudra discuter de partenariat tant et aussi longtemps qu’une majorité de Québécois n’auront pas voté OUI à un référendum spécifiquement destiné à réaliser la souveraineté du Québec.”

¹⁶³ In his memoirs, Parizeau insisted that the only way to avoid the trap set by Trudeau during the 1980 referendum was to avoid linking secession to any other agreement with the other governments in the federation. “La première leçon que j’ai tirée du référendum de 1980, c’est que, si on veut réaliser la souveraineté, il faut dire dans le détour.” In Parizeau, *Pour un Québec souverain*, Page 38.

Quebec.¹⁶⁴ To convince the United States to recognize an independent Quebec, other countries, such as France, would have to lobby them. “Le seule chose qui pourrait faire bouger les États-Unis, ce serait que la France annonce qu’elle va reconnaître le Québec.”¹⁶⁵ This entire plan, however, depended upon receiving a clear mandate from the voters of Quebec. Before any country would recognize the Government of Quebec’s UDI, they had to be convinced that secession was the true intention of the voters of Quebec.¹⁶⁶

As for the voters of Quebec, Parizeau had to convince them that a UDI was a perfectly legitimate process for achieving independence for Quebec; notwithstanding the fact that the Constitution of Canada required major changes to the federation to be made through negotiating an amendment to the Constitution, via the 1982 amending formula. Parizeau had to convince Quebec voters that the Constitution of Canada did not apply to secession. Between 1991 and 1995 he would attempt to do this through a campaign to entrench secession as a purely political act, exempt from the Canadian Constitution and rule of law. After over fifteen years with René Lévesque at its head, Parizeau’s acclamation as leader radicalized the P.Q., and created a different secessionist threat which the government of Canada would have to deal with. Parizeau’s success in establishing secession as a purely political act would greatly depend upon the reaction of the government of Canada to that claim.

3.2 The Politicalization of Quebec Secession

¹⁶⁴ Parizeau, *Pour un Québec souverain*, 49.

¹⁶⁵ Ibid. 49.

¹⁶⁶ Parizeau, *Pour un Québec souverain*, 38.

Jacques Parizeau, as opposition leader, has his first opportunity to establish his unilateral secession process as a policy of the government of Quebec in 1991, when he was asked to help develop an all-party report on the future political and constitutional options for Quebec. When the report was released, recommendations on the secessionist option for Quebec included provisions for a unilateral declaration of independence. It, along with recommendations on considering a new constitutional reform package offer from the other governments in the federation, was entrenched in provincial legislation later that year. The second opportunity for Jacques Parizeau to establish secession as a “purely political” process came during his 1994 election campaign and the campaign leading up to the 1995 sovereignty-partnership referendum in Quebec. During the course of the campaign, Parizeau established two more pieces of Quebec legislation based on making a UDI. The government of Canada, throughout this politicalization process, remained silent for various reasons, leaving no federal opposition to the P.Q.’s arguments that the Constitution and Canadian rule of law would not apply to the secession of Quebec from Canada.

3.2.1 Parizeau & Bourassa’s Bill 150

The first opportunity that Parizeau had to establish secession as a purely political process came in 1990, after several provinces backed out of a constitutional deal, the Meech Lake Accord that would have given Quebec a special status in the federation in exchange for its approval of the constitutional changes of 1982. To force the provinces back to the negotiating table, Bourassa asked Parizeau to help him design a new

negotiating strategy aimed at establishing the secession of Quebec as the only alternative to another failed attempt to entrench Quebec's Meech Lake demands in the Constitution. Parizeau used this opportunity to convince Bourassa's government to establish, in referendum legislation, that secession was a political act exempt from the Constitution and Canadian rule of law.

3.2.2 Prime Minister Mulroney's Broken Promise of a New National Consensus

In his platform for the 1983 federal P.C. Party leadership race, Brian Mulroney, a lawyer from Baie Comeau Quebec, promised that if he became the leader, his top priority would be to take whatever steps were necessary for an electoral breakthrough in the province of Quebec. Mulroney insisted that it was because of a string of failures in that province, 4 seats in 1968; 2 in 1972; 3 in 1974; and 2 in 1979, that their party had not been given many opportunities to form the Government of Canada.¹⁶⁷ To make this breakthrough, Mulroney insisted that he would listen to the concerns of neo-nationalists and other Quebecers who believed that their province needed a "special status" in Confederation.

Mulroney agreed with the neo-nationalist argument that the primary responsibility for protecting and promoting the Francophone language and culture in Canada should reside with the government of Quebec. Therefore, while he supported the 1982 entrenchment of minority language rights, he argued that this accomplishment was "tarnished" by the "possible reduction" of Quebec's powers to advance legislation related to the protection and promotion of the French language and culture in Quebec. Mulroney

¹⁶⁷ Brian Mulroney, *Where I Stand* (Toronto: McClelland and Stewart, 1983), 90.

insisted that the national consensus that Trudeau established in 1982 was not set in stone, and that as leader of the PC Party he would initiate another round, a Quebec round, of mega constitutional negotiations to change that national consensus to something more acceptable for neo-nationalists in Quebec.¹⁶⁸

Brian Mulroney won his party's leadership and went to great lengths to include Quebec nationalists on his campaign team during the federal election of 1984.¹⁶⁹ On the campaign trail Mulroney promised that as Prime Minister, he would reopen mega-constitutional negotiations to bring Quebec into the constitutional fold "with honour and enthusiasm."¹⁷⁰ On September 4, 1984, the P.C. Party won enough seats across the country to form a majority government, including 58 of Quebec's 75 seats. Shortly after becoming Prime Minister, Mulroney gained a key ally in the government of Quebec to help him fulfill his promise when one of his close friends, Robert Bourassa, became the Premier of Quebec. During his campaign leading to the December 2, 1985 provincial election, Bourassa had listed a set of constitutional changes that, if made, would render the 1982 national consensus acceptable to the government of Quebec. Included in these changes were the recognition of Quebec as a "distinct society" and the establishment of a veto for Quebec on constitutional change.¹⁷¹

Although the other provinces were reluctant to once again engage in mega constitutional politics, during months of back-room negotiations between December of 1985 and May of 1987, Mulroney was able to convince the other premiers to accept

¹⁶⁸ Mulroney, *Where I Stand*, 66.

¹⁶⁹ Lucien Bouchard, *On the Record*, (Toronto: Stoddart Publishing Limited, 1994), 107. Well known secessionists such as Benoît Bouchard, Monique Landry and Gilles Loiselle were all P.C. candidates during the 1984 federal election. Benoit Bouchard and Monique Landry, for example, had been outspoken proponents of secession during the 1980 referendum. See Jean-François Lisée, *Le Tricheur: Robert Bourassa et les Québécois: 1990-1991*, (Québec: Les éditions Boréal, 1994), 240.

¹⁷⁰ Patrick J. Monahan, *Meech Lake: The Inside Story* (Toronto: University of Toronto Press, 1991), 42.

¹⁷¹ Roger Gibbins, *Conflict & Unity* (Scarborough: Nelson Canada, 1994), 340.

Bourassa's five conditions.¹⁷² In April of 1987 the first ministers met privately at Wilson House, the federal government's conference centre at Meech Lake in Gatineau Park, to negotiate a final proposal. On April 30, the first ministers emerged with an agreement signed by each province and the federal government.¹⁷³

The Meech Lake Accord proposed to give Quebec the "special status" that had been rejected by Lévesque and Trudeau during the late 1960's. The Accord proposed to include in the Constitution the statement that the Constitution of Canada would be interpreted in a manner consistent with "the recognition that Quebec constitutes within Canada a distinct society."¹⁷⁴ The Accord also proposed to include in the Constitution recognition that it was "the role of the legislature and Government of Quebec to preserve and promote the distinct identity of Quebec referred to in [the distinct society clause]."¹⁷⁵ Although the Accord touched on several other matters of Constitutional reform, including increasing the scope of the provincial veto over constitutional change and the creation of a provincial role in appointing judges to the Supreme Court of Canada, it was the distinct society clause that was meant to appease neo-nationalists in Quebec. This distinct society clause would change Trudeau's national consensus, which held that Quebec was no more distinct than New Brunswick or Manitoba in terms of promoting the interests of Franco-Canadians.

The first ministers agreed to a three-year ratification period during which the Accord would be debated and approved in the provincial legislatures and in Parliament.

¹⁷² The reluctance of many premiers to enter into negotiations over Bourassa's constitutional demands was explained in a Canadian Press piece in July of 1986. "Provinces criticize Quebec's demands." In *The Globe and Mail*. Monday, July 7, 1986 A1.

¹⁷³ As reported in *The Globe and Mail*. "Premiers approve of Quebec demands." Friday, May 1 1987 A1.

¹⁷⁴ Proposed 1997 Constitutional Accord. Section 2(1)b. Found in Michael D. Behiels Ed. *The Meech Lake Primer*. Appendix. page 541.

¹⁷⁵ Ibid. Page 541.

However, there was a catch. To ensure that the deal would not be undone, each of the first ministers promised to ratify the Accord as it stood, without any substantial changes. Unfortunately for Prime Minister Mulroney, elections changed the governments in Manitoba, New Brunswick and Newfoundland before these provinces could ratify the accord. Although New Brunswick was eventually convinced to sign, the governments of Manitoba and Newfoundland failed to ratify the Accord before the June 23 deadline. Mulroney's promise to bring Quebec into the Constitution with "honour" had failed.

3.2.3 *Negotiating with a Knife to the Throat: Bourassa and Parizeau's Bill 150*

In response to the failure of the Meech Lake Accord, Premier Bourassa decided to take a tougher approach towards mega-constitutional negotiations. During a televised address on Saturday, June 23, 1990, Bourassa blamed the failure of the Meech Lake Accord on the broken promises of several provincial governments, noting that they simply "...did not live up to their signatures."¹⁷⁶ He argued that mega-constitutional negotiations with the provinces had lost all credibility, and insisted that the government of Quebec would from now on only negotiate constitutional changes bilaterally with the government of Canada and not with the other provinces.¹⁷⁷ However, before his government would even consider another round of mega-constitutional negotiations, Bourassa promised that the Government of Quebec would take some time to reconsider Quebec's future within the Canadian federation.

¹⁷⁶ As reported in *The Globe and Mail*. "Bourassa sees a redefined role for his province." Saturday, June 23, 1990 A2.

¹⁷⁷ As reported in *The Globe and Mail*. "A critical moment in Quebec's history." Monday, June 25, 1990.

Bourassa wanted to make it clear that there would be serious consequences for another failed round of mega-constitutional talks. On several occasions during the debate over the Meech Lake Accord, Bourassa had warned that its rejection could lead to the secession of Quebec from Canada.¹⁷⁸ Opponents of the deal, however, dismissed these warnings as a bluff to force Canadians to accept the agreement.¹⁷⁹ After the failure of Meech, Bourassa decided to ensure that there would no longer be any doubt over his intentions to hold a second referendum on secession should another round of mega-constitutional negotiations fail. On June 19, 1990, six days after time limit for ratification of the Meech Lake accord had expired, Bourassa met with Jacques Parizeau to discuss the establishment of a special committee to examine possible options for Quebec's political future, including secession.¹⁸⁰ On September 4, 1990, Bourassa reached an agreement with Jacques Parizeau and passed *An Act to establish the Commission on the Political and Constitutional Future of Québec*.¹⁸¹

The Commission, which became known as the Bélanger-Campeau Commission (named after its two co-chairmen Michel Bélanger and Jean Campeau), was made up of eighteen members of the National Assembly, including Premier Bourassa and nine of his appointees and the Leader of the Opposition, Jacques Parizeau, and six appointees chosen by him, along with non-governmental members and three members from the House of

¹⁷⁸ Examples of these warnings will be given in the next section of this chapter.

¹⁷⁹ For example, see the comments of Pierre Trudeau as cited in the article "Separatism talk is a bluff, Trudeau says." *The Toronto Star*. Thursday, March 22, 1990 A13.

¹⁸⁰ "Bourassa, Parizeau close to deal Talks continue on chairman for probe into Quebec's future." *The Toronto Star*. Wednesday, July 11, 1990. A10.

¹⁸¹ *An Act to establish the Commission on the Political and Constitutional Future of Québec*. Found in The Government of Quebec. *Québec's Positions on Constitutional and Intergovernmental Issues: From 1936 to March 2001*. Québec City: Secrétariat aux affaires intergouvernementales canadiennes, 2001. Page 390.

Commons in Ottawa, one of whom was Lucien Bouchard.¹⁸² The mandate of the Commission was to “examine and analyse the political and constitutional status of Québec and to make recommendations in respect thereof.”¹⁸³ Between September of 1990 and March of 1991, the Bélanger-Campeau Commission met with six hundred individuals and groups, the majority of whom advocated more autonomy for Quebec.¹⁸⁴ Every option for Quebec was considered, including various forms of a special status for Quebec within the federation, and the potential status of an independent Quebec.

On March 28, 1991, the Commission released its report, and recommended a two-pronged approach towards future mega-constitutional negotiations.¹⁸⁵ The Report advised that Quebecers agreed that profound changes must be made to Quebec’s political and constitutional status.¹⁸⁶ “Two courses are open to Québec with respect to the redefinition of its status, i.e. a new, ultimate attempt to redefine its status within the federal regime, and the attainment of sovereignty.”¹⁸⁷ The Report advised that to prevent a never-ending debate, the government of Quebec should allow for one more offer from the other governments in the federation before moving directly to the secession of Quebec. “Should a final attempt to renew federalism fail, sovereignty would be the only course remaining.”¹⁸⁸ To facilitate this two-pronged approach, the Report advised the government of Quebec pass legislation setting a date for a referendum on secession, make preparations for that referendum, and only divert from holding the secession referendum

¹⁸² *An Act to establish the Commission on the Political and Constitutional Future of Québec*. Found in The Government of Quebec. *Québec’s Positions on Constitutional and Intergovernmental Issues: From 1936 to March 2001*. Québec City: Secrétariat aux affaires intergouvernementales canadiennes, 2001. Page 390.

¹⁸³ Ibid. 390.

¹⁸⁴ Russell, *Constitutional Odyssey*, 158.

¹⁸⁵ Commission sur l’avenir politique et constitutionnel du Québec. *Report of the Commission on the Political and Constitutional Future of Quebec*. (Quebec: Secrétariat de la Commission, 1991).

¹⁸⁶ Ibid. Page 72.

¹⁸⁷ Ibid. Page 73.

¹⁸⁸ Ibid. Page 73.

if it received an acceptable offer on constitutional change, agreed to in advance by the other provincial governments and the federal government, before the secession referendum deadline.

It was in describing the process for removing Quebec from the federation that the influence of Jacques Parizeau over the Report became apparent. The Report acknowledged that the Constitution of Canada had left provisions for removing a province from the federation in abeyance, neither providing for nor permitting secession. “The Canadian Constitution makes no mention of the right of the provinces to secede, that is, to withdraw from the federation.”¹⁸⁹ The Report then moved to clarify that abeyance, by insisting that only the principles of international law would govern how Quebec could become independent. “The democratic expression by Quebecers of their clear will to become an independent State, along with Québec’s commitment to comply with the principles of international law, would establish the political legitimacy of Québec’s seeking to attain its sovereignty.”¹⁹⁰ The Report explained that ultimately it was up to the international community to recognize whether or not a country as being independent. It advised that there were two ways to bring about that recognition: secession through negotiations and secession through a unilateral declaration of independence.

The Report advised that if the other governments in the federation agreed to negotiate, then, then the government of Quebec could effect the secession of Quebec from Canada through reaching an agreement with the other governments in the federation. The Report explained that with this process, negotiations to amend Quebec

¹⁸⁹ *Report of the Commission on the Political and Constitutional Future of Quebec*, 52.

¹⁹⁰ *Ibid.* 52.

out of the Constitution of Canada would probably take place *before* Quebec actually became independent.¹⁹¹ However, because only international law would govern secession, according to the Report, there was also a second, equally legitimate, way to remove Quebec from the federation: a unilateral declaration of independence.

The Report advised if the government of Quebec was unable to reach a satisfactory agreement negotiating independence, it could simply declare its independence. “Failing such an agreement, Québec would have to secede unilaterally, on the basis of an unequivocal, clearly expressed will among Quebecers to do so.”¹⁹² While recognition of Quebec’s independence would automatically follow the legal approach of negotiating secession, recognition of a unilateral declaration of independence would only come once the government of Quebec demonstrated that it had taken control of the federal government’s jurisdictions in Quebec, and had effective and exclusive control over the territorial integrity of Quebec.¹⁹³ This latter, unconstitutional, approach was a legitimate option for Quebec because, according to the Report’s reasoning, international law only required that the government of Quebec have complete and sovereign authority over its territory, regardless of whether that control was achieved through negotiations, or through a UDI.

On May 15, 1991, less than two months after the Bélanger-Campeau Commission released its report, the government of Quebec tabled Bill 150, *An Act respecting the process for determining the political and constitutional future of Quebec*.¹⁹⁴ Bill 150 set

¹⁹¹ Ibid. 52.

¹⁹² Ibid. 52.

¹⁹³ *Report of the Commission on the Political and Constitutional Future of Quebec*, 52.

¹⁹⁴ *An Act respecting the process for determining the political and constitutional future of Quebec*. Found in The Government of Quebec, *Québec’s Positions*, 400. For the purposes of clarity, I will continually refer to this Act as Bill 150, even though it was assented to on June 20, 1991, and became a law, or statute.

the main recommendations of the Bélanger-Campeau Commission into legislation, including the provisions for a secession referendum and a unilateral declaration of independence. It provided for the holding of a referendum on secession either between June 8 and June 22, 1992 or between October 12 and October 26, 1992. In preparation for that referendum, it provided for the establishment of a committee to examine matters related to the accession of Quebec to sovereignty. It also provided for the establishment of a committee to examine any offer of a new constitutional partnership, but only from the government of Canada. In short, Bill 150 gave the government of Canada until October 26 to come up with a new mega-constitutional offer before Bourassa would hold a referendum on the secession of Quebec from Canada.

Bill 150 also purported to give the government of Quebec a right to declare independence unilaterally. “If the results of the referendum are in favour of sovereignty, they constitute a proposal that Québec acquire the status of a sovereign State one year to the day from the holding of the referendum.”¹⁹⁵ The one difference between Bill 150 and the recommendations of the Bélanger-Campeau Commission was that the recommendations stated that positive results would mean “Québec will acquire the status of a sovereign State.” Bill 150 toned down this stipulation by stating that positive results “would constitute a proposal that “ Quebec acquire this status. Although Bill 150’s blurring of this issue was perhaps a legal exit strategy in case the legislation was challenged, Bill 150 nevertheless purported to give the Government of Quebec the right

¹⁹⁵ *An Act respecting the process for determining the political and constitutional future of Quebec*, 402.

to unilaterally effect the secession of Quebec from Canada. Parizeau's attempt to politicalize Quebec's secession process thus succeeded.¹⁹⁶

3.2.4 The government of Canada's complicity in Bourassa's Unilateral Secession Process

The unilateral secession provisions of Bill 150 were unconstitutional because they purported to give the government of Quebec the authority to overthrow the authority of the Constitution and the authority of the government of Canada in Quebec. As explained in the introduction of this paper, the government of Canada had a constitutional obligation to protect its sovereign authority in Quebec, and the territorial integrity of the country. It therefore should have challenged the unconstitutional provisions of Bill 150. Instead, Prime Minister Mulroney remained silent; left the government of Canada's position on how Quebec could leave the federation in abeyance; and focused his attention on cobbling together a new national consensus to offer to the government of Quebec.

Like the Government of Quebec, the Government of Canada also initiated hearings for a new round of mega-constitutional negotiations shortly after the failure of the Meech Lake Accord. On November 1, 1990, Prime Minister Mulroney established a "Citizen's Forum on Canada's Future," which was to meet with Canadians across the country to determine what was needed in a new national consensus for Canada.¹⁹⁷ Later, on December 17, 1990, a joint Senate and House of Commons committee was created by

¹⁹⁶ Parizeau boasted that even though Bill 150 did not guarantee a referendum on secession, it gave legitimacy to his secession process. "We got our referendum on sovereignty and the premier's signature. He may not think it's legally binding but it's politically binding." As cited in *The Toronto Star*. "Canada must woo Quebec top Bourassa aide says." Wednesday, March 27, 1991. A1.

¹⁹⁷ Russell, *Constitutional Odyssey*, 164.

Parliament to investigate ways to improve the process for amending the Constitution.¹⁹⁸

By the spring of 1991 Prime Minister Mulroney had also established a Ministry of Constitutional Affairs, headed by Joe Clark, and a Cabinet Committee on Canadian Unity to come up with a broad set of constitutional proposals.¹⁹⁹ The provinces and territories also established working committees to investigate into possible constitutional solutions. A Royal Commission on Aboriginal Peoples was established as well, to investigate the aboriginal situation in Canada and to make recommendations to the constitutional committee.²⁰⁰ Thus, by the time that Bourassa's Bill 150 was introduced in the National Assembly, the Government of Canada was already hard at work developing a new offer for the Government of Quebec.

Mulroney was also not in a good position to challenge the constitutionality of Bill 150 because he was complicit with Bourassa's strategy for tabling the bill in the first place: to force a mega-constitutional agreement on entrenching Quebec's "basic" demands into the Constitution.²⁰¹ The purpose of Bill 150 was not to advance the secession of Quebec from Canada, but to force mega-constitutional change, as Léon Dion (a political scientist from Quebec), explained in his submissions to the Commission on Quebec's political future. "English Canada will only give in—and even that is not sure—with a knife at its throat."²⁰² The P.Q. members of the Commission had argued that there should be a referendum on secession no matter what, and when this was downgraded in the final Report to the "option" of holding a referendum on secession, they accused

¹⁹⁸ Ibid., 164.

¹⁹⁹ Ibid., 164.

²⁰⁰ Ibid., 169.

²⁰¹ Michel Vastel, *Bourassa*, (Toronto: Macmillan Canada, 1993), 212.

²⁰² This quote is translated in Max Nemni's study "*The Politics of Secession in Quebec*." (Page 3) Max Nemni, *The Politics of Secession in Quebec: The Case of the Bélanger-Campeau Commission* (Quebec City: Université Laval Department of Political Science, 1994), 3.

Premier Bourassa of using secession as a threat. As one P.Q. member, Mr. Brassard, explained to the press on March 22, 1991: “We no longer have the assurances that there will be a referendum on sovereignty. The government’s strategy is clear: It is to use the commission’s recommendations and the conclusions as a means to exercise pressure, as a means of blackmail.”²⁰³ This would explain why Bourassa included the unilateral secession provisions in Bill 150.

The knife to the throat strategy embodied in Bill 150 was not, however, a new one. In fact, both Prime Minister Mulroney and Premier Bourassa had actually used this strategy during the dying months of the Meech Lake negotiations. Prior to, and especially after the Quebec provincial election on Monday, September 25, 1989 (an election in which Premier Bourassa won 92 of the 125 seats in the National Assembly but saw the P.Q. under Jacques Parizeau secure 40 per cent of the popular vote), both Prime Minister Mulroney and Premier Bourassa began warning the provinces who had not yet ratified the Meech Lake Accord that if the Accord failed the secession of Quebec could be a consequence.²⁰⁴

Bourassa used this knife to the throat strategy both in private and public debates over the Meech Lake Accord. During the 1989 provincial election campaign, Bourassa was directly warning Canadian citizens, through the press, that the failure of Meech would increase the chances that Quebec would leave the federation. “I don’t think the separation of Quebec can be positive, and to that extent I hope very much the Meech

²⁰³ As reported in *The Globe and Mail*. “Referendum question splits panel: PQ members want vote ‘on sovereignty, period.’” Friday, March 22, 1991. A1

²⁰⁴ As reported in *The Globe & Mail*. “Liberals retain big majority in Quebec.” Tuesday, September 26, 1989. A1.

Lake Accord will be ratified.”²⁰⁵ Prime Minister Mulroney issues similar warnings a week earlier during a CBC Radio interview.

And I can tell you this: If ever there is a referendum in the future, every Canadian watching that referendum vote come in, will be saying to himself or herself: My God, we could have avoided all of this for those terms of Meech Lake, which would have made Quebec a full part of Canada.²⁰⁶

When the media accused Bourassa of blackmail for similar warnings at a Quebec Liberal conference in February of 1990, it was Prime Minister Mulroney who came to his defence. After insisting that it was “unacceptable” to consider Bourassa’s warnings “blackmail” to force acceptance of the Meech Lake Accord, he issued a warning of his own. “I don’t accept the view that the Meech Lake accord can be set aside without consequences. I think there will be consequences but I can’t say what they would be right now.”²⁰⁷ It is thus not surprising that Prime Minister Mulroney’s initial reaction to the release of the *Report on the political and constitutional future of Quebec* was to inform opposition Members of Parliament that the future existence of the Canadian federation depended upon his party cooperating better with their parties to create a new constitutional offer for Quebec. “The future of Canada is the only important matter...The future of the Conservative Party, or of any member of the Conservative party, pales into insignificance when compared with the importance of the future of the nation.”²⁰⁸ Perhaps, then, one of the reasons why Mulroney did not challenge the unconstitutional provisions of Bill 150 was because he, like Bourassa, believed that the threat of the

²⁰⁵ As cited in *The Globe and Mail*. “Meech crucial, Bourassa warns Anglophones.” Tuesday, September 12, 1989. A4.

²⁰⁶ As reported in *The Toronto Star*. “Meech Lake: Time to cool the rhetoric.” Thursday, September 28, 1989. A33.

²⁰⁷ As cited in *The Toronto Star*, “PM rejects view that Bourassa is using threats to push Meech,” Wednesday, February 28, 1990. A3.

²⁰⁸ As cited in *The Globe and Mail*, “Canada’s future paramount, Mulroney says,” Friday, April 26, 1991. A6.

secession of Quebec from Canada would convince Canadian politicians and citizens to support a new constitutional package addressing the demands of the government of Quebec.

3.2.5 *Opposition to Bill 150*

Not everyone ignored the unconstitutional provisions of Bill 150. For example, the Bill itself had established a Commission d'étude des questions afférents à l'accession du Québec à la souveraineté (Commission) to study questions related to *how* Quebec could become independent. The Commission assembled a group of five experts in international law to explain what effect, if any, secession would have on the territorial integrity of Quebec.²⁰⁹ In their submission to the Commission, the experts made it clear that international law did not fill the Constitution of Canada's abeyance on *how* a province could leave the federation. They explained that international law only provided rules for the secession of colonial territories.

In Quebec's case, they insisted that international law would neither govern the process of secession, nor guarantee any of the attributes, including territorial integrity, of an independent Quebec. In short, international law would only apply to Quebec *after* the international community recognized it as an independent state. L'accession à la souveraineté d'un territoire est une simple question de fait au regard du droit

²⁰⁹ These experts were: Thomas M. Franck, a professor of law and international studies at New York University, Rosalyn Higgins, professor at the London School of Economics, Alain Pellet, professor of public law at the Université de Paris X & member of the United Nations Commission on International Law, Malcolm N. Shaw a professor of law at the University of Leicester, and Christian Tomuschat, professor of law at Bonn University & President of the United Nations Commission on International Law. Commission d'étude des questions afférents à l'accession du Québec à la souveraineté. *Exposés et études Volume 1: Les Attributs d'un Québec souverain* (Quebec: Bibliothèque nationale du Québec, 1992), 378.

international: le nouvel État est considéré comme tel si son existence est effective. La reconnaissance par les États tiers...constitue un test de cette effectivité.²¹⁰ The experts thus clarified that the “democratic expression by Quebecers of their will to become an independent state,” and the government of Quebec’s “commitment to comply with principles of international law,” would not guarantee international recognition of a UDI, as was suggested in the Report of *Commission sur l’avenir politique et constitutionnel du Québec*.

Another submission to the Commission, from Stephen A. Scott, a law professor from McGill University, agreed with the international experts that international law did not give the voters of Quebec or their provincial government a right to declare independence unilaterally.²¹¹ Scott explained, therefore, that the only source of authority and legitimacy for the actions of the government of Quebec was found in the Constitution of Canada. He insisted that any act, including a unilateral declaration of independence, taken outside the framework of the Constitution, had no political legitimacy, regardless of whether or not it was based on a “democratic expression by Québecers.”²¹² The only way for Quebec to be removed from the federation, argued Scott, was to amend the Constitution of Canada with the constitutional amending formula contained in Part V of the *Constitution Act, 1982*. Scott made it clear that under Canadian law, there was no other method for constitutional change than the amending formula contained in the Constitution.²¹³

²¹⁰ *Les Attributs d’un Québec souverain*, 444.

²¹¹ *Ibid.* 471.

²¹² *Commission sur l’avenir politique et constitutionnel du Québec. Report of the Commission on the Political and Constitutional Future of Quebec*. (Quebec: Secrétariat de la Commission, 1991), 52.

²¹³ *Ibid.* 472.

Scott went even further to argue that a unilateral declaration of independence would not only be unconstitutional, but criminal. For him, a UDI had to be seen for what it truly was: an extra-constitutional method of ending the government of Canada's sovereignty in Quebec. "En droit canadien, il est élémentaire que toute tentative de renverser l'autorité gouvernementale par des moyens extra-constitutionnels – tout acte de ce fait révolutionnaire – est non seulement nul, mais en princip aussi en soi un fait criminel."²¹⁴ Scott argued that in the last resort, it would be the duty of the government of Canada to defend, by any means including force, the Constitution and territorial integrity of Canada against any threats, including a UDI made by the government of Quebec.²¹⁵ Notwithstanding the issues raised by Scott and the experts in international law, the government of Quebec maintained its position that Quebec could separate unilaterally, and the government of Canada remained silent on the matter.

3.2.6 *The Demise of the Charlottetown Consensus Report*

By the summer of 1991, the government of Canada's consultations on a new constitutional consensus were reaching full steam. On June 20, 1991, the Beaudoin-Edwards Committee tabled its Report, recommending that the amending formula adopted in 1982 be changed to the formula that Trudeau had promoted in 1971, which gave a constitutional veto to Ontario and Quebec.²¹⁶ On June 27, 1991, the Citizens' Forum on

²¹⁴ *Report of the Commission on the Political and Constitutional Future of Quebec*, 473.

²¹⁵ *Ibid.* 473.

²¹⁶ As reported in *The Globe and Mail*. "Give politicians the last word, committee says." Friday, June 21, 1991. A6.

Canada's Future released its Report.²¹⁷ After receiving submissions from over 400,000 Canadians the Forum advised that future mega-constitutional politics be conducted with transparency, not behind closed doors, and that Senate reform, recognition of Quebec's uniqueness, and recognition of Aboriginal rights were Canadian's top constitutional priorities.²¹⁸ In response to these reports, on September 24, 1991, the government of Canada published a list of 28 unity proposals for constitutional change in a document titled *Shaping Canada's Future Together*.²¹⁹ Included in these proposals were the demands Quebec had made during the Meech Lake Accord negotiations, including a distinct society clause, with the provision that it would only apply to the Charter of Rights and Freedoms. It also included provisions for many of the issues left out of the Meech Lake Accord including: Aboriginal self-government in the Constitution, reforming the Senate and how appointments are made to the Supreme Court of Canada.

These proposals were sent to a joint parliamentary committee (headed by Senator Gérald Beaudoin and MP Dorothy Dobbie), which would have until February of 1992 to consult with interest groups and individuals and to tune the report into an acceptable proposal for all regions of the country.²²⁰ On February 28, 1992, the Beaudoin-Dobbie Committee finished its cross-Canada consultations and released its Report, entitled *A Renewed Canada*. It proposed major changes to the government of Canada's original proposals such as: abandoning a federal proposal aimed at entrenching property rights in

²¹⁷ As reported in *The Globe and Mail*. "Provide leadership, Spicer tells Ottawa." Friday, June 28, 1991. A1.

²¹⁸ *Report of the Citizen's Forum on Canadian Unity*, 1991, available from <http://www.uni.ca/spicer.html>; archived under "Reports, Proposals and Accords," at the UNI.CA Website; accessed 15 January 2004.

²¹⁹ As reported in *The Globe and Mail*. "Canada's future in people's court." Wednesday, September 25, 1991. A1. See the government of Canada's proposals, *Shaping Canada's Future Together*, 1991, available from <http://www.uni.ca/future.html>; archived under "Reports, Proposals, Accords," at the UNI.CA Website; accessed 15 January 2004.

²²⁰ Russell, *Constitutional Odyssey*, 192.

the Charter; adopting a proposal to guarantee an Aboriginal right to self-government in the Constitution; and calling for less decentralization of powers from the central government.²²¹ It was from this Report that Joe Clark, on behalf of the government of Canada, along with the provinces and aboriginal representatives, cobbled together a best offer for the government of Quebec.

Between February and August 1992, the first ministers (with the exception of the Premier of Quebec), met to agree on a final constitutional package. Although Bourassa had insisted on letting the “rest of Canada” come up with a proposal for his government to accept or reject during these meeting, he soon became worried that the final product would not have enough to pass in his province. On August 4, Bourassa ended Quebec’s official holdout by meeting with the other first minister to go over their agreement. On Senate reform, the other premiers had agreed to reform the senate based on provincial equality, making no special provisions for the government of Quebec. To compensate, the premiers agreed to Bourassa’s demand to entrench into the constitution a stipulation that Quebec would have 25% of the combined seats in the House of Commons and Senate.²²² With this final agreement, the first ministers met once a gain in Charlottetown on the 28th of August to formally sign the agreement that would be put to the country in Canada’s first national referendum.

In the final Charlottetown Accord Quebec was once again given a distinct society clause. Section 2.(1) stipulated that the Constitution of Canada, including the Canadian Charter of Rights and Freedoms, would be interpreted in a manner consistent with the following fundamental characteristics ”...[c.] Quebec constitutes within Canada a

²²¹ As reported in *The Globe and Mail*. “Weighty constitutional report ‘only a start.’” Monday, march 2, 1992. A1. For a detailed description of the changes see Russell, *Constitutional Odyssey*, 180-189.

²²² Russell, *Constitutional Odyssey*, 192.

distinct society, which includes a French-speaking majority, a unique culture and a civil law tradition.”²²³ Other proposed reforms included: Senate reform, reform of the Supreme Court, the entrenchment of the right of self-government for First Peoples, an amending formula and a promise to discuss “other issues” in the future, such as inland fisheries, intellectual property and property rights.

In October of 1992, Bourassa amended Bill 150 to provide for a referendum on the Charlottetown Accord instead of a referendum on sovereignty, making way for a Canada-wide referendum to be held on October 26, 1992. Since Quebec had its own referendum laws, technically speaking, it would be a different referendum, but across the country the question would remain the same. “Do you agree that the Constitution of Canada should be renewed on the basis of the agreement reached on August 28, 1992?”

Opposition to the Charlottetown Consensus came from several different sources. Lucien Bouchard, as leader of the secessionist Bloc Québécois, came out strongly against the Accord. He insisted that the Charlottetown Accord gave Quebec less than the Meech Lake Accord did when Quebec clearly needed more.²²⁴ Former Prime Minister Pierre Trudeau also emerged from retirement to dismiss the Accord. In an article published in *Maclean's* on September 28, Trudeau outlined the “traditional demands” of neo-nationalist influenced governments from Lesage to Bourassa and described them as “blackmail” for gaining more and more concessions from the federal government.²²⁵ Aboriginal women’s organizations also opposed the agreement, because they had not

²²³ *Consensus Report on the Constitution*, Charlottetown, August 28, 1992. In Russell, *Constitutional Odyssey*. Appendix.

²²⁴ See Bouchard’s essay in Mark Charlton and Paul Barker Ed., *Crosscurrents: Contemporary Political Issues* (Scarborough: Nelson Canada, 1994), 143.

²²⁵ Pierre Elliott Trudeau, *Against the Current: Selected Writings, 1939-1996*. (Toronto: McClelland & Stewart, 1996), 262.

been adequately consulted. Most importantly, the Canadian people, as it turned out, were not ready to sign on to those years of hard work. In the Quebec polls the yes side was not once ahead of the No campaign.²²⁶ In early October, opposition ranging from 71% in the Atlantic region to 89% in British Columbia objected to this special status for Quebec.²²⁷ On referendum day, the 26th of October, 75% of all eligible Canadian voters turned out to defeat the Charlottetown Accord. Although it was not a national blow-out, 54.2% voted against the accord while 44.8% supported it. In the province of Quebec, 55.4 percent opposed while British Columbia recorded the most opposition with 67.8%.

Perhaps the only winners to come out of the Charlottetown Accord negotiations were P.Q. leader Jacques Parizeau and B.Q. leader Lucien Bouchard. Parizeau had managed to entrench his unilateral secession process in provincial legislation. Even though it had been dropped, its adoption in Bill 150 gave legitimacy to his argument that secession was a political process that was not bound to the Constitution of Canada or Canadian rule of law. The Conservatives were severely defeated and only managed to win two seats. Bouchard increased the membership of the B.Q. to 54 seats, while the Western-based Reform Party, under Preston Manning, won 52 seats. To make matters worse for federalists, in 1994 Jacques Parizeau and a rejuvenated Parti Québécois returned to power in Quebec on a campaign platform promising to hold a referendum on outright secession of Quebec from the federation.

3.3 The 1995 Sovereignty Partnership Referendum

²²⁶ Russell, *Constitutional Odyssey*, 224.

²²⁷ Ibid., 226.

The second opportunity that Jacques Parizeau had to establish secession as a purely political process came after he was elected Premier of Quebec in 1994, and during the year long campaign leading up to the 1995 sovereignty-partnership referendum. In preparation for the referendum, Parizeau tabled referendum legislation based on a unilateral declaration of independence, and went to great lengths to convince Quebecers that only international law would apply to the secession of Quebec from Canada. In response, the government of Canada remained silent. It had its own strategy for defeating the secessionist option in the referendum, and it involved adopting a code of silence on *how* Quebec could be removed from the federation. Because the government of Canada participated in the campaign, yet kept its position on how Quebec could leave the federation in abeyance and encouraged others also to avoid that debate, it lent legitimacy to Parizeau's argument that secession was a political process exempt from the Canadian Constitution and rule of law.

3.3.1 The Draft Bill of Jacques Parizeau

Less than two years after the government of Quebec decided to hold a referendum on the Charlottetown Accord instead of on sovereignty, the government of Canada once again had to face the threat of a UDI. During the 1994 provincial election in Quebec, Jacques Parizeau and the P.Q. ran on a platform clearly stating that should they form the Government of Quebec, they would hold a referendum on the secession of Quebec from Canada within a year. Moreover, they clearly stated that if a majority of Quebecers voted in favour of their option for Quebec in a provincial referendum, then they would accept

that vote as a mandate to effect the secession of Quebec from Canada unilaterally. On December 6, 1994, after defeating Liberals and only weeks after being sworn in as the government of Quebec, Jacques Parizeau and the P.Q. tabled legislation in the National Assembly spelling out exactly how his government intended to transform the province of Quebec into an independent country.

Parizeau's *Draft Bill Respecting the Sovereignty of Quebec* began by stating "Quebec is a sovereign country," and then set out the first actions the government of Quebec would undertake as the government of an independent Quebec.²²⁸ The *Draft Bill* stated, among other things, that the government of Quebec: would draft a new constitution; would retain the territorial boundaries it had been given as a province of Canada; would permit citizens of Quebec to retain Canadian citizenship along with Quebec citizenship; would continue to use the Canadian dollar; and would continue to be included in all of the international treaties that the Canadian federation had been part of. The *Draft Bill* also authorized the government of an independent Quebec to negotiate a new economic association between Quebec and Canada. However, this and all of these actions would occur once Quebec was already an independent nation-state.²²⁹

The *Draft Bill* made it clear that negotiations were not necessary for the government of Quebec to remove Quebec from the Canadian federation. After the *Draft Bill* was debated and approved by the National Assembly, it would be submitted to the population of Quebec for their approval in a province-wide referendum. Parizeau proposed that the referendum questions should be clear and to the point. "Are you in favour of the Act passed by the National Assembly declaring the sovereignty of Quebec?"

²²⁸ *An Act respecting the sovereignty of Québec. (Draft Bill)* (Québec: Québec Official Publisher, 1994).

²²⁹ Ibid.

Yes or No”²³⁰ If a majority of Quebecers voted in favour of the Bill, the Government of Quebec will then be able to use its official passage as a declaration of independence any time after the referendum. Section 16 of the *Draft Bill*, entitled “Coming to Force,” made this clear. “This Act comes into force one year after its approval by referendum, unless the National Assembly fixes an earlier date.”²³¹

The UDI provisions contained in the *Draft Bill* should not have been a surprise to the Government of Canada. Jacques Parizeau was a long-time proponent of outright secession and had made his commitment to effecting secession unilaterally perfectly clear during the months prior to becoming the Premier of Quebec.²³² He publicly blamed the failure of the 1980 referendum on Lévesque’s commitment to achieve sovereignty-association through negotiations with the Government of Canada. He insisted that this mistake would not be made again, and that if the P.Q. formed the next government of Quebec, his government’s secession process would not pin independence on negotiations with the Government of Canada.²³³ Although he would not rule out negotiations *after* Quebec was independent, the process of gaining independence would be based on the voters of Quebec giving the Government of Quebec a mandate to make a UDI. “The decision to have a country will be taken by Quebeckers and by Quebeckers only.”²³⁴

²³⁰ *Draft Bill*, 1994.

²³¹ Ibid.

²³² During the lead-up to the 1994 Quebec provincial election, Jacques Parizeau and the P.Q. Executive published a booklet entitled “Sovereignty: A Clear and Coherent Plan.” The plan explained clearly that during its term in power, a P.Q. government would hold a referendum on secession, and if the results were positive, declare independence unilaterally. “This referendum will be the act that will bring into being a sovereign Quebec.” As reported in Frances Russell’s editorial “Manifesto for independence.” *Winnipeg Free Press*. Tuesday, April 26, 1994.

²³³ As reported in *The Globe and Mail*. “Separation not negotiable, Parizeau says Free trade protects Quebec from Canada’s reprisals, PQ leader warns.” Friday, May 20, 1994. A1.

²³⁴ As reported in *The Globe and Mail*. “No consent needed to separate, Parizeau says PQ Leader argues Chretien legitimized process by participating in 1980.” Thursday, May 26, 1994.

3.3.2 *The Referendum Strategy of Jean Chretien: Maintaining the Code of Silence*

On Monday, December 21, 1994, Jean Chrétien, who became Prime Minister in 1993, revealed his government's response to the government of Quebec's referendum strategy. During an interview on national television, Chrétien made it clear that he understood the unconstitutional nature of Parizeau's *Draft Bill*. "It is not in the Constitution. If you want to talk legality and constitutionality there is nobody who will argue that it is legal and constitutional." However, he also made it clear during his interview that the Government of Canada had no intentions to challenge the government of Quebec's claims that it could unilaterally effect the secession of Quebec from Canada. "They have the burden of proof to tell the people of Quebec how they will do it. It is not for me. It's for them. For me, I know they have a hell of a hill to overcome and I will not make it easy for them."²³⁵ Although he did not agree with Parizeau's secession process, Chrétien decided that it was best to leave the government of Canada's position on *how* Quebec could be removed from the federation in abeyance and fight the referendum at the political level, playing by Parizeau's rules.

The primary reason why Chrétien wanted to avoid challenging the legality of Parizeau's *Draft Bill*, and weigh in on *how* Quebec could leave the federation, was due to the fact that the federalist option in Quebec was ahead in the polls. Chretien was confident that Premier Parizeau could never convince a majority of Quebecers to vote Yes in a referendum on outright secession. Public opinion polls supported his view.²³⁶

²³⁵ As reported in *The Globe and Mail*. "Quebec separation illegal, non-constitutional, PM says." Tuesday, December 20, 1994. A6.

²³⁶ Eddie Goldenburg, one of Chretien's most trusted advisors, has indicated that the prime minister was confident, up to the last few weeks of the referendum campaign, that the federalists would win. See

On August 8, 1994, a month before the P.Q. won the provincial election, only 38 per cent of Quebecers were in favour of secession.²³⁷ This dropped to 37 per cent on August 29, 1994. When the P.Q. won the election, it did so with only 44.7 per cent of Quebec's popular vote, while the Liberals secured 44.3 per cent.²³⁸ Between the election of the P.Q. in September of 1994 and early-October of 1995, polls consistently indicated that a majority of Quebecers would not vote in favour of secession. Even in mid-October, 1995, when polls began to show equal numbers of Quebecers polled in favour and against secession, Chrétien remained confident that on referendum day a majority would vote No, as they did in 1980. "En 1980, les resultants étaient beaucoup plus serrés que cette fois et ça a fini 60-40."²³⁹

By playing by Parizeau's rules, however, the government of Canada risked lending further legitimacy to Parizeau's argument that secession was a purely "political" process. If the government of Quebec won the referendum and declared independence unilaterally, the Government of Canada would not have much ground to stand on because they played by these unconstitutional rules. To insist after the fact that the law be respected and that Quebec be amended out of the Constitution through negotiations would not have held ground.

The Prime Minister, nevertheless, was willing to take these risks. Instead of addressing the unconstitutionality of a UDI, he considered any discussion on the question of Quebec's secession process to be a form of constitutional debate, which he promised

Lawrence Martin's biography of Jean Chretien. *Iron Man: The Defiant Reign of Jean Chretien* (Toronto: Viking Canada, 2003), 123. Also, Prime Minister Chretien professed his confidence to the media shortly after the P.Q. won the 1994 election. See "PM plays down victory." *Winnipeg Free Press*. Tuesday, September 13, 1994.

²³⁷ As reported in *The Toronto Star*. Monday, August 8, 1994. A1.

²³⁸ As reported in *The Toronto Star*. Tuesday, September 13, 1994.

²³⁹ As reported in *La Presse*. "Jean Chrétien reste confiant." Dimanche, 15 octobre 1995. A5.

during his 1993 election campaign not to engage in. Even before the Charlottetown Accord had failed (as Leader of the Opposition), Jean Chrétien had insisted that pass or fail, the Accord would be the last round of mega-constitutional politics that he and, if he formed it, his government of Canada would engage in.²⁴⁰ Chrétien adopted and maintained a code of silence on constitutional questions through the election and insisted that his government would promote national unity through good governance, and if need be, non-constitutional renewal of the federation.²⁴¹ He made it clear, after the release of Parizeau's *Draft Bill*, that questions related to the legality of Quebec's unconstitutional secession process were also subject to this code of silence.

3.3.3 Three Challenges to the Government of Canada's Code of Silence

Not only did the government of Canada not weigh in on the legality of the government of Quebec's secession process, but they discouraged other groups and institutions from doing so as well. Between the election of the Parti Québécois in 1994 and the referendum on secession in 1995, the government of Canada made every effort to silence concerns over the unconstitutionality of Quebec's secession process stemming from the press, opposition Members of Parliament, and individual Canadians. The government of Canada's efforts to silence opposition to the government of Quebec's unconstitutional secession process led many voters in Quebec to believe that the

²⁴⁰ Debates of the House of Commons. September 8, 1992. Page 12734.

²⁴¹ For an interesting look at Chrétien's approach towards federalism through non-constitutional renewal, see Harvey Lazar. "Non-Constitutional Renewal: Toward a New Equilibrium in the Federation." in Canada: *The State of the Federation 1997* (Ottawa: Institute of Intergovernmental Relations, 1997). Chrétien made good on this promise during the 1993 federal election campaign. In their 112 page campaign platform entitled "Creating Opportunity: The Liberal Plan for Canada," the word "constitution" was not written once. Liberal Party of Canada, *Creating Opportunity: The Liberal Plan for Canada*. (Ottawa: Liberal Party of Canada, 1993).

government of Quebec was correct when it argued that Quebec's secession process was entirely political.

Political and constitutional commentators in the press were the first group to press the government of Canada to weigh in on the legality of the government of Quebec's secession process. They first questioned members of the federal government in early 1994, and maintained a debate over the constitutionality of Quebec's secession process for the duration of the referendum campaign. For example, in an article in the *Ottawa Citizen* a panel of five constitutional experts, including Stephen Scott, who had challenged Bourassa and Parizeau's Bill 150 several years earlier, agreed that Parizeau's *Draft Bill* was unconstitutional in whole, or at least in part.²⁴² The declaration "Quebec is a sovereign country" was unconstitutional because Quebec was indeed a province and, as Francois Chevrete, a law professor at the Université de Montréal pointed out, "...you can only draft legislation on areas over which the present Constitution allows."²⁴³ Scott reiterated his past arguments that the entire bill was unconstitutional because it proposed the effect the secession of Quebec outside of the terms of the Constitution.²⁴⁴

In his piece for *The Globe & Mail*, Toronto lawyer E. James Arnett argued that the government of Canada was under no obligation to recognize a UDI. "There is no

²⁴² François Chevrete, a law professor at the Université de Montréal, Steven Scott, a law professor at McGill University, Armand de Mestral, an International Law scholar, all came out in the press against Parizeau's *Draft Bill*, insisting that secession could only occur through mega constitutional negotiations. See *The Ottawa Citizen*, Monday, December 12, 1994. A4. Political commentator William Johnson, in the *Montreal Gazette*, called Parizeau's unilateral secession process a revolutionary attempt to overthrow the Government of Canada's sovereignty in Quebec. He criticised the Government of Canada's code of silence and insisted that they use the courts to clarify that secession could only be achieved through mega constitutional negotiations. See *The Montreal Gazette*, "False dichotomy: Courts, not the army, can be used to fight secession." Friday, January 6, 1995. Patrick J. Monahan, a law professor from Osgoode Hall Law School at York University, argued that international law did not support the Government of Quebec's claims that it could unilaterally decide the borders of an independent Quebec. See "International law isn't on Parizeau's side." In *The Globe and Mail*, May 19, 1994. A29.

²⁴³ *The Ottawa Citizen*, Monday, December 12, 1994 A4

²⁴⁴ Ibid.

particular legitimacy to the results of a referendum held by the government of the Province of Quebec, because that government is made up of legislators elected simply to govern over certain classes of matters pursuant to the Constitution of Canada.”²⁴⁵ The federal government, he argued, would have no legal obligation to recognize the results of a referendum. Not only were federal jurisdictions a target of Parizeau’s UDI, but other rights protected in the Constitution were at risk. Arnett explained that the federal government also had an obligation to protect aboriginal peoples in Quebec. Arnett agreed with Scott and others that to do so, it would be up to the federal government to stop the government of Quebec from making a UDI. “The federal government has the constitutional authority to take all measures necessary to prevent any move by Quebec toward secession and a constitutional duty to defend the territorial integrity of Canada.”²⁴⁶

Each and every time the government of Canada was asked to comment on the matter, however, its representatives refused. The Minister of Justice and Attorney General of Canada, Allan Rock, for example, told reporters in December of 1994 that the unconstitutional nature of Parizeau’s referendum strategy was only a “technical question.” He argued that the “real question” was for Quebecers in a referendum.”²⁴⁷ The problem with this neutrality was that it left the government of Quebec’s claim that the Constitution would not apply to the secession of Quebec unchallenged. By remaining neutral in the debate in the media over the legality of Quebec secession, the government of Canada further helped deconstitutionalize Quebec secession.

²⁴⁵ E. James Arnett. “The Law is on Canada’s side, not the separatists,” in *The Globe and Mail*, January 3, 1995. A17.

²⁴⁶ Ibid.

²⁴⁷ As reported in *The Globe and Mail*. “Is separation legal? The question is a red herring.” January 9, 1995.

The second group to challenge the government of Canada's code of silence was the Reform Party through their Members of Parliament in the House of Commons. Even before the Quebec provincial elections in the summer of 1994, Preston Manning, the leader of the Reform Party, was convinced that the government of Canada should clearly establish a position on how a province could be removed from the federation.²⁴⁸ Manning was convinced that he and his party would take up the cause of communicating the "hard realities" of Quebec secession to all Canadians after a meeting with former prime minister Pierre Trudeau in April of 1994. According to Manning, Trudeau agreed that questions about the consequences of separation should be raised in advance of the Quebec election and referendum. "He did not hesitate at all in saying, yes, such questions should be raised, and publicly."²⁴⁹

On May 12, 1994, Manning and the other the Reform Party Members of Parliament held a special meeting to develop a "Quebec strategy" that would promote the harsh realities of secession and encourage the adoption of a federal position on how a province could be removed from the Canadian federation.²⁵⁰ On Tuesday June 7, 1994, it was the Reform Party's turn to set the debate of the House of Commons, and they chose "National Unity" as the topic. After speaking to great lengths on the virtues of the Canadian federation, Manning informed the House that his party was working to develop a "reasoned, principled, federalist response to all those troubling questions and issued which the threat of Quebec secession raises for Canada."²⁵¹ In answering these questions, Manning hoped that the government of Canada would begin to establish "contingency"

²⁴⁸ Preston Manning, *Think Big: Adventures in Life and Democracy* (Toronto: McClelland & Stewart Ltd., 2002), 124.

²⁴⁹ Ibid., 128.

²⁵⁰ Manning, *Think Big*, 129.

²⁵¹ Debates of the House of Commons. Tuesday, June 7, 1994.

legislation for the eventuality that a majority of Quebecers voted in favour of Quebec secession.

The government of Canada, wishing to preserve its code of silence, reacted coldly to this Reform Party initiative. On behalf of the Government of Canada, Deputy Prime Minister Sheila Copps insisted that it was obvious that the Reform Party did not understand the Government of Canada's strategy for dealing with the emerging secessionist threat, "because the approach taken by the leader of the Reform Party and his party today actually fuel the cause of breaking up the nation. They fuel the cause of separation." Copps insisted that any discussion related to the use of a UDI would only help the secessionist goal of promoting Canada as a broken federation. Copps insisted that her government was elected on a platform to focus on a jobs agenda and to "stay off the eternal treadmill of constitutional dissension."²⁵² Copps maintained her government's strategy of focusing on the positives of being Canadian when she told the Reform Party Members of Parliament that "...the best way to ensure Canadian unity is to strengthen the things which unite us, not the things which separate us."²⁵³

Regardless of the government of Canada's persistent code of silence on the matter, the Reform Party continued in its efforts to clarify the "harsh realities" of a unilateral secession process. On June 8, 1994, The Reform Party sent a letter to Prime Minister Chrétien urging him to begin to counter the arguments being advanced by Jacques Parizeau and the P.Q. that the government of Quebec could unilaterally effect the secession of Quebec from Canada.²⁵⁴ Attached to the letter were 20 questions, and

²⁵² Debates of the House of Commons. Tuesday, June 7, 1994.

²⁵³ Ibid.

²⁵⁴ E. Preston Manning. *The Open Letter to the Prime Minister, June 8, 1994* (Ottawa: Library of Parliament, 1994), 3.

twenty Reform Party opinions on how each question should be answered, related to how the Government of Canada should prepare for a second referendum on Quebec secession.²⁵⁵ By late September of 1994, however, the government of Canada had still not responded to the Reform Party's twenty questions.²⁵⁶

After the election of the Jacques Parizeau and the P.Q. to form the government of Quebec, all Parliamentarians knew that there would be a second referendum on secession. However, whenever members of the Reform Party asked senior government members questions related to Parizeau's secession plans, the Government simply dismissed their concerns as pure speculation over something that simply would not happen.²⁵⁷ Time and time again, government members repeated that the best way to ensure unity was through good government, and that any questions related to the secession of Quebec from Canada were hypothetical because the secessionists would never win in Quebec, as Prime Minister Chrétien pointed out on December 9, 1994. "I do not even have to answer a hypothetical question. There is no doubt in my mind that Canada will win. Come on!"²⁵⁸

The government of Canada's code of silence was so effective that between September of 1994 and October of 1995, not one Liberal Member of Parliament commented, during Members Statements or during Question Period, on the legality of Quebec's secession process. More importantly, by September of 1995 the Reform Party had simply given up on asking the government questions related to Parizeau's UDI. Between the reopening of Parliament in September of 1995 and the referendum on

²⁵⁵ Reform Party of Canada. "Reform Responses to the Twenty Questions Posed to the Prime Minister on June 8, 1994." Ottawa: Library of Parliament, 1994. Page 1.

²⁵⁶ See Statement by Mr. Bob Ringma (M.P. Nanaimo-Cowichan) during Members Statements. In the Debates of the House of Commons. September 30, 1994.

²⁵⁷ Debates of the House of Commons. Monday, October 17, 1994.

²⁵⁸ Debates of the House of Commons. December 9, 1994.

October 30, 1995, the Reform Party did not ask the government one question related to the legality of the government of Quebec's secession process. Without the Reform Party, opposition to the government of Quebec's secession process simply vanished from Parliament. In terms of public perception, the Reform Party's decision to stop questioning the unconstitutionality of Quebec's secession process only added to the public perception that the Constitution and Canadian rule of law did not apply to the secession of a province from the federation.

The third challenge to the government of Canada's constitutional code of silence came from an individual Canadian citizen, Guy Bertrand. In January of 1995 Bertrand, a Quebec City lawyer and former high-ranking member of the Parti Québécois, publicly spoke out against the government of Quebec on the grounds that their secession process was unconstitutional and illegal and would threaten the rights and freedoms constitutionally guaranteed to him, as a Canadian citizen, in the Charter of Rights and Freedoms contained in the *Constitution Act, 1982*.²⁵⁹ Bertrand insisted that Parizeau's *Draft Bill* constituted "...an actual parliamentary and constitutional coup d'état, a fraud upon the Canadian Constitution and an abuse of powers, resulting in a violation and a denial of his rights and freedoms and those of all Québec taxpayers."²⁶⁰ On July 31, 1995 Bertrand wrote a letter to the Attorney General of Quebec requesting a reference to the Quebec Court of Appeal on the validity of both the *Draft Bill* and its proposed UDI. In his letter to Parizeau, he added the following. "Should your answer be negative, I will have no choice but to proceed with all legal steps necessary to protect my rights and

²⁵⁹ "PQ referendum strategy 'suicidal.'" In *The Globe and Mail*. Tuesday, January 17, 1995. Page A1.

²⁶⁰ *Bertrand c. Bégin et al.* [1996] R.J.Q. 2393 (September 8, 1995).

freedoms guaranteed by the Canadian Charter of Rights and Freedoms.”²⁶¹ Bertrand also sent letters to the Prime Minister and Attorney General of Canada, asking them to refer the legality of Quebec’s proposed secession process to the Supreme Court of Canada.

On behalf of the Government of Canada, the Attorney General of Canada, Allan Rock, wrote back to Bertrand and informed him that the federal government was not interested in challenging Parizeau’s referendum legislation.²⁶² Bertrand received a response from a representative of the government of Quebec on August 8, 1995, in the pages of *Le Soleil*: “Mr. Bertrand wishes to deny Quebecers their right to vote...Quebec’s right to self-determination is indisputable.”²⁶³ In response to this disinterest, Bertrand filed a motion for interlocutory measures, seeking a declaratory and injunctive relief against the legality and the holding of the referendum.

In his motion to the Court, Bertrand argued that Parizeau’s *Draft Bill*, and its provisions for a UDI, seriously threatened several of the rights and freedoms that he was constitutionally guaranteed, in the Charter of Rights and Freedoms entrenched in the *Constitution Act, 1982*, as a Canadian citizen.²⁶⁴ These included his right to Canadian citizenship, his right to vote and to run for office in federal elections (S. 3, *Constitution Act, 1982*); his right to enter, remain in and leave Canada as he pleases and; his right to move and to take up residence throughout the country and to pursue the gaining of a livelihood therein. (S. 6, *CA, 1982*) Bertrand was asking the court take action to protect his rights, as it was required to do under Section 24. (1) of *CA, 1982*, which was also threatened. It stated: “Anyone whose rights or freedoms, as guaranteed by this Charter,

²⁶¹ *Bertrand c. Bégin et al.* 1995.

²⁶² Warren J. Newman, *The Secession Reference: The Rule of Law and the Position of the Attorney General of Canada* (Toronto: York University Press, 1999), 10. Footnote 10.

²⁶³ *Bertrand c. Bégin et al.* 1995.

²⁶⁴ *Ibid.*

have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate.”²⁶⁵ All together, Bertrand claimed that his rights in sections 2, 3, 6, 7, 15 and 24 of the Canadian Charter of Rights and Freedoms were threatened by Parizeau’s *Draft Bill*.²⁶⁶

Bertrand was seeking several remedies. He wanted the Quebec Superior Court to make 30 different judicial declarations and to respond to 20 requests for an injunction, essentially aimed at preventing the government of Quebec from proceeding with the referendum, and establishing that secession could only occur according to the Constitution of Canada.²⁶⁷ For example, he wanted the court to declare that the government of Quebec’s plans to make a UDI threatened public order in Quebec, sought to destroy the territorial integrity of Canada, and ignored the process for amending the Constitution as provided for in Part V of *THE CONSTITUTION ACT, 1982*.²⁶⁸ Further, he wanted the court to issue an injunction, ordering the government of Quebec to withdraw from the National Assembly the *Draft Bill* on the sovereignty of Quebec and to order that no bill authorizing the National Assembly of Quebec to unilaterally declare the sovereignty of Quebec, without the consent of Canada, be submitted for the approval of the citizens by means of a referendum.²⁶⁹

On August 24, 1995 the Attorney General of Quebec responded to Bertrand’s action by filing a motion to dismiss his case, arguing that in hearing Bertrand’s arguments the Court would be interfering with the legislative powers of the National Assembly. However, the court disagreed with the government of Quebec, and on August

²⁶⁵ Section 24(1) *Constitution Act, 1982*.

²⁶⁶ *Bertrand c. Bégin et al.* 1995.

²⁶⁷ *Ibid.* 156.

²⁶⁸ *Ibid.* 158.

²⁶⁹ *Ibid.* 159.

31 agreed to hear Bertrand's arguments. After failing to block Bertrand's action, the government of Quebec withdrew from the case altogether, arguing that they could not "subjugate Quebecer's right to vote to a decision of the courts."²⁷⁰ The court proceedings continued in absence of the government of Quebec. During his hearings, Bertrand reiterated his arguments that the government of Quebec's *Draft Bill* was unconstitutional because the government of Quebec intended to use it to unilaterally effect the secession of Quebec from Canada. By making a UDI, Bertrand argued that the government of Quebec would be unilaterally severing the rights and freedoms that he enjoyed as a Canadian citizen. Thus, Bertrand argued that the secession process advanced by Parizeau and his allies constituted a threat to his right as guaranteed in the Charter of Rights and Freedoms. He insisted that Parizeau's *Draft Bill* constituted "...an actual parliamentary and constitutional coup d'état, a fraud upon the Canadian Constitution and an abuse of powers, resulting in a violation and a denial of his rights and freedoms and those of all Québec taxpayers."²⁷¹

Before the Court could render a decision, on September 7, 1995, the government of Quebec revised its *Draft Bill*, (as will be explained in the next section) replacing it with *Bill 1, An Act Respecting the Future of Québec*.²⁷² Although there were several new elements in *Bill 1*, the provisions for a Unilateral Declaration of Independence remained. On September 8, 1995, Justice Robert Lesage rendered a decision. In light of the Quebec Government's reaffirmation of its right to effect secession unilaterally in *Bill 1*, Justice

²⁷⁰ "PQ avoids federalist's court challenge" In the *Times Colonist*. Saturday, September 2, 1995. Page A8.

²⁷¹ Bertrand v. Bégin, 1995.

²⁷² (Bill 1) *An Act respecting the future of Quebec*. Quebec: Québec Official Publisher, First session, Thirty-fifth legislature, 1995. A copy of Bill 1 can be found in *Québec's Positions on Constitutional and Intergovernmental Issues: From 1936 to March 2001*. Government of Quebec: Secrétariat aux affaires intergouvernementales canadiennes at the ministère du Conseil exécutif, 2001, 444.

Lesage affirmed that the actions of the Government of Quebec and the process set forth in both the *Draft Bill* and *Bill 1* demonstrated that the government of Quebec had undertaken, on behalf of Quebecers, "...to proceed with a unilateral declaration of independence and to have Québec recognized as a state separate from the rest of Canada."²⁷³ Justice Lesage noted that it was evident that the government of Quebec did not intend to comply with the constitutional amending formula in Part V of the *Constitution Act, 1982* to effect secession and therefore was giving itself a mandate not conferred upon it by the Constitution of Canada. Therefore the "...actions of the Government of Québec to achieve the secession of Québec are a repudiation of the Constitution of Canada."²⁷⁴ The "clearly illegal actions of the Government" led Lesage to conclude that the Mr. Bertrand was entitled to a remedy that the Court considered appropriate and just in the circumstances.

While Justice Lesage had no problem determining that the government of Quebec's secession process represented a threat to the constitutionally entrenched rights and freedoms of Bertrand, he did have a problem with preventing the referendum from going ahead. Justice Lesage pointed out that there was nothing wrong with holding a referendum, even if it is on an unconstitutional proposal. "A referendum, by its nature, is a consultative process. It does not offend the legal or constitutional system."²⁷⁵ Although as of September 8, 1995, the Government of Quebec was maintaining its unconstitutional secession process, Lesage noted that it was still quite possible for the government of Quebec to change Bill 1 to conform to the Constitution of Canada.²⁷⁶ Thus, Lesage

²⁷³ Bertrand v. Bégin, 1995.

²⁷⁴ Ibid.

²⁷⁵ Ibid.

²⁷⁶ Ibid.

decided to give the Government of Quebec and the other governments participating in the reference proceedings the opportunity to ensure that Quebec's secession process would not violate the Constitution of Canada by issuing a declaratory judgment.

Lesage argued that a declaratory judgement, instead of an injunction, would be better suited to prevent the Government of Quebec from using the referendum to make a UDI. "A declaration does not interfere with the workings of the executive branch or the legislative branch," noted Lesage. "On the contrary, it enables the government to try to find a way to satisfy the judicial declaration, which helps in maintaining the balance between our democratic institutions."²⁷⁷ In short, Lesage expected that the Government of Quebec would respond to a judicial declaration by modifying its *Draft Bill* so that it conformed to the Constitution of Canada and no longer poses a threat to the rights and freedoms of Guy Bertrand. Thus, Lesage declared that Bill 1, *An Act Respecting the Future of Quebec*, "constitutes a serious threat to the rights and freedoms of the Plaintiff as guaranteed by the Canadian Charter of Rights and Freedoms, in particular, by Sections 2, 3, 6, 7, 15 and 24(1)."²⁷⁸

In spite of Justice Lesage's clear ruling that the unilateral secession process adopted by the government of Quebec constituted a repudiation of the Constitution of Canada, neither the government of Quebec nor the government of Canada issued a formal response to the Superior Court's ruling.²⁷⁹ Polls continued to show the federalist option for Quebec in the lead, and a month before the referendum was no time to begin a debate over a process that the government of Canada had for close to a year freely participated in. As indicated at the outset of this section, the polls were still in Chrétien's favour,

²⁷⁷ Bertrand v. Bégin, 1995.

²⁷⁸ Ibid.

²⁷⁹ Debates of the House of Commons. Monday, September 18, 1995.

thus, not even a ruling from the Superior Court of Quebec, that the government of Quebec's secession legislation constituted a repudiation of the Constitution of Canada, could end Prime Minister Chrétien's code of silence.

3.3.4 *A Close Call: Capitalizing on the Government of Canada's Code of Silence*

The decision of Jean Chrétien to leave his government's position on the legality of Parizeau's *Draft Bill* in abeyance was ultimately exploited by the secessionist movement in Quebec and almost lead to a victory during the 1995 referendum. Parizeau was able to fully politicize Quebec's secession process through the passing of referendum legislation based on a UDI, and able to use the government of Canada's code of silence to create "winning conditions" during the referendum campaign. Although Parizeau would ultimately lose the 1995 referendum, the 1995 referendum campaign served to further politicalize Quebec's secession process.

Chrétien had been confident that he could beat Parizeau on a straight up, "yes" or "no" question on removing Quebec from the federation. During the spring of 1995, it became apparent he was correct. Polls conducted in late February had support for Parizeau's option for Quebec at a steady 40 per cent.²⁸⁰ Moreover, Parizeau had set up province-wide commissions to discuss and receive feed back on his *Draft Bill*, and the many of the reports coming back from these commissions indicated that some moderate secessionists would not vote "yes" unless secession was linked with an offer for an

²⁸⁰ As reported in the *Winnipeg Free Press*. "Sovereignists banking on Bouchard." Saturday, February 18, 1995.

economic association with what was left of Canada.²⁸¹ In response to these bad polls, Lucien Bouchard, leader of the Bloc Québécois in the House of Commons, forced Premier Parizeau to make a change in plans.

On June 11, 1995, Bouchard managed to convince Parizeau, and Mario Dumont, the leader of the Democratic Action party who supported secession with an association, to sign onto a new secession strategy based on offering an economic partnership with what was left of Canada.²⁸² The agreement was similar to Parizeau's *Draft Bill*, with the exception that it bound the government of Quebec, after a Yes vote, to offer to negotiate an economic partnership between Quebec and what would be left of Canada before it declared independence.²⁸³ Although it promised a referendum based on proposing this economic "partnership," the June 12 agreement maintained the unilateral provisions from Parizeau's original *Draft Bill* and Bill 150. "The negotiations shall not exceed one year, unless the National Assembly decided otherwise. If the negotiations prove to be fruitless, the National Assembly will be empowered to declare the sovereignty of Québec without further delay."²⁸⁴

The agreement between Bouchard, Dumont and Parizeau changed everything. No longer would the referendum be on straight-up secession, but on sovereignty AND an attempt to maintain an economic partnership with what would be left of the Canadian federation. Prime Minister Chrétien recognized this, but decided to maintain his code of silence anyway. In the wake of this change in direction, the polls were still clearly

²⁸¹ As reported in the *Times Colonist*. "Musing about referendum conjures up 1980 question." Thursday, March 2, 1995.

²⁸² As reported in *The Globe and Mail*. "Quebec Party leaders to sign referendum deal." Monday, June 12, 1995.

²⁸³ This agreement was included in *Bill 1*, 1995.

²⁸⁴ *Bill 1*, 1995.

against straight up independence.²⁸⁵ Also, on the day the agreement was signed a poll published in *Le soleil* found that Jean Chrétien's popularity was at 68 per cent, the highest ever recorded for a Canadian prime minister.²⁸⁶ This may explain why he and his cabinet decided to maintain their referendum strategy. Chrétien's senior advisors were convinced that notwithstanding the government of Quebec's change in approach, they could convince the voters of Quebec that what they were really voting for was Parizeau's straight up independence.²⁸⁷ By ruling out any "association" with what was left of Canada, the Prime Minister could continue to portray the referendum as being on independence only.

The problem with this strategy was that while the government of Canada tried to convince Quebecers that they were voting on straight up independence, the government of Quebec and members of the Bloc Québécois did everything they could to convince Quebec voters that they were voting to negotiate a new partnership between an independent Quebec and what was left of Canada. For example, during a debate in the House of Commons on October 16, 1995, Chrétien made it clear to a Bloc Québécois member that the vote was on secession only. "Today we have to answer a question put by the Leader of the Opposition and his former leader, the Premier of Quebec, about whether we should separate. When asked the question: "Should we separate?", the people of Quebec will say no."²⁸⁸ B.Q. members, however, were suggesting that the question was not on secession per se, but on a partnership, like Mr. Bernard St-Laurent, M.P. Manicouagan made clear during Members Statements on Wednesday, October 25,

²⁸⁵ As reported in *La Presse*. "Souveraineté assortie d'une union?" Lundi 19 juin 1995. A7.

²⁸⁶ As reported in *Le soleil*. "La popularité de Jean Chrétien." Lundi 12 juin 1995. A12.

²⁸⁷ Martin, *Iron Man*, 123.

²⁸⁸ *Debates of the House of Commons*. Monday, October 16, 1995. Oral Questions.

1995. “Over the years, the people of Quebec and Canada have developed strong bonds of friendship, and they have many interests in common. A partnership would be in everyone’s best interests, since more than 300,000 jobs on each side are at stake. Partnerships are clearly the way of the future.”²⁸⁹

On September 7, 1995, the P.Q. government recalled the National Assembly and tabled their final secession process plan, in Bill 1, *An Act Respecting the Future of Québec*. Bill 1 began with the heading “The Parliament of Québec Enacts as Follows.” The first article of Bill 1 declared that Quebec would proclaim sovereignty. “The National Assembly is authorized, within the scope of this Act, to proclaim the sovereignty of Québec. The proclamation must be preceded by a formal offer of economic and political partnership with Canada.” Most of the details in Bill 1 were similar to those in Parizeau’s *Draft Bill* and to those in the June 12, agreement. The date of the referendum would be October 30, 1996 and the bill stated that the conclusion of a partnership treaty with Canada would have to take place within a year.

The negotiations relating to the conclusion of the partnership treaty must not extend beyond October 30, 1996, unless the National Assembly decides otherwise. The proclamation of sovereignty may be made as soon as the partnership treaty has been approved by the National Assembly or as soon as the latter, after requesting the opinion of the orientation and supervision committee, has concluded that negotiations have proved fruitless.²⁹⁰

This Bill would not be passed until a majority of Quebecers voted Yes in the October referendum. Also unveiled on September 7, was the new Bouchard influenced referendum Question. “Do you agree that Québec should become sovereign, after having made a formal offer to Canada for a new Economic and Political Partnership, within the

²⁸⁹ *Debates of the House of Commons*. Wednesday, October 25, 1995. Members Statements.

²⁹⁰ Bill 1, 1995.

scope of the Bill respecting the future of Quebec and of the agreement signed on June 12, 1995? YES or NO?”²⁹¹

In mid-October of 1995, the fortunes of Prime Minister Chrétien began to change. To further convince Quebecers that the referendum was on “sovereignty partnership,” and not outright independence, October 12, 1995 Parizeau appointed Lucien Bouchard as the “chief negotiator” for Quebec after a “Yes” vote.²⁹² Shortly after the polls began to swing in the secessionists favour. On October 12, 1995, a poll published in *Le Devoir* had 49.5 per cent for the yes, and 50.5 per cent for the no.²⁹³ On October 18, 1995, a poll published in *Le soleil* had the yes side ahead at 50.6 per cent, with the no receiving 49.4 per cent.²⁹⁴ Another poll published in *Le soleil* on October 22, 1995, had slightly higher numbers for the no side with 49.8 per cent, but with the yes side still in the lead with 50.2 per cent.²⁹⁵ Some of the members of Chrétien’s cabinet, such as Fisheries Minister Brian Tobin, began to regret not challenging Parizeau’s referendum legislation early on, but admitted that with under two weeks to go before the referendum there was not much to do about it. “We could not say the referendum didn’t matter, that it didn’t count, that it would not be ‘official,’ because Ottawa had engaged in the process before Lucien Bouchard took command of the sovereigntist movement, back when the polls indicated the separatists would be rejected.”²⁹⁶ A massive unity rally, and some promises from

²⁹¹ As cited in Robert Young. *The Struggle for Quebec* (Kingston: McGill-Queen’s University Press, 1999), 26.

²⁹² As cited in *The Guardian*. “What does the future hold for Lucien Bouchard.” Friday, October 13, 1995. A6.

²⁹³ As reported in *Le Devoir*. “Un sondage du PQ place le OUI et le NON à égalité.” Jeudi 12 octobre 1995. A6.

²⁹⁴ As reported in *Le soleil*. “CROP donne une légère avance au OUI.” Mercredi 18 octobre 1995. A7.

²⁹⁵ As reported in *Le soleil*. “OUI: 50,2% NON: 49,8%” Dimanche 22 octobre 1995. A7.

²⁹⁶ Brian Tobin, *All in Good Time* (Toronto: Penguin Canada, 2002), 142.

Prime Minister Chrétien to see if Quebec could not be given a non-constitutional veto and distinct society status may have been just enough to avert disaster.²⁹⁷

On October 30, Quebec voted no, by a whisker, with 50.58% of the votes for No, and 49.42% of the votes for Yes. Jacques Parizeau made it clear that he had been prepared to declare independence within weeks of the vote if necessary. The government of France, moreover, had been on the record that it would give Quebec official recognition as an independent country should Parizeau have chosen that path. While the government of Canada had narrowly averted dealing with whatever the consequences of a Yes vote would be, they had allowed the government of Quebec to set a clear precedent that should a majority of voters choose yes, then Quebec could be removed from the federation unilaterally.

3.4 Breaking the Code of Silence: The Government of Canada's Response to a Political/Legal Catch-22

The third reason why the government of Canada referred questions related to the secession of Quebec from Canada to the Supreme Court in 1996 was because a reference to the Supreme Court was perhaps the only way that the Government of Canada could have extracted itself from a political/legal Catch-22 in which it found itself following the 1995 referendum.

Following the referendum, Quebec City lawyer Guy Bertrand decided to launch a second round of proceedings against the government of Quebec's unconstitutional

²⁹⁷ For a good look at the last minute unity efforts of the government of Canada see Kenneth McRoberts' book *Misconceiving Canada: The Struggle for National Unity* (Don Mills: Oxford University Press, 1997), 221-231.

secession process. Bertrand's renewed action placed the federal government in a political/legal Catch 22. If the Government of Canada ignored the proceedings, then it risked allowing Guy Bertrand and the judiciary to establish the constitutional process for the secession of a province from the federation. On the other hand, having permitted a secession process based on UDI legislation in 1991 and during the 1995 Referendum, and having ignored the original court decision on the Bertrand hearings prior to the referendum, the government of Canada was in a poor position to flip flop, only months later, and publicly declare that secession could only occur through mega-constitutional negotiations and an amendment to the Constitution. Both options were thus problematic for the government of Canada. However, by referring questions with a limited scope to the Supreme Court, the government of Canada could have the judiciary establish that secession could only occur through mega-constitutional negotiations. In other words, it could constitutionalize Quebec secession, while avoiding some of the more controversial political issues related to the secession of Quebec from Canada.

As mentioned in the introduction of this thesis, in the wake of the 1995 referendum, proponents of a "Plan B" strategy increased pressure on the government of Canada to better prepare itself for a possible third referendum on Quebec secession. Shortly after the referendum, the government of Canada took action on several "Plan A" promises that Chrétien made during the dying hours of the referendum campaign. On Monday, November 27, 1995, Prime Minister Chrétien introduced a "unity package" that proposed to give: non-constitutional recognition of Quebec as a "distinct society;" a non-constitutional veto to Quebec, Ontario, the Atlantic provinces and the Western provinces over constitutional change; and a promise to allow the provinces to play a greater role in

labour-market training.²⁹⁸ By early December, the Prime Minister's unity package was approved in principle in the House of Commons. However, it was quickly becoming clear that there was not going to be any immediate "Plan B" legislation to complement this "Plan A" unity package.²⁹⁹

Quebec City lawyer, Guy Bertrand, was not prepared to wait for the government of Canada to adopt "Plan B" on its own.³⁰⁰ On January 3, 1996, Bertrand filed a revised action with the Quebec Superior Court to initiate a second challenge of the government of Quebec's UDI legislation.³⁰¹ Along with a request for a permanent injunction against referendums based on a UDI, Bertrand's asked the court for a judicial declaration stating that the Government of Quebec's plans to use a UDI to effect the secession of Quebec amounted to a "forcible constitutional take over and a coup d'état," that threatened the democratic rights and fundamental freedoms of all Canadians living in Quebec.³⁰² Further, Bertrand insisted that as long as the government of Quebec maintained that it could unilaterally effect the secession of Quebec from Canada, his rights will continue to be threatened and that it was the duty of the Superior Court of Quebec to ensure that governments governed in accordance with the Constitution.³⁰³

²⁹⁸ As reported in *The Globe and Mail*. "PM offers Quebec distinct status Reforms providing veto, some decentralization of federal power, condemned by province." Tuesday, November 28, 1995. A1

²⁹⁹ As reported in *The Guardian*. "Commons approves veto bill." Tuesday, December 5, 1995. A1

³⁰⁰ Bertrand, *Enough is Enough*, 110.

³⁰¹ Apart from Guy Bertrand, Montreal professor Stephen Scott, on behalf of Roopnarine Singh and other Quebecers, had also filed a motion for declaratory judgement in the Superior Court of Quebec on October 23, 1995. This motion was still before the court when Bertrand initiated his second court action against the Government of Quebec. Scott's arguments were similar to those of Bertrand however the federal government did not participate in the Singh hearings and they were sidelined by the federal involvement in the Bertrand hearings that will be explained below. See *Singh et al. v. Attorney General of Quebec* (October 23, 1995), Montreal 500-05-11275-953.

³⁰² Guy Bertrand. *Enough is Enough*. Page 110.

³⁰³ *Bertrand v. Bégin et al.; Johnson et al., mis en cause. [Bertrand v. Quebec (Attorney General)]* Quebec Superior Court, Pidgeon J. August 30, 1996. In *Dominion Law Reports*. 138 D.L.R. (4th) Page 490.

With the renewed court action of Guy Bertrand, the government of Canada was forced to confront two difficult facts. First, the government of Canada could no longer, even if it wanted to, maintain its silence on the unconstitutionality of a UDI. Premier Parizeau and the federal government had ignored the warning of Justice Lesage to ensure that the 1995 referendum respected his 1995 judgment, so there was a good chance that the new judge, Justice Pidgeon, would go as far as to forbid the government of Quebec from holding another referendum based on a UDI. If this were the case, there was also a chance that Justice Pidgeon would establish conditions that the government of Quebec would have to meet in order to leave the federation, and consequential obligations of the government of Canada in negotiating the secession of Quebec. In other words, there was a chance that Justice Pidgeon would constitutionalize Quebec secession in the absence of the federal government.

The second difficult fact that the government of Canada had to face was that if it did break its silence and require that secession could only occur through mega-constitutional negotiations and an agreement to amend the Constitution, there was a good chance that it would suffer a political backlash from the voters of Quebec. Beginning in 1990 and through the 1995 referendum campaign, the government of Canada not only permitted but also fought to maintain its silence on the whether or not the government of Quebec could unilaterally effect the secession of Quebec from Canada. In the wake of the 1995 referendum, in which over 49 percent of Quebec voters voted in favour Parizeau's UDI secession process, any attempts on the part of the government of Canada to constitutionalize Quebec's secession process could be perceived by the voters of Quebec as a desperate attempt to curtail a right that Ottawa had only months earlier permitted the

government of Quebec to have. If the voters of Quebec perceived an attempt by Ottawa to constitutionalize Quebec secession as an attack on the rights of the Quebec National Assembly, or even an attack on the rights of the citizens of Quebec, secessionist leaders (who had promised to hold another referendum in the near future), could use such a move as a launch-pad into a third and perhaps successful referendum campaign.

3.5 A Supreme Solution

Apart from participating, as an intervener, in the proceedings of Guy Bertrand or publicly informing the government of Quebec that its unconstitutional secession process would not be permitted, the government of Canada had one other option; it could refer the matter to the Supreme Court of Canada. The government of Canada could remove the issue of the legality of a UDI from the Bertrand hearings altogether by referring the matter to the Supreme Court of Canada. Challenging the legality of a UDI in a Reference to the Supreme Court of Canada would have three advantages. First, it would suspend the Bertrand hearings. Because the Supreme Court of Canada was Canada's highest court, all lower courts dealing with a question related to the legality of a UDI would have to suspend their hearings. The Bertrand hearings, and all of the controversial legal debates that came with it, would have to wait until the Supreme Court rendered its opinion. Secondly, a reference procedure allowed the government of Canada to control the scope of the Supreme Court's investigation. If the government of Canada wanted to have the Court formally constitutionalize Quebec's secession process without addressing if or how Quebec would be divided after a "Yes" vote, for example, it could instruct the Court to

do so. Finally, with a reference it would be the Supreme Court of Canada, with its reputable and highly respected justices, and not the Government of Canada, that would be advising governments and citizens of Quebec that their government could not unilaterally effect the secession of Quebec from Canada.

This is not to say that such a ruling from Canada's highest court would be risk free. There was no guarantee that the voters of Quebec would respect the court's competence on what many, led by the government of Quebec, viewed as a matter purely political in nature. Since it was founded in 1949, debate over the proper role of the Supreme Court in the Canadian system of governance has been maintained between those who champion creative jurisprudence, or judicial activism, and those who champion mechanical jurisprudence, or judicial restraint.³⁰⁴ In short, proponents of mechanical jurisprudence argued that the court's role was to settle disputes with a strict adherence to established laws and judicial precedence. If no appropriate law or judicial precedence could be found to settle a dispute (because the issue was too new for laws to have been established or because the issue was part of an unsettled political dispute over an issue not covered by law), then that dispute should be referred to legislators to take care of.³⁰⁵

Proponents of creative jurisprudence argued that laws should be viewed as a living tree, and that instead of sending disputes back to lawmakers, judges should use other societal values to fill in the gaps that black and white written laws leave void. While most Supreme Court justices accepted their creative role following the

³⁰⁴ For an excellent explanation of the development of the Supreme Court of Canada and of these two competing ideas of the proper role of the judiciary in the Canadian system of governance, see Ian Bushnell, *The Captive Court: A Study of the Supreme Court of Canada* (Montreal: McGill-Queen's University Press, 1992). Also see John T. Saywell's book *The Lawmakers: Judicial Power and the Shaping of Canadian Federalism* (Toronto: University of Toronto Press, 2002).

³⁰⁵ Bushnell, *The Captive Court*, 69.

entrenchment of the Charter of Rights and Freedoms in 1982, the debate over the proper role of the Canadian judiciary continued throughout the 1980's and 1990's. This was due in part to controversial judicial decisions on matters such as abortion, language laws and aboriginal treaty disputes.³⁰⁶ This debate was ongoing in 1996, when the government of Canada was deciding how to respond to the renewed judicial action of Guy Bertrand.³⁰⁷ Moreover, the government of Quebec had withdrawn from the first Bertrand case on the grounds that secession was a purely political matter. If the government of Canada decided to use the Supreme Court to constitutionalize Quebec secession, the voters of Quebec would have to decide whom to support, the Supreme Court of Canada, or their own provincial government. The Government of Canada would thus be taking a gamble in referring the legality of the government of Quebec's UDI referendum legislation to the Supreme Court.

Either through the courts or by engaging the government of Quebec directly, the post-referendum Bertrand hearings forced the government of Canada to constitutionalize Quebec secession. The question was how to manage that operation. Prime Minister Chrétien had gambled during the 1995 referendum campaign that he could beat Premier Parizeau, even playing by his rules. He dismissed questions related to the legality of Parizeau's secession process as being "hypothetical" because Quebecers would "never" vote in favour of the secessionist option for Quebec. The close results of the 1995 referendum suggested otherwise, and by taking this gamble Prime Minister Chrétien only

³⁰⁶ For a review of major Charter cases between 1982 and 1989, see Peter H. Russell, Rainer Knopff & Ted Morton, *Federalism and the Charter: Leading Constitutional Decisions* (Ottawa: Carleton University Press, 1989).

³⁰⁷ For a review of the post-Charter academic debate over the role of the Canadian judiciary, see F.L. Morton & Rainer Knopff, *The Charter Revolution & The Court Party* (Peterborough: Broadview Press, 2000).

further entrenched a UDI as an acceptable method for removing Quebec from the Canadian federation. After Bertrand threw the government of Canada into a legal-political Catch 22, a reference to the Supreme Court of Canada was perhaps the best approach towards constitutionalizing *how* Quebec could be removed from the federation, while minimizing political backlash from the voters of Quebec.

CHAPTER FOUR

CONFRONTING THE ABEYANCE: PRIME MINISTER CHRETIEN CONSTITUTIONALIZES THE QUESTION OF QUEBEC SECESSION

During the spring and summer of 1996, the government of Canada made it clear that it was not going to let Guy Bertrand and the Superior Court of Quebec set the rules for secession on their own. It soon revealed its own strategy to establish *how* any province could leave the federation. The *Quebec Secession Reference* was the key element of this strategy. After a brief intervention in the Court proceedings of Guy Bertrand, the government of Canada referred three questions related to the legality of a provincial government unilaterally effecting the secession of their province from the federation. The federal government had two objectives in the *Quebec Secession Reference*, one legal and one political. Firstly, the federal government wanted the courts to constitutionalize the process for removing a province from the federation, by establishing that a UDI was unconstitutional and illegal, and that neither international nor domestic law gave a province the right to unilaterally effect secession. Secondly, the government of Canada wanted the Supreme Court's decision to be accepted by the Francophone voters of Quebec as a clarification of the Constitution and not as a political tactic aimed solely at making secession impossible to achieve.

This chapter will demonstrate that the *Quebec Secession Reference* met both of these objectives. Firstly, notwithstanding intervenor efforts to sidetrack the court, while the Supreme Court justices were unequivocal in answering the reference questions as the federal government suggested they should, they refused to pronounce on the specifics and

certain controversial issues such as whether or not aboriginal communities would be able to separate their territories from an independent Quebec to remain as part of the Canadian federation. Secondly, notwithstanding the efforts of secessionist leaders to discredit the Reference procedure, the court's constitutionalization of Quebec secession did not result in a backlash against the government of Canada. As a result, the Chrétien government was able to pass legislation stipulating that secession could only occur through negotiations and an agreement on amending the Constitution without causing an increase in support for secession in Quebec.

4.1 The Government of Canada's Constitutionalization Strategy

The government of Canada revealed the first stage of its constitutionalization strategy in the spring of 1996, when the Attorney General of Canada announced that the federal government would be intervening in the Bertrand proceedings, to contest the government of Quebec's motion to dismiss. Speaking to the House of Commons on May 3, 1996, the Attorney General, Allan Rock, announced that the government of Canada was concerned over the fact that the government of Quebec believed that the Constitution of Canada would not apply to the secession of Quebec from the federation.

Primarily, the question under consideration is the position taken by the government of Quebec that the Canadian constitution and the courts are absolutely without a role in the question of a declaration of sovereignty. That's an extraordinary position, and we're currently studying the implications of that position.³⁰⁸

³⁰⁸ As cited in Warren J. Newman, *The Quebec Secession Reference: The Rule of Law and the Position of the Attorney General of Canada* (Toronto: York University Centre for public Law and Public Policy, 1999, 19.

The Attorney General's comments brought to an end the government of Canada's six-year code of silence concerning the government of Quebec's unconstitutional secession process.

There had been several signs during the winter of 1996 suggesting that the Chrétien government was planning to break its silence. On January 25, 1996, Prime Minister Chrétien appointed Stéphane Dion to his Cabinet as Minister of Intergovernmental Affairs. Stéphane Dion was a professor of political science at the University of Montreal and an ardent federalist who, prior to the 1995 referendum, had been an outspoken critic of the government of Canada's silence on Quebec's secession process.³⁰⁹ Another sign of change came during the Governor General's Speech from the Throne, opening Parliament on February 27, 1996. After noting the federal government's post-referendum unity initiatives, the Governor General made it clear that the government of Canada was committed to establishing clear rules for any future referendums. "But as long as the prospect of another Quebec referendum exists," the Governor General argued, "...the Government will exercise its responsibility to ensure that the debate is conducted with all the facts on the table, that the rules of the process are fair, that the consequences are clear, and that all Canadians, no matter where they live, will have a say in the future of their country".³¹⁰

³⁰⁹ See Stéphane Dion, *Straight Talk: Speeches and Writings on Canadian Unity* (Montreal & Kingston: McGill-Queen's University Press, 1999), Preface. Because Dion had held several contracts with the government of Canada prior to the 1995 Referendum, in March of 1995 secessionist MP's accused Prime Minister Chrétien of sharing the views of Dion, who had insisted at a conference that difficult negotiations, and the economic hardships that went with them, would greet the Government of Quebec if a majority of Quebecers voted Yes. As mentioned in the last chapter, because the polls were in his favour Chrétien maintained his code of silence. "Mr. Speaker, Mr. Dion is not a constitutional advisor. Furthermore, as everyone knows, I do not spend a lot of time discussing the constitution these days."³⁰⁹ However, Dion's appointment to Cabinet in January of 1996, without being elected, suggested that the Government of Canada was planning a change in its approach towards the secessionist threat in Quebec.

³¹⁰ As cited in Newman, *The Quebec Secession Reference*, 19.

After the Attorney General's announcement it became increasingly clear that the Government of Canada was no longer going to allow the Government of Quebec to claim that the Canadian Constitution would not apply to the secession of Quebec from the federation. On Tuesday, May 14, 1996 in the House of Commons, Prime Minister Chrétien insisted that the secession of Quebec had to be effected within the scope of the Canadian rule of law. "We are saying that the laws of Canada must be respected, that there won't be a unilateral declaration of independence and that international law, also, must be respected."³¹¹ He argued that secession, to be achieved legally, would have to be effected via amending the Constitution.

This increased assertiveness, however, was measured. The government of Canada wanted to constitutionalize how a province could leave the federation, but did not necessarily want to enter into a debate over the specifics of Quebec secession, or over some of the controversial issues related to it that had been raised by Guy Bertrand. The government of Canada simply needed to re-establish that the secession of Quebec had to occur in respect of the Canadian rule of law and the Constitution. In other words, that it had to occur through the amending formula found in the *Constitution Act, 1982*. Thus, the government of Canada went to great lengths to establish that their intervention in no way meant that they agreed with all of the objectives of Guy Bertrand, as the Attorney General pointed out during his May 3 announcement in the House of Commons. "I would, however, like to point out that our reasons for this is not connected with the positions of either Mr. Bertrand or Mr. Singh, but rather the position taken by the Government of Quebec."³¹² The government of Canada was well aware that the

³¹¹ *The Globe and Mail*. "Quebec can't just leave, PM says." Wednesday, May 15, 1996. A 1.

³¹² *Ibid*.

government of Quebec would try to paint their intervention in the worst political light possible.

When the Attorney General of Canada submitted his factum to the Quebec Superior Court for its hearings on the government of Quebec's motion to dismiss the case of Guy Bertrand, the nature of the federal government's constitutionalization plans became clear. The factum of the Attorney General clearly established the grounds for the Government of Canada's opposition to the Government of Quebec's unilateral secession process. The factum also revealed two interesting characteristics of the Government of Canada's constitutionalization strategy.³¹³

First, the government of Canada wanted to emphasise that it was the responsibility of the courts to constitutionalize Quebec's secession process. They wanted to state that the decision to constitutionalize Quebec secession was a judicially motivated, and not part of a federal government political strategy to discourage voters from choosing the secessionist option for Quebec. This was evident from the Attorney General's focus on insisting that the duty of maintaining the rule of law in Canada was "manifestly the prerogative and duty of the courts, as defenders of the Constitution."³¹⁴ Second, the government of Canada did not want to engage in debate over other matters related to the secession of Quebec from Canada. Indeed, at the outset of his presentation, the Attorney General insisted that he would limit his participation to arguing that the Constitution would apply to the secession of Quebec and that the judiciary had the jurisdiction to

³¹³ The Hon. Allen Rock, Attorney General of Canada. "Synopsis of the Position of the Attorney General of Canada on the Motion to Dismiss." In *Bertrand v. Quebec* (Attorney General) Quebec: Quebec Superior Court, Pidgeon J. August 30, 1996. No: 200-05-002117-955

³¹⁴ Synopsis of the Position of the Attorney General of Canada on the Motion to Dismiss, May 22 1996, available from <http://canada.justice.gc.ca/en/news/nr/1996/resume7.html>; archived at the Department of Justice Canada Website in the "Newsroom Archives;" accessed 15 January 1994.

determine the legal validity of any process adopted by the government of Quebec to remove Quebec from Canada.³¹⁵ The Attorney General made it clear in his factum that establishing the legal rules for secession would be the limit of the scope of the federal government's constitutionalization efforts.

The government of Canada's attempts to focus on the Constitution and the rule of law made sense, given the government of Quebec's earlier accusations that Guy Bertrand was trying to prevent Quebecers from expressing themselves democratically for political reasons. Indeed, when news broke that the federal government was considering intervening in Bertrand's case, the Premier of Quebec argued that such a move meant that the government of Canada was adopting the "Plan B" strategy of Guy Bertrand. On May 2, 1996, Lucien Bouchard, who had become Premier in January, warned that such an intervention "...would be an extremely serious gesture...is this the first step of the implementation of Plan B?"³¹⁶

After the Attorney General of Canada announced that indeed the federal government would intervene in Bertrand's hearings, on May 10, 1996, the government of Quebec's Minister of Intergovernmental Affairs, Jacques Brassard, argued that the federal government had adopted Bertrand's strategy. "Although Mr. Rock may claim the opposite, we are not being fooled. Ottawa will be siding with Bertrand."³¹⁷ Although Premier Bouchard had even threatened a snap election and an immediate referendum on secession if the government of Canada intervened, no such action was taken.³¹⁸

³¹⁵ "Synopsis of the Position of the Attorney General of Canada on the Motion to Dismiss."

³¹⁶ As reported in *The Globe and Mail*. "Ottawa ponders joining referendum suit." Friday May 3, 1996.

A5

³¹⁷ As reported in *The Globe and Mail*. "Quebec, Ottawa head for showdown." Saturday May 11, 1996.

A1

³¹⁸ Ibid.

On August 30, 1996, Justice Pidgeon released his decision on the government of Quebec's motion to dismiss. Pidgeon rejected each of the government of Quebec's arguments and argued that there were several questions that indeed should and could be addressed by the Court. "Is the right to self-determination synonymous with the right to secession? Can Quebec unilaterally secede from Canada? Is Quebec's process for achieving sovereignty consistent with international law? Does international law prevail over domestic law?"³¹⁹ The Court's decision meant that the Bertrand legal challenge would be heard.

The government of Quebec responded to the ruling of Justice Pidgeon in the same way that it had responded to the initial ruling of Justice Lesage in 1995: the government of Quebec withdrew from the hearings altogether. On September 4, 1996, the Attorney General of Quebec announced that it was withdrawing from the Bertrand case because the courts had no right to pronounce on what they considered to be a purely "political" matter.

[Après] avoir prétendu, suivi nos propositions pendant deux reprises devant le juge Lesage et devant le juge Pidgeon à l'effet qu'il ne revenait pas aux tribunaux de se prononcer et après avoir reçu deux décisions à cet égard, nous avons décidé de ne pas porter en appel cette décision et de ne pas être présent devant la Cour lorsque le dossier continuera devant le juge Pidgeon ou un autre juge qui sera désigné par le juge en chef.³²⁰

As was the case in 1995, the Bertrand hearings would proceed without the government of Quebec and with or without the participation of the government of Canada. However, the government of Canada was not ready to let that happen.

³¹⁹ Bertrand v. Quebec (Attorney General)

³²⁰ As cited in Newman, *The Quebec Secession Reference*, 25.

4.1.1 *The Reference to the Supreme Court of Canada*

On September 26, 1996 the government of Canada revealed the second stage of its constitutionalization strategy by announcing, in a letter to Quebec's Minister of Intergovernmental Affairs, Paul Bégin, and later during a speech in the House of Commons, its intention to refer three questions related to the legality of the government of Quebec's unilateral secession process to the Supreme Court of Canada.³²¹ The three questions 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 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?³²²

Referring these three questions to the Supreme Court immediately suspended the hearings of Guy Bertrand.³²³ Moreover, while the questions sought to establish that

³²¹ Attorney General of Canada's letter to the Attorney General of Quebec, September 26, available from <http://canada.justice.gc.ca/en/news/nr/1996/begin.html>; archived at the Department of Justice Canada Website in the "Newsroom Archives;" accessed 15 January 1994. Also, see the "Statement by the Honourable Allan Rock minister of Justice and Attorney General of Canada. "Debates of the House of Commons, September 26, 1996.

³²² P.C. 1996-1497; *Factum of the Attorney General of Canada*. SCC Factum 25506 V. 30.

³²³ The Attorney General of Canada noted that the reason why the government of Canada did not allow Bertrand's case to proceed was because they wanted the matter to be addressed more quickly by referring it directly to the top, the Supreme Court of Canada. "While it would have been possible for the Government of Canada to remain involved in the Bertrand litigation and to argue these points at trial, we have, on such fundamental issues, a duty as a national government to ensure that they are brought to the courts directly with a view to an early and definitive judgment." (Attorney General of Canada's letter to the Attorney General of Quebec, September 26) While speed may have been a deciding factor, another advantage of referring the matter to the Supreme Court was that the government of Canada could focus the Court's attention on its questions while avoiding those of Bertrand.

neither domestic nor international law gave the Government of Quebec a right to unilaterally effect the secession of Quebec from Canada, many of the “Plan B” objectives of Guy Bertrand and others (such as determining the majority that would be needed in a referendum to establish a mandate for secession or establishing how federalist areas of Quebec could choose to remain Canadian), were left out of this new stage in the government of Canada’s attempt to constitutionalize the process.

In explaining the motivations behind its decision to refer these questions to the Supreme Court, the government of Canada finally owned up to its obligation to challenge internal threats to its sovereign authority and to the territorial integrity of Canada. During a speech announcing the Reference in the House of Commons, the Attorney General of Canada made his confession while he explained why he became involved in the Bertrand hearings in the first place. “It was my obligation as the Attorney General of Canada, and the custodian of the Constitution of our country, to respond in the courtroom. There we argued that the Constitution is indeed relevant and that the courts have a jurisdiction to deal with these issues.”³²⁴ However, the second stage of the government of Canada’s constitutionalization strategy was as measured as the first. As he had done in the Bertrand intervention, the Attorney General of Canada insisted that the government’s decision to initiate the *Quebec Secession Reference* was to address not political, but legal concerns raised by the courts themselves.

In his speech before the House of Commons, the Attorney General explained that it was the government of Quebec’s position that the courts and the constitution would have no role to play in the secession of Quebec from Canada that forced them to seek

³²⁴ *Statement by the Honourable Allan Rock*. September 26, 1996.

judicial clarification.³²⁵ He argued that although the government of Canada and the leading political figures of all provinces had long agreed that the country would not be held together against the will of Quebecers, it was the position of the government of Canada that secession, like any other governmental action, could only be achieved within the framework of the Canadian constitution and the rule of law. The Attorney General argued that a UDI would undermine political stability, interrupt the prevailing order and cast into doubt the interests and rights of Quebecers and all Canadians. Moreover, he argued that the position of the government of Quebec was "...contrary to Canadian law, unsupported in international law and deeply threatening to the orderly governance of our nation."³²⁶ The Attorney General concluded that the Reference was necessary because leaving this disagreement unresolved "...would pose a serious threat to orderly government in Quebec and the rest of Canada."³²⁷

Although the Attorney General insisted that the government of Canada had no choice but to challenge the Government of Quebec's unconstitutional secession process, he also went to great lengths to argue that it was the Quebec Superior Court, and the arguments submitted by the government of Quebec during the Bertrand hearings, that were the reasons behind the Reference.

It was only after the Attorney General of Quebec brought a motion last spring to dismiss that litigation that we decided to involve ourselves...I also wish to emphasize that the questions we are putting to the Court, and that arose from the judgement of Mr. Justice Pidgeon, resulted directly from the position taken by the Attorney General of Quebec in the Bertrand litigation.³²⁸

³²⁵ *Statement by the Honourable Allan Rock*. September 26, 1996.

³²⁶ *Ibid.*

³²⁷ *Ibid.*

³²⁸ *Ibid.*

Indeed, although the Attorney General insisted that he was confident that the Supreme Court would accept and endorse his position, he wanted the public to believe that the federal government was not using the courts to make political gains against the secessionists in Quebec. “Nonetheless, it is for the courts to make that determination, and we will, of course, respect and abide by the results.”³²⁹

4.1.2 The Government of Canada’s Submission to the Supreme Court

When the Attorney General submitted his factum to the Supreme Court, it became clear that the government of Canada had two objectives that it hoped would be met during the Reference proceedings. The first objective was that it wanted the Court to agree with its submitted answers for the reference questions. In short, they wanted the Court to find that neither domestic nor international law gave the government of Quebec a right to ignore the Constitution and unilaterally effect the secession of Quebec from Canada. The second objective of the government of Canada was to limit the scope of the proceedings to the three reference questions. The government of Canada wanted the Court to answer the reference questions without weighing in on any of the controversial issues related to the secession of Quebec that were not directly relevant to the constitutionalization of Quebec secession.

The government of Canada’s first objective in the Reference proceedings was to have the Court agree with the answers it submitted for each of the reference questions. The Attorney General of Canada explained his arguments for how the Supreme Court

³²⁹ *Statement by the Honourable Allan Rock. September 26, 1996.*

should answer each of the reference questions in his factum, which he submitted to the Court on February 28, 1997.

The first reference question asked the Court to determine whether or not the Government of Quebec could, under the Constitution of Canada, unilaterally effect the secession of Quebec from the federation. The Attorney General argued that it was the Government of Canada's position that the "...Constitution of Canada [was] capable of accommodating any alteration to the federation or its institutional structures, including even such an extraordinary change as the secession of a province."³³⁰ The Attorney General insisted that although the Constitution was silent on the question of *how* a province could be removed from the federation, unilateral secession went against the most fundamental constitutional principles upon which the Canadian federation was built. The principles of constitutional government, the rule of law, the courts as guardians of the Constitution and the principle of federalism held that major changes to the federation, such as secession, could only be achieved through reaching an agreement between many governments on amending the Constitution of Canada.³³¹ Moreover, since 1982, he argued, the Constitution stipulated that any changes to the Constitution had to be effected through the constitutional amending formula, contained in the *Constitution Act, 1982*.³³²

³³⁰ SCC Factum 25506 V. 1. Factum of the Attorney General of Canada, 29. This and all of the factum cited in this paper are located at the Brian Dickson Law Library at the University of Ottawa, Ottawa, Canada.

³³¹ Factum of the Attorney General of Canada, 23-26.

³³² Although many secessionists argued that because the Government of Quebec did not approve of the ratification of the Constitution Act, 1982, that the provisions in that part of the constitution, namely the Charter of Rights and Freedoms and the amending formulas, did not apply to the Government of Quebec. (See the Government of Quebec's motion to dismiss as referred to above.) However, the Supreme Court of Canada, in the *Quebec Veto Reference*, (*Reference re Objection by Quebec to a Resolution to Amend the Constitution*, [1982] 2 S.C.R. 793) affirmed that the 1982 Constitutional changes applied to the province of Quebec.

The Attorney General noted that in Part V of the *Constitution Act, 1982*, the “Procedure for Amending the Constitution of Canada,” provided five different procedures for amending the Constitution, depending on the nature or subject matter of the proposed changes. He listed them as follows:

1. the general (or “7/50”) procedure, which requires the assent of the House of Commons, the Senate (suspensive veto only) and the legislative assemblies of two-thirds of the provinces representing 50% of the population of the provinces: s. 38 (or s. 42 if the matter is not subject to provincial opting out);
2. the unanimity procedure, which requires the assent of the House of Commons, the Senate (suspensive veto only) and the legislative assemblies of all of the provinces: s. 41’
3. the “some-but-not-all provinces” (or “bilateral”) procedure, which requires the assent of the House of Commons, the Senate (suspensive veto only) and the legislative assemblies of those provinces that are affected by the amendment of provisions not applying to all provinces: s. 43;
4. the federal unilateral procedure, permitting amendment by Parliament alone (i.e., the House of Commons, Senate and Governor General): s. 44; and
5. the provincial unilateral procedure, permitting amendment by a provincial legislature alone (i.e., the legislative assembly and lieutenant governor): s. 45.³³³

The Attorney General argued that the only amending formula providing for unilateral provincial amendments was section 45 of Part V. Section 45 states: “Subject to s. 41, the legislature of each province may exclusively make laws amending the constitution of the province.”³³⁴ The Attorney General submitted that “constitution of the province” referred to in s. 45 had to be understood as only the provincial constitution and not the Constitution of Canada. In other words, if an amendment would also affect the Constitution of Canada, it could not be made via the use of s. 45.

The Attorney General argued that the secession of Quebec from Canada would alter more than the Constitution of Quebec. It would drastically alter the Constitution of

³³³ The Factum of the Attorney General of Canada, 32.

³³⁴ Ibid. 33.

Canada as well. Thus, while the national Assembly of Quebec would be a necessary participant in any such constitutional amendment process, other Part V participants would also have a role.³³⁵ The Attorney General thus ruled out s. 45 as a means for effecting the unilateral secession of a province.³³⁶ Since there were no other unilateral provincial amendment procedures under Part V, the Attorney General concluded that no institution of the province of Quebec could, under the Constitution of Canada, unilaterally effect the secession of Quebec from Canada.

The second reference question asked the Court to determine whether or not international law, via a right to self-determination or otherwise, gave the Government of Quebec a right to unilaterally effect the secession of Quebec from Canada. The Attorney General submitted that international law did not give the Government of Quebec a right to secede unilaterally and that international law clearly stated that a right to self-determination did not mean a right to secession. The Attorney General noted that under international law, the right to self-determination had both an internal and an external aspect. Outside the context of colonies, and possibly peoples under alien domination or subject to gross oppression, the right of external self-determination, which he submitted was the right of a people of the state to determine, without external interference, their form of government and international status, could only be exercised by “the entire people of the state.”³³⁷

The Attorney General submitted that the internal aspects of the right to self-determination, under international law, involved the right of the people of a state to a

³³⁵ Factum of the Attorney General of Canada, 37.

³³⁶ Ibid, 37.

³³⁷ Ibid, 40.

government representing the whole of that people on a basis of full equality.³³⁸ The Attorney General submitted that the people in Quebec were neither oppressed nor colonized, and that they fully participated, through their federal and provincial governments, on a basis of full equality. The Attorney General concluded that Canada was a state in which the government represented the whole people on a basis of full equality, and that in such a state "...the principle of respect for territorial integrity under international law sets the limit for the exercise of the right of self-determination, and there is no right to unilateral secession from such a state."³³⁹

The Attorney General argued that every major source of established international law that dealt with the issue of self-determination held that it was to be achieved by peoples within the framework of the territorial integrity of established states.³⁴⁰ The Attorney General concluded that since, and only in rare circumstance, international law only recognized that a right to self determination could lead to a right to independence for peoples who were either colonized or subject to gross oppression, then international law did not recognize a right for the people of Quebec to unilaterally effect the secession of Quebec from Canada. Self-determination, as elaborated under international law, was a right enjoyed by all Canadians, including Quebecers, within Canada.³⁴¹ He argued that Quebec in no way constituted a colony, nor was its population in any way subject to alien

³³⁸ Factum of the Attorney General of Canada, 40.

³³⁹ Ibid., 40.

³⁴⁰ The Attorney General noted that Professor Jacques Brossard, in "L'accession à la souveraineté et le cas du Québec: Conditions et modalités politico-juridiques, 2s. ed. (Montreal: Les press de l'Université de Montréal, 1995) at 190-91, argued that if a "people" met five or six "conditions," including having characteristics as a 'distinct' people, live in a defined geographical area with control over institutions in that territory and if there was a viable chance that they could survive as an independent state, then they would have a right to gain independence without the consent of the state of which they were a part. Most international law experts disagreed. See. *Factum of the Attorney General of Canada* 62-67.

³⁴¹ Factum of the Attorney General of Canada, 67.

domination or gross oppression.³⁴² Consequently, there was no legal basis for any assertion that the right to self-determination provided the governmental institutions of Quebec with a right, under international law, to effect the unilateral secession of Quebec from Canada.

The third reference question asked the Court to determine whether or not there was a conflict between international and domestic law on the question of Quebec having a right to unilaterally effect the secession of Quebec from Canada, and if so, determine which law would prevail. The Attorney General submitted that there was no conflict between domestic and international law on this matter. “[Neither] gives the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally.”³⁴³ If there were a conflict, then domestic law would apply, because any law inconsistent with the Constitution of Canada was, in Canada, “of no force or effect.”³⁴⁴

The factum of the Attorney General also addressed the second objective of the Government of Canada in the Reference proceedings. The Attorney General advised that Court that it was “neither necessary nor appropriate” for it to investigate beyond what was necessary for answering whether or not the Constitution of Canada permitted the Government of Quebec to effect unilaterally the secession of Quebec from Canada. “In particular, it is respectfully submitted that this Court need not consider arguments as to

³⁴² The Attorney general insisted: “Quebecers can freely make their own political choices through both their federal and their provincial governmental institutions. As well, Quebecers can pursue their economic, social and cultural development through those same federal and provincial governmental institutions. Those are the key elements of the 1970 Declaration on Friendly Relations. It is therefore clear that Quebecers exercise the right of self-determination internally.” Factum of the Attorney General of Canada, 71.

³⁴³ Ibid., 72.

³⁴⁴ Ibid., 76.

which of the amending procedures under the Constitution of Canada or what other constitutional principles might apply in the event of a potential secession.”³⁴⁵

The Attorney General’s factum made it clear that the Government of Canada wanted the Court to focus on having the Court establish that Quebec could only be legally removed from the federation via one of the non-unilateral provisions of the amending formula in the *Constitution Act, 1982*.

The Attorney General of Canada thus had two objectives in the Reference hearings. The first was to have the Court agree with its arguments on each of the three reference questions. The second was to keep a tight focus on the Reference proceedings. Unfortunately for some proponents of tough and comprehensive “Plan B” objectives, the Attorney General’s factum made it clear that the government of Canada had no intention of having the Court establish stringent and specific conditions to be met during secession negotiations after a potential Yes vote in a future referendum. On the contrary, the Court was instructed to limit its investigation to the constitutionalization of Quebec secession; to establish that Quebec could secede only through mega-constitutional negotiations and reaching an agreement on amending the constitution with the other governments in the federation.

4.2 Procedural and Political Threats to the Attorney General’s Reference Objectives

Although the Attorney General was confident that the Supreme Court would endorse and accept the federal government’s position on each of the reference questions, the federal government’s attempt to have the judiciary constitutionalize the secession

³⁴⁵ Factum of the Attorney General of Canada, 38.

issue, Quebec secession faced two substantive procedural threats, and one political threat. The procedural threats to the government of Canada's Reference initiative came from the arguments submitted by the *amicus curiae*, a lawyer appointed to represent the arguments of the government of Quebec, and by the interveners in the *Quebec Secession Reference*. While the procedural objectives of the *amicus curiae* threatened to prevent the Court from even answering the reference questions, the procedural objectives of the interveners threatened to have the Court increase the scope of the hearing to address some a wide range of secession issues that the government of Canada was hoping to avoid.

The political threat came from the government of Quebec, which mounted a campaign against the legitimacy of the Supreme Court to weigh in on Quebec's secession legislation. The Attorney General of Canada had hoped that the Reference would resolve, once and for all, the question of whether or not the Constitution and Canadian rule of law would govern the potential secession of Quebec, or any province, from Canada.³⁴⁶ If the government of Quebec succeeded in its campaign to paint the Reference as legal scheme to deny political rights of the voters of Quebec, then the voters of Quebec might reject the Court's decision to constitutionalize secession as in illegitimate attempt to curb their rights.

4.2.1 *The Factum of the Amicus Curiae*

Although the Supreme Court could not force the government of Quebec to participate in the Reference, it could appoint an *amicus curiae*, or "friend of the court," to argue the position of the government of Quebec during the Reference proceedings. On

³⁴⁶ *Statement by the Honourable Allan Rock*. September 26, 1996.

July 11, 1997, this is exactly what the Supreme Court did when it appointed Quebec City lawyer André Joli-Coeur as amicus curiae for the proceedings. The amicus curie divided his factum into two sections: one attacking the competence of the Supreme Court to hear the case, and the other offering “hypothetical” answers to the reference questions in the event that the Court decided, wrongly in his opinion, that it was able to answer them.

In the first part of his factum, the amicus curiae advanced several arguments explaining why he believed that the Supreme Court of Canada did not have the competence to answer the reference questions. He began by arguing that the Section 53 of *Supreme Court Act*, the section of the *Act* that permitted the Government of Canada to refer questions to the Supreme Court, was unconstitutional. He argued that the Court’s reference provision was in conflict with section 101 of the *Constitution Act, 1867*. Article 101 stipulated that the Parliament of Canada could provide for “the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the laws of Canada.”³⁴⁷ The amicus curiae argued that a “General Court of Appeal,” could only hear “appeals,” that is, the revision of an inferior court's decision and a real litigation between parties.³⁴⁸ Judicial references were not “appeals” and therefore, the Supreme Court Act, in providing the Supreme Court with a reference jurisdiction, was in violation of the Constitution Act, 1867.”³⁴⁹ He added that even if a Court of Appeal could accept references, then those references should be based upon actual appeals from lower courts.³⁵⁰

³⁴⁷ Section 101. *The Constitution Act, 1867*.

³⁴⁸ Mémoire de l’amicus curiae. V. 16, 4.

³⁴⁹ Ibid., 3.

³⁵⁰ Ibid., 9.

Secondly, the *amicus curiae* argued that even if the reference questions fell under the provisions set out in section 53, the Supreme Court should refuse to answer them because they were too theoretical, purely political and not ripe for judicial decision. He argued that the questions submitted to the Court did not concern a law in force, a Bill, an agreement of facts between interested parties or a determined factual situation, likely to lead to a useful and conclusive answer.³⁵¹ The *amicus curiae* also argued that the existence and origins of a State were political facts and that because the reference questions dealt with the origin and existence of a State, they should be excluded from the jurisdiction of the Courts.”³⁵² The *amicus curie* also noted that American courts had developed a “ripeness doctrine” whereby courts refused to answer when questions were too hypothetical or abstract to be decided.

Thirdly, the *amicus curiae* argued that domestic courts did not have jurisdiction over matters of international law. He argued that the role of the Supreme Court was to interpret and apply Canadian law, not international law.³⁵³ The *amicus curiae* argued that the second reference question was a question dealing purely with international law and therefore was outside of the jurisdiction of Canadian domestic courts. And finally, the *amicus curiae* argued that the Court should not answer the reference questions because they constituted an attack on the parliamentary privileges of the National Assembly of Quebec. He submitted that the National Assembly was the only judge of the legality of its debates. He argued that it was well established that only laws that had been fully implemented could be examined by the Court.³⁵⁴ The reference questions thus

³⁵¹ *Mémoire de l’amicus curiae*. V. 16 Page 12.

³⁵² *Ibid.*, 13.

³⁵³ *Ibid.*, 15.

³⁵⁴ *Ibid.*, 17.

undermined the parliamentary privileges of Quebec and its National Assembly because in answering them the Supreme Court could affect the nature of parliamentary debates on these issues in the future.³⁵⁵

In the second part of his factum, the amicus curiae submitted answers for each of the reference questions in case the Court found that it did indeed have the competence to answer them. The amicus curiae answered the questions in reverse order, beginning with the third question. The amicus curiae argued that because international law and domestic law existed in two different legal universes, when an international and domestic norm came into conflict, each would have precedence in their respective jurisdictions.³⁵⁶ He insisted that if Canadian law was incompatible with international law, then Canada, as part of the international community and as a country that subscribes to international law, had the responsibility to ensure that domestic law was modified so as not to be in conflict with international agreements. Thus, if the secession of Quebec from Canada fell under international jurisdiction, Canadian law would have to be adjusted to reflect international law governing the partition of countries.

The amicus curiae then addressed the second reference question. He argued that international law permitted unilateral secession because there were no international agreements forbidding it as a process for achieving independence. One of the witnesses of the amicus curiae, a former president of the United Nations Commission of International Law, argued that what was not expressly prohibited in international law was legal. He explained, "...il est indiscutable qu'aucune règle de droit international ne

³⁵⁵ Mémoire de l'amicus curiae, 18.

³⁵⁶ The amicus curiae explained "Comme le droit international et le droit canadien sont distincts et parallèles, chacun détient la primauté en ce qui le concerne dans le champ d'application qui lui est propre. De son point de vue, le droit international a préséance sur le droit canadien au Canada. De son point de vue, le droit canadien a préséance sur le droit international au Canada." Mémoire de l'amicus curiae, 20.

s'oppose à la secession du Québec du Canada et que, donc, l'Assemblée nationale, la législature, ou le gouvernement du Québec peut y proceder unilatéralement.”³⁵⁷ Thus for the amicus curiae, international law was clear. Because unilateral secession was not specifically prohibited in international law, the Government of Quebec had every right to effect the secession of Quebec unilaterally.³⁵⁸

The amicus curiae argued that once the government of the new country that has gained independence through secession demonstrated to the international community that it was indeed an independent country, then the international community will simply recognize, as a matter of fact, the new country. This “principle of effectivity” meant that a unilateral secession would be legal if it was an effective political reality. In the case of Quebec, he added, secession would be effective when the Quebec authorities assumed responsibility for all official activities in the territory of Quebec. After this, the international community would recognize, as a fact, the creation of a new State.³⁵⁹

The amicus curiae also argued that because international law gave peoples a right to self-determination, “peoples,” such as the people of Quebec, had a right to unilaterally declare independence. He argued that because the Government of Canada was a signatory on several international agreements concerning peoples right to self-determination, all of which stated that only colonial peoples or peoples subject to gross oppression could claim a right to secession, Canada had also agreed to all peoples having a right to their own independent country, should they be able to form it. Although he was not able to cite any international agreements that made this link between self-determination and a right for peoples to their own independent country, the amicus curiae was able to find two authors

³⁵⁷ Mémoire de l'amicus curiae, 22.

³⁵⁸ Ibid., 22.

³⁵⁹ Ibid., 27.

from Quebec, Professor Thomas M. Franck and Daniel Turp, who argued that international law indeed provided that peoples who could demonstrate their ability to do so, had a right to unilaterally declare independence.³⁶⁰

Finally, in answering the first reference question, the amicus curiae argued that because only international law provided for unilateral secession, Canadian domestic law had to give way and recognize its international legality. “Une fois la sécession réalisée dans les faits, le droit international régira les rapports entre le Québec et le Canada.”³⁶¹ The principle of effectivity and international law would transcend the Constitution of Canada, which would have to adapt to the new political reality.³⁶²

The Government of Quebec’s withdrawal from the Reference proceedings and the amicus curiae’s arguments against the Court’s competence to answer the reference questions threatened the Government of Canada’s attempt to use the Supreme Court to reconstitutionalize Quebec secession. If the Supreme Court agreed with the amicus curiae and the Government of Quebec, which it did not have the competence to answer the reference questions, then the Government of Canada’s attempt to have the Supreme Court reconstitutionalize Quebec secession would have failed.

4.2.2 Factum of the Interveners

Other substantive challenges came from the arguments of the groups and individuals who were granted permission to intervene in the Reference proceedings. While the Attorney General of Canada wanted the Court to focus solely on its three

³⁶⁰ Mémoire de l’amicus curiae, 27.

³⁶¹ Ibid., 31.

³⁶² Ibid., 36.

Reference questions, these groups wanted the Court to expand its ruling to cover other issues related to the secession of Quebec from Canada, including issues related to Aboriginal rights, the rights of federalists in Quebec and the rights of the Territorial governments in Canada.

The Supreme Court granted intervenor status to thirteen different groups and individuals. With the exception of Yves Michaud, a prominent secessionist who supported the arguments of the government of Quebec, these interveners all agreed with the answers that the government of Canada submitted for each of the reference questions. That is, they all agreed that neither domestic nor international law permitted the government of Quebec to unilaterally effect the secession of Quebec from Canada. However, these interveners did not agree with the Attorney General of Canada's request that the Supreme Court limit its focus on the three Reference questions. On the contrary, these groups wanted the Court to go beyond the reference questions to address more controversial aspects related to the secession of Quebec from Canada.

The interveners in the *Quebec Secession Reference* can thus be divided into three groups, according to the particular issues related to secession that they wanted the Court to address. The interveners with a focus on Aboriginal rights included: Kitigan Zibi Anishinabeg, the Grand Council of the Cree, the Makivik Corporation and the Chiefs of Ontario. The interveners with a focus on individual rights and the Charter of Rights and Freedoms included: Guy Bertrand, Roopnarine Singh et al., the Ad Hoc Committee of Canadian Women on the Constitution, Vincent Pouliot and the Minority Advocacy Rights Council. And finally, the interveners with a focus on provincial and territorial rights included: the Attorney General for Manitoba, the Attorney General of

Saskatchewan, the Minister of Justice for the Northwest Territories and the Minister of Justice for the Yukon.

The interveners with a focus on Aboriginal rights wanted the Supreme Court to rule that if the government of Quebec opted for independence, it could not become independent unless it first reached an agreement with Aboriginal peoples living in Quebec. They argued that Aboriginals did not consider themselves as “Québécois,” and that even if the governments of Canada and Quebec reached an agreement on secession, Aboriginal peoples in Quebec could not be transferred to an independent Quebec.³⁶³ These groups noted that aboriginal treaty rights could not be ignored by the governments of Canada or Quebec if the latter chose to separate from Canada unilaterally. Also, they wanted the court to recognize that the Canadian federation was not simply made up of federal and provincial governments, “but also includes Aboriginal peoples as constituent elements.”³⁶⁴ They wanted the Supreme Court to rule that along with the Government of Canada, the Government of Quebec had to reach an agreement with these Aboriginal “constituent elements” in Quebec before Quebec could be removed from the federation.

The interveners with a focus on the Charter of Rights and Freedoms wanted the Supreme Court to be more specific about how the Government of Quebec could effect the secession of Quebec from Canada. For example, Guy Bertrand could not understand why the Attorney General of Canada did not want the Supreme Court to decide which amending formula in the Constitution would be used to remove Quebec from Canada. “Le fait de n’examiner que l’article 45 de la “Partie V” ne peut certainement pas

³⁶³ The Grand Council of the Crees argued: “Presently, the province of Quebec is made up of numerous peoples, including distinct Aboriginal peoples. It cannot be said by the National Assembly or government of Quebec that there is a single “people” within the province that is synonymous with the province or government of Quebec.” Factum of the Intervener Grand Council of the Crees (Eeyou Estchee). Page 29.

³⁶⁴ Factum of the Intervener Grand Council of the Crees (Eeyou Estchee), 7.

constituer une clarification du droit interne canadien relativement à la sécession d'une province."³⁶⁵

Bertrand submitted that because the secession of Quebec would effect every level of government, the Senate and the Crown, the unanimity amending formula would have to be used to effect the secession of Quebec from Canada. "Il est évident, à la lecture de l'article 41 de la Loi Constitutionnelle de 1982, que la sécession du Québec impliquerait un amendement à la Constitution sur au moins quatre des cinq matières qui y sont prévues, nécessitant ainsi l'unanimité des provinces, du Sénat et de la Chambre des Communes."³⁶⁶ These groups also wanted the Court to establish that Quebec could not declare independence until it had guaranteed that the rights and freedoms that were guaranteed to the Quebecers as citizens of Canada would continue to be guaranteed to them as citizens of an independent Quebec.³⁶⁷

Finally, the interveners with a focus on provincial and territorial rights wanted the Court to assure that Quebec had no right, under international law or otherwise, to unilaterally adjust the boundaries of its neighbouring political entities. For example, the Minister of Justice for the North West Territories noted that during public consultations on Parizeau's *Draft Bill* in 1995, there were many commentators that argued that an independent Quebec could claim territory like Labrador and certain islands of the Northwest Territories off Quebec's northern coast.³⁶⁸ The Government of Quebec could not, given these and other concerns, effect the secession of Quebec unilaterally. The

³⁶⁵ Mémoire de L'Intervenant Me Guy Bertrand, SCC FACTUM 25506 V.7, 19.

³⁶⁶ Mémoire de L'Intervenant Me Guy Bertrand, 19.

³⁶⁷ See the Factum of the Ad Hoc Committee of Canadian Women and the Constitution. SCC Factum 22506 V. 14.

³⁶⁸ Factum of the Intervener, the Minister of Justice of the Northwest Territories. SCC FACTUM 25506 V. 13, 4.

Minister insisted that the negotiation process involved with amending the Constitution would be necessary to resolve issues relating to boundaries and other matters. The factum of the Minister of Justice of the Yukon and Manitoba argued along similar lines.

The factums of the interveners thus presented a second threat to the substantive and procedural objectives of the government of Canada in the *Quebec Secession Reference*. A key element of the government of Canada's constitutionalization strategy was to avoid opening a debate on controversial matters related to secession that did not need to be addressed to establish that Quebec could only leave the federation through mega constitutional negotiations and an amendment to the Constitution of Canada.

If the Court agreed to the requests of the interveners, and ruled that an agreement had to be reached on each of the issues they raised before the Government of Quebec could become independent, the secessionist leaders in Quebec would most likely then be able to use the Court's decision to argue that the Courts and the federal government had adopted the "Plan B" strategy to make secession seem impossible. Such a decision could then be used both to justify ignoring the courts and to promote holding a third referendum on secession. This explains why the Attorney General of Canada insisted that the Supreme Court justices avoid these issues, and focus completely on the constitutionalization of Quebec secession.³⁶⁹

4.2.3 The Political Risks of the Reference Objectives

³⁶⁹ For an example of the Government of Canada's resolve to have the Court maintain this focus, see the exchange between Mr. L. Yves Fortier, a lawyer for the Attorney General, and Chief Justice Lamer on the last day of the oral presentations during the proceedings, February 18, 1998. Transcription of Cassettes. SCC FACTUM 25506 V. 41. Pages 80-81.

The government of Canada also faced serious political risks with pursuing the Reference. The Attorney General of Canada had based his Reference initiative on his belief that the voters of Quebec would respect a ruling from the Supreme Court of Canada constitutionalizing Quebec secession. He believed that the voters of Quebec would respect the role of the Supreme Court and accept a ruling that constitutionalized Quebec's secession process. Throughout the Reference proceedings, however, the government of Quebec sought to undermine the legitimacy of the Supreme Court by charging, as it had during the Bertrand hearings, that it had neither the competence nor the neutrality to answer the reference questions fairly. In response, the government of Canada mounted a two-year campaign to convince the voters of Quebec of both the legal and practical necessity of a secession process that respected the Canadian Constitution and rule of law. By maintaining their position throughout the Reference proceedings, the government of Quebec also maintained the threat that a ruling in favour of the federal government would cause a backlash of secessionist support in the province of Quebec.

Even before the Allan Rock announced the *Quebec Secession Reference*, Quebec's Minister of Intergovernmental Affairs, responding to rumours suggesting that a federal reference was in the making, argued that the government of Canada was once again planning to adopt the "Plan B" strategy of Guy Bertrand and others. "If the federal government decided to proceed before the Supreme Court, I interpret this as a demonstration or proof that Plan B prevails." After he announced the Reference initiative, Rock denied that the Reference had anything to do with "Plan B" objectives, and reaffirmed this point when reporters asked why the reference questions ignored basic "Plan B" questions such as what kind of Referendum majority and what type of question

would be needed to determine that Quebecers clearly wanted to leave the federation.

“It’s not intended to get a clear referendum question. It’s intended to establish fundamental principles.”³⁷⁰

The government of Quebec was not interested in the arguments of the Attorney General of Canada, and shortly after his Reference announcement the Quebec government held a press conference of its own to announce that they would not be participating in the Reference proceedings. Quebec’s Attorney General, Mr. Bégin made it clear that his government believed that the Reference proceedings were illegitimate, because the judiciary would have no jurisdiction over the secession of Quebec from Canada. “Nous avons déclaré depuis le début que ce n’est pas aux tribunaux de décider ce qu’il va advenir...”³⁷¹ Other secessionist leaders, such as Bloc Québécois leader Michel Gauthier, insisted that the Reference had only one purpose. “En portant la question de la souveraineté du Québec devant la Cour suprême, le gouvernement fédéral reconnaît implicitement avoir perdu la bataille politique et tente maintenant de créer des obstacles juridiques pour empêcher le peuple québécois de décider par lui-même de son avenir.”³⁷²

Assaults on the Reference were not limited to secessionist leaders. Prominent federalists, who were worried that the move would create a backlash from nationalists and politicians in Quebec, and consequently hinder the efforts of federalists who hoped to capture the votes of Quebec nationalists, also questioned whether or not addressing the reference questions was a proper role for the Supreme Court. On September 27, 1996, the leader of the federal Progressive Conservative Party, Jean Charest, argued that the

³⁷⁰ As reported in *The Guardian*. Friday, September 27, 1996. A1.

³⁷¹ Newman, *The Quebec Secession Reference*, 31.

³⁷² As reported in *Le Devoir*. “Politique.” Jeudi 26 septembre 1996. A4.

Reference was “...un geste malheureux et erroné qui n’apporte rien d’utile à ceux qui croient en l’avenir d’un Canada uni. L’accent est mis sur le plan B et cela ne mène nulle part.”³⁷³ Daniel Johnson, the Leader of the Liberal Party and the Official Opposition in Quebec, also argued on September 27 that the government of Canada’s Reference was unnecessary. “I would prefer that it focus its attention on other things instead of going to the Supreme Court.”³⁷⁴

To counteract these charges, the government of Canada initiated its own campaign to promote both the legal and political necessity of the *Quebec Secession Reference*. Shortly after the Reference announcement, on September 30, 1996, Stéphane Dion appeared on the television program *Point de presse*, to explain to Quebecers that the purpose of the Reference was not to deny them the choice of removing Quebec from the federation. Dion insisted that in negotiating Quebec out of the Constitution, after a clear majority of Quebecers clearly supported that option, Quebecers would not have to worry about a province vetoing secession, or having the entire deal subject to a pan-Canadian referendum. “Ce n’est pas raisonnable que l’Île-du-Prince-Édouard bloque le départ du Québec de la fédération parce que ce n’est pas démocratique, ce n’est pas québécois, ce n’est pas canadien.”³⁷⁵ Dion assured Quebecers that such negotiations would not be blocked because there would be no ambiguity over the will of the voters of Quebec.³⁷⁶

In May of 1997, the government of Quebec made it clear that it was not persuaded by the views of Stéphane Dion. At a Parti Québécois fundraiser on May 12, 1997,

³⁷³ As reported in *La Presse*. “Actualités.” Samedi 28 septembre 1996. A19.

³⁷⁴ As reported in *The Globe and Mail*. “Federalists split over call for court ruling.” September 28, 1996.

³⁷⁵ As reported in *La Presse*. “Rien ne retiendrait le Québec, assure Dion.” Monday, September 30, 1996. A4.

³⁷⁶ As reported in *La Presse*. “Rien ne retiendrait le Québec, assure Dion.” Monday, September 30, 1996. A4.

Bouchard assured delegates that the government of Quebec would not respect the eventual “political” judgement on secession of the Supreme Court of Canada. “Moi, comme premier ministre du Québec, comme chef du Parti québécois, je pense que ce jugement, puisqu’il s’agira d’un jugement politique, sera nul et non avenu. Et nous n’en tiendrons aucun compte.”³⁷⁷ Bouchard accused the government of Canada of transforming the Supreme Court into a political tool to use against democracy and the National Assembly of Quebec. Deputy Premier Bernard Landry, in his speech to delegates, added that the courts had no role whatsoever to play in the process of removing Quebec from the federation. “Le peuple souverain, en toute démocratie, se prononcera et de cette manière, et de nulle autre, que le Québec accédera au concert des nations.”³⁷⁸

Nevertheless, this debate between representatives of the government of Canada and the government of Quebec continued for the duration of the Reference proceedings. Between the summer of 1997 and the summer of 1998, the position of the government of Canada and the position of the government of Quebec collided head on in an open letter writing campaign.³⁷⁹ In a series of open letters printed in Quebec newspapers, Dion advanced both the legal and practical rationale for initiating the *Quebec Secession Reference*. For example, on August 11, 1997, Dion criticized the Government of Quebec’s understanding of international law.³⁸⁰ “The vast majority of international law experts...believe that the right to declare secession unilaterally does not belong to

³⁷⁷ As reported in *Le Devoir*. “Un gouvernement du PQ fera outrage à la Cour suprême.” May 13, 1997. A10.

³⁷⁸ As reported in *Le Devoir*. “Un gouvernement du PQ fera outrage à la Cour suprême.” May 13, 1997. A10.

³⁷⁹ Phillip Lee, *Frank: The Life and Politics of Frank McKenna* (Fredericton: Goose Lane Editions, 2001), 238.

³⁸⁰ Printed in *La Presse*. “Stéphane Dion répond à Lucien Bouchard.” Wednesday, August 13, 1997. B2.

constituent entities of a democratic country such as Canada.”³⁸¹ In reply, Bernard Landry, the Deputy Premier of the Government of Quebec, wrote an open letter of his own accusing the Government of Canada of trying to change the very rules of the game that they had agreed with during the 1995 referendum.³⁸²

Dion also made sure to stress the practical difficulties of unilateral secession in his letters, as he did in his response to Landry’s letter on Wednesday August 26, 1997.³⁸³ “Imagine the chaos that would ensue if your government unilaterally told Quebecers that they must ignore the courts, the Constitution, the federal government and the international community...”³⁸⁴ Dion also wrote open letters to Intergovernmental Affairs Minister Jacques Brassard on December 3, 1997, and to former Quebec Liberal Party Leader Claude Ryan in on February 6, 1998, stressing the practical importance of a secession process that respected the Constitution of Canada.³⁸⁵ “In short, while Quebecers must not be kept in Canada against their will, neither must they lose Canada without having very clearly renounced it. These two considerations cannot be respected unless governments act in accordance with the Constitution and the law.”³⁸⁶ On top of his letter, by the spring of 1998 Dion had travelled across Canada stressing the importance of accepting secession as a form of mega-constitutional politics.³⁸⁷

³⁸¹ Letter to Mr. Lucien Bouchard. In Stéphane Dion, *Straight Talk: Speeches and Writings on Canadian Unity* (Kingston: McGill-Queen’s University Press, 1999), 189-193.

³⁸² Letter to Stéphane Dion from Bernard Landry. As reported in *La Presse*. “La “dérive antidémocratique” d’Ottawa se poursuit.” Thursday, August 14, 1997. B2.

³⁸³ Printed in *La Presse*. “Procédures de sécession: le débat de fond engagé?” Wednesday, August 27, 1997. B2.

³⁸⁴ Stéphane Dion. “Letter to Mr. Bernard Landry.” In Stéphane Dion. *Straight Talk: Speeches and Writings on Canadian Unity*. Kingston: McGill-Queen’s University Press, 1999. Pages 194-197.

³⁸⁵ See both letters in Dion, *Straight Talk*, 208-213 & 222-224.

³⁸⁶ Letter from Stéphane Dion to Claude Ryan, February 6, 1998, in Dion. *Straight Talk*, 222-224. Printed in *Le Soleil*. “Nous sommes souvent d’accord, M. Ryan.” Saturday, February 7, 1998. A28.

³⁸⁷ Dion spoke at the Canadian Club of Vancouver on October 17, 1997, at the Montreal Press Club on December 3, 1997, at the Faculty of Law at the University of Montreal on March 18, 1998, and to the Canadian Bar Association in Montreal on March 23, 1998. See speeches in Dion, *Straight Talk*.

The efforts of Dion may have been partly responsible for the lack of a backlash from Quebec voters in the form of increased support for secession during the Reference proceedings. During the federal election of 1997, popular vote support for the Bloc Québécois dropped by over 11 per cent, leaving the party with ten less seats. In October of 1997, a COMPAS poll indicated that support for secession had actually dropped after the Reference was announced, from 49% in September of 1996 to 41% in October of 1997.³⁸⁸ A poll conducted by CROP in Quebec, between April 3-19 1998, found that support for secession continued to plummet. The poll found that only a minority of Francophones in Quebec, 43%, supported Quebec becoming “a sovereign country.” This translated to 36% of Quebecers.³⁸⁹

Notwithstanding the efforts of Dion and the decrease of support for secession in Quebec, secessionist leaders maintained their opposition the Reference throughout the proceedings. Indeed, on February 16, 1998, at a demonstration against the Reference in front of the Supreme Court, Bloc Québécois leader Gilles Duceppe reaffirmed that secession was “...a purely political matter,” and went as far as to send three Bloc Members of Parliament to each provincial legislature across Canada to try to build support for their argument that secession was a matter outside of the jurisdiction of the courts.³⁹⁰ The efforts of the government of Quebec and other secessionist leaders to discredit the Supreme Court meant that when the Court released its opinion, the voters of Quebec would be forced to choose between their provincial and federal governments in determining the legitimacy of the Court’s opinion. This challenged the government of

³⁸⁸ As reported in the *Financial Post*, “Support for separation drops,” October 7, 1997, 7.

³⁸⁹ CRIC-CROP-ENVIRONICS Poll “Portraits of Canada 1998,” April 24 1998, available from http://www.cric.ca/pdf/cric_poll/portraits/portraits1998_poll.PDF; archived at the Website for the Center for Research and Information on Canada, www.cric.ca; accessed 15 January, 2004.

³⁹⁰ As reported in *Winnipeg Free Press*. Tuesday, February 17, 1998 A11.

Canada's strategy that the Reference would "resolve" the debate over the legality of Quebec secession.

4.3 Constitutionalizing Quebec Secession: The Reference Opinion, a Struggle for Clarity, and the Outcome of the Debate

On August 20, 1998 the Supreme Court released its Reference opinion. In a unanimous decision, the Court found that the government of Quebec could not, under domestic or international law, legally effect the secession of Quebec from Canada. Predictably the Chrétien government claimed that the decision was a victory for all Canadians. Unpredictably, the Bouchard government shocked many observers by also applauding the Court's decision. Premier Bouchard had to make the best of the situation, and prised the "common sense" elements of the opinion, greatly minimizing the chance that the voters of Quebec would react negatively to the Court's opinion. On the other hand, in managing the loss of their "right" to make a UDI, the government of Quebec called into question whether or not the court actually ruled against the referendum legislation used by the government of Quebec in 1995. In response to this disinformation campaign, the government of Canada entrenched the key elements of the Reference opinion into federal legislation so there would be no doubt as to how it interpreted the Court's opinion.

4.3.1 The Jurisdiction of the Supreme Court of Canada

From the outset, one of the biggest risks of referring questions related to the secession of Quebec from Canada to the Supreme Court was that the voters of Quebec would not respect the Court's jurisdiction over such a highly controversial matter. The extent of this risk was demonstrated by the government of Quebec's decision to withdraw twice from court proceedings against Guy Bertrand on the grounds that neither the courts nor the Constitution applied to Quebec secession. The government of Quebec's decision not to participate in the Reference proceedings only further promoted their point of view. However, because the amicus curiae made the same jurisdictional arguments in his submission to the Supreme Court that the government of Quebec had made before, the justices were able to devote a significant portion of their decision to explaining why the Courts *did* have a role to play in adjudicating disputes over how Quebec could be removed from the federation.

The Court first addressed the amicus curiae's argument that the Supreme Court, as a "General Court of Appeal," for Canada, could neither have a reference jurisdiction because an "appeal" presupposed the revision of an inferior court's decision, nor address matters related to international law. The Court dismissed this argument by demonstrating that courts of appeal in Canada, England and all over the world exercised original jurisdictions. Moreover, they found, as the Judicial Committee of the Privy Council did in 1910, that the definition "General Court of Appeal" in no way restricted the creation of a Supreme Court with a reference jurisdiction.³⁹¹ The Court found that the amicus curiae's argument that matters of international law were outside of the Court's jurisdiction were equally groundless. In providing an advisory opinion on international law would not be

³⁹¹ The Judicial Committee of the Privy Council was Canada's highest court of appeal until 1949, when the Supreme Court of Canada took over that position. *Reference Re Secession of Quebec*, 234.

purporting to act as a substitute for an international tribunal. Moreover, the Court demonstrated that the use of international law in settling disputes in Canada (for example between two provinces over off shore mineral rights), was well established.³⁹²

The Court then addressed the amicus curiae's argument that the Supreme Court should refuse to answer the reference questions because they were too theoretical, too political in nature and were not yet "ripe" for judicial consideration. The Court insisted that the very reason for creating a reference jurisdiction for the Supreme Court was to answer hypothetical questions.³⁹³ They argued that because a reference did not engage the Court in a disposition of rights, or the weighing of facts, the Court could examine any matter whatsoever, within certain limitations.³⁹⁴

The Court could refuse to examine questions if in examining those questions the Court would move beyond its own assessment of its proper role in the constitutional framework of the federation or would move outside of its area of expertise: the interpretation of law. However, they argued that this was not the case in the present Reference. "The questions posed by the Governor in Council, as we interpret them, are strictly limited to aspects of the legal framework in which that democratic decision is to be taken."³⁹⁵ The Court added that in its history, it also refused to answer reference questions if they were too imprecise or ambiguous to answer, or if the Court simply was not given enough information to provide a complete answer. The Court noted that neither

³⁹² *Reference Re Secession of Quebec*, 235.

³⁹³ *Ibid.*, 236.

³⁹⁴ *Ibid.*, 237.

³⁹⁵ *Ibid.*, 237.

of which were the case with the reference questions at hand.³⁹⁶ “Thus, the Court is duty bound in the circumstances to provide its answers.”³⁹⁷

4.3.2 *The Court’s Response to the Reference Questions*

In answering the first reference question, the Supreme Court effectively constitutionalized Quebec secession. The first question had asked the following: “Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally?” The Court argued that the first reference question was best answered through an understanding of the major unwritten constitutional principles that formed the framework of the Constitution of Canada.³⁹⁸ They argued that these were the principles of federalism, democracy, constitutionalism and the rule of law, and the protection of minorities.³⁹⁹ The court noted that the questions of whether or not a province could be separated from the federation was left in abeyance because there were “gaps” in the Constitution, which meant that some constitutional questions could not be answered by a specific section of the Constitution alone. Constitutional principles were often used by the courts to help fill in these gaps. Because the Constitution did not have a section dealing directly with the

³⁹⁶ Ibid., 239.

³⁹⁷ Ibid., 239.

³⁹⁸ The Court defined these principles as the following: “Underlying constitutional principles may in certain circumstances give rise to substantive legal obligations, which constitute substantive limitations upon government action. These principles may give rise to very abstract and general obligations, or they may be more specific and precise in nature. The principles are not merely descriptive, but are also invested with a powerful normative force, and are binding upon both courts and governments.” In the *Reference Re Secession of Quebec*, 249.

³⁹⁹ The Court described the development of each of these underlying principles in great detail, with reference to many past cases that had been resolved by using these principles. See *Reference Re Secession of Quebec*, 247-263.

secession of a province of the federation, the Court argued that the answer to the first question would require the use of these underlying constitutional principles.

The Court observed that what is claimed by a right to secede unilaterally is the right to effectuate secession without prior negotiations with the other provinces and the federal government.⁴⁰⁰ In justifying this right, some secessionists argued that a clear expression of democratic will in a referendum in the province of Quebec would outweigh the Constitution of Canada and rule of law. The Court noted, however, that democracy could not exist without the rule of law. “It is the law that creates the framework within which the ‘sovereign will’ is to be asserted and implemented.” Thus, the principle of the rule of law required that the exercise of public power must find its ultimate source in a legal rule. Because the Constitution was the supreme law of the federation, the Court insisted that the Constitution bound all of the governments in the federation. “[Indeed], their sole claim to exercise lawful authority rests in the powers allocated to them under the Constitution, and can come from no other source.”⁴⁰¹

The Court argued that the Constitution was the expression of the sovereignty of the people of Canada. “It lies within the power of the people of Canada, acting through their various governments...to effect whatever constitutional arrangements are desired within the territory, including, so it be desired, the secession of Quebec from Canada.”⁴⁰² The Court argued that because the secession of Quebec would purport to alter the governance of the Canadian territory in a manner inconsistent with the Constitution, under the Constitution secession would require a constitutional amendment.

⁴⁰⁰ *Reference Re Secession of Quebec*, 264.

⁴⁰¹ *Ibid.*, 258.

⁴⁰² *Ibid.*, 264.

The government of Quebec could not dictate the terms of secession and then after offer to negotiate technical details. Nor could the other governments in the federation claim that a clear expression of self-determination by the people of Quebec would impose no obligations to negotiate.⁴⁰³

The Court insisted that a referendum was merely consultative, and that the results of a referendum would have no direct role or legal effect under the Constitution. However, the Court found that the constitutional principles of federalism and democracy would dictate that the clear expression of the desire to pursue secession by the population of a province would give rise to a reciprocal obligation on all parties to Confederation to negotiate constitutional changes to respond to that desire. Such a clear expression, which the Court admitted could be ascertained by a referendum, would confer legitimacy on the efforts of the government of Quebec to initiate negotiations over the constitutional amendment process necessary to remove Quebec from the federation. However, in order to constitute a “clear expression,” the Court insisted that “a referendum must be free of ambiguity both in terms of the question asked and in terms of the support it receives.”⁴⁰⁴ The justices did not say, however, what type of a majority a referendum needed to have to constitute an unambiguous, clear expression.

Negotiations following such a clear expression should also be guided by the four underlying constitutional principles. The Court insisted that secession negotiations would give rise to many issues of great complexity and difficulty and that no one could predict the course that these negotiations might take. “Negotiations would be necessary to address the interests of the federal government, of Quebec and the other provinces, and

⁴⁰³ *Reference Re Secession of Quebec*. Page 267.

⁴⁰⁴ *Ibid.*, 265.

other participants, as well as the rights of *all* Canadians both within and outside Quebec.”⁴⁰⁵

The Court made a special reference to questions surrounding the territorial integrity of Quebec or indeed the provinces and territories bordering Quebec. “Nobody seriously suggests that our national existence, seamless in so many aspects, could be effortlessly separated along what are now the provincial boundaries of Quebec.”⁴⁰⁶ The Court insisted that *all* of these issues would have to be resolved within the overall framework of the rule of law. And even if negotiations were carried out in conformity with the underlying constitutional principles highlighted by the Court, there was still the possibility that these negotiations could reach an impasse. “We need not speculate here as to what would then transpire. Under the Constitution, secession requires that an amendment be negotiated.”⁴⁰⁷ The Court reiterated that secession would have to be negotiated within the overall framework of the rule of law, in order to assure Canadians resident in Quebec and elsewhere a measure of stability in what would likely be a period of considerable upheaval and uncertainty.

The Court also noted that although there was no right under the Constitution to unilaterally effect the secession of Quebec from Canada, this did not rule out the possibility of an unconstitutional declaration of secession leading to a de facto secession, as mentioned in the submission of the amicus curiae. However, the Court insisted that this would be akin to the Government of Quebec acting without regard to the rule of law simply because it asserted the power to do so, or that the law may be broken so long as it can be broken successfully. “Such a notion is contrary to the rule of law, and must be

⁴⁰⁵ *Reference Re Secession of Quebec*, 265.

⁴⁰⁶ *Ibid.*, 269.

⁴⁰⁷ *Ibid.*, 270.

rejected.” The Court thus answered question one by concluding that under the Constitution of Canada, neither the National Assembly, legislature or government of Quebec could effect the secession of Quebec from Canada unilaterally, that is to say, without principled negotiations and be considered a lawful act.⁴⁰⁸

The court then addressed the second reference question, which asked whether or not the government of Quebec had a right, through self determination or otherwise, in international law to unilaterally effect the secession of Quebec from Canada. The Court’s response to Question 2 was quite similar to the response submitted to them by the Attorney General. They began by stating that it was clear that international law did not specifically grant parts of sovereign states the legal right to secede unilaterally from their parent state. They argued that although international law does not grant or deny a right to unilateral secession, the difficulties of achieving statehood via a right to self-determination suggest that there is no right for unilateral action. The Court opined that international law does recognize, in some circumstances, “rights” of other entities, including the right of a people to self-determination.

The Justices argued that international law expects that the right to self-determination would be exercised by peoples within the framework of existing sovereign states and consistently with the maintenance of the territorial integrity of those states. They explained the difference between external and internal international law and concluded that the international law principle of self-determination had evolved within a framework of respect for the territorial integrity of existing states.

⁴⁰⁸ The Court insisted that “[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. *Reference Re Secession of Quebec*, 270.

The justices argued that the *Declaration on Friendly Relations*, the *Vienna Declaration*, the *Declaration on the Occasion of the Fiftieth anniversary of the United Nations*, and the *Helsinki Final Act* all stipulate that a people's right to self-determination could not be used to justify the dismembering of the territorial integrity of States possessed of a government representing the whole people belonging to the territory without distinction.⁴⁰⁹ The only exception to this rule was in the case of colonial or oppressed peoples. However, the Court opined that the people of Quebec were neither a colonial people, nor were they a people oppressed by the Canadian constitutional order. The Court argued that the people of Quebec were not denied access to government, they occupied prominent positions in government and were equitably represented in legislative, executive and judicial institutions in Canada. In terms of answering Question 2, the Courts answers were quite similar to those submitted by the Attorney General.

Before concluding their opinion on Question 2, the Justices turned to the question of Aboriginal rights. The Court acknowledged the importance of the submissions made concerning aboriginal rights in the event of a unilateral secession, specifically concerning territorial questions relating to native territorial claims. The Court, however, argued that these concerns were based on the potential right of Quebec to unilateral secession. Since the Court decided that no such right existed, "it becomes unnecessary to explore further the concerns of the aboriginal peoples in this reference."⁴¹⁰ The Aboriginal interveners would be disappointed that the Court did not take the opportunity to weigh in on their argument that regardless of how negotiations played out, secession could not occur

⁴⁰⁹ *Reference Re Secession of Quebec*, 282.

⁴¹⁰ *Ibid.*, 288.

without the consent of Aboriginals in Quebec.⁴¹¹ However, the Court was following the government of Canada's request for judicial restraint.

The Justices concluded their opinion by revisiting the amicus curiae's argument concerning the principle of effectivity. Once again the Court admitted that an illegal act may eventually, as a matter of empirical fact, be recognized on the international plane. However, it is "...quite another matter to suggest that a subsequent condonation [sic] of an initially illegal act retroactively created a legal right to engage in the act in the first place." The Court concluded that this latter contention was not supported by the international principle of effectivity or otherwise and that "it must be rejected." In closing, the Supreme Court addressed the third reference question in one sentence. "In view of our answers to Questions 1 and 2, there is no conflict between domestic and international law to be addressed in the context of this Reference."⁴¹²

4.3.3 Judicial Restraint: Leaving Some Issues in Abeyance

While the government of Canada was pleased with what the Court did say, it was also pleased with what the Court did not say. The Attorney General had asked the Court not to consider arguments as to which of the amending procedures in the Constitution of Canada applied to the secession of a province from the federation.⁴¹³ Opening a debate over whether or not the consent of P.E.I. or Alberta was needed before Quebec could

⁴¹¹ For reaction from the legal team representing the Grand Council of the Crees in the Reference proceedings, see Andrew Orkin and Joanna Birenbaum's article "The Aboriginal Argument: the Requirement of Aboriginal Consent," in *The Quebec Decision: Perspectives on the Supreme Court Ruling on Secession*, ed David Schneiderman (Toronto: James Lormier & Company Ltd., 1999), 83.

⁴¹² *Reference Re Secession of Quebec*, 292.

⁴¹³ Factum of the Attorney General of Canada, 38.

leave the federation would have been controversial, and unnecessary for the Court and government of Canada to constitutionalize secession. The Court skilfully avoided discussion of which amending formula would apply by insisting that secession had to be negotiated in accordance with the four general constitutional principles identified by the Court, without even mentioning the requirements of the different amending formulas in the *Constitution Act, 1982*. They implied that secession negotiations should not be based on any one of the specific amending formula. Rather a decision should be made on which of the amending formula to use if and when an agreement was reached on the secession of Quebec from Canada. Interests of the federal government, provincial and territorial governments, Aboriginals and the rights of all Canadians both within and outside of Quebec would be considered in reaching this agreement.

The Attorney General had also asked the Court not to consider arguments as to what other constitutional principles might apply in the event of a potential secession.⁴¹⁴ Although the Court did reorganize and expand on the Attorney General's constitutional principles (joined constitutionalism with 'The Rule of Law', extracted democracy and individual rights from 'The Rule of Law' to form separate principals of minority rights and democracy), it went to great lengths to avoid going beyond establishing the judicial justification for mega-constitutional negotiations and avoided discussion on how those principles would influence secession negotiations.⁴¹⁵ "Having established the legal framework, it would be for the democratically elected leadership of the various participants to resolve their differences."⁴¹⁶

⁴¹⁴ Factum of the Attorney General of Canada, 38.

⁴¹⁵ Ibid., 23-26.

⁴¹⁶ *Reference Re Secession of Quebec*, 271.

The Court also avoided taking a position on many of the concerns raised by the interveners, such as whether or not Aboriginals in Quebec could veto a secession agreement, or what constituted a “clear question” and a “clear majority” for a referendum to give a government a mandate for secession.⁴¹⁷ “Equally, the initial impetus for negotiation, namely a clear majority on a clear question in favour of secession, is subject only to political evaluation, and properly so.”⁴¹⁸

The Court’s opinion met all of the Chrétien government’s key objectives in the Reference proceedings. The Court was unequivocal in answering the reference questions. The government of Quebec did not have a right under international or domestic law to unilaterally effect the secession of Quebec from Canada. Secession could only be achieved through mega constitutional negotiations and an amendment to the Constitution. Moreover, questions related to the nature of negotiations to effect the secession of Quebec from Canada were left unanswered by the court, including what constituted a clear expression of will to initiated negotiations to amend Quebec out of the Constitution.

4.3.4 Legislating Elements of the Court’s Opinion: The Clarity Bill

Predictably, after the Court released its decision, the government of Canada claimed victory. During a press conference on August 20, 1998, Stéphane Dion argued that the Court’s opinion confirmed “...that our constitution as well as international law permit the independence of Quebec, but that the Government of Quebec does not have

⁴¹⁷ *Reference Re Secession of Quebec*, 288.

⁴¹⁸ *Ibid.*, 271.

the constitutional power nor the right in international law to effect independence unilaterally.”⁴¹⁹ Dion concluded that “the current Government of Quebec should respect the Court’s ruling and consequently reject a unilateral declaration as a means to effect secession.”⁴²⁰ During his press conference on August 21, 1998, Prime Minister Chrétien insisted that the Court ruling was “...a victory for all Canadians.”⁴²¹ He insisted that the Court confirmed the Government of Canada’s position that secession was as much a legal act as a political act, and that negotiations would follow a clear majority vote on a clear question in favour of secession.⁴²² Moreover, Chrétien insisted that the opinion made it clear that in order for a referendum to establish a mandate for secession it would have to be based on a question “free of ambiguity, both in terms of the question asked and in terms of the support it generates,” and that the terms for secession would not be dictated by the government of Quebec.⁴²³

While it was clear that the Government of Canada was pleased with the Court’s opinion, the federal government’s constitutionalization strategy also depended upon the reaction of the Quebec government and its citizens. In a surprising turn of events, instead of condemning the Court’s ruling, the government of Quebec actually praised it. Maintaining its position that the federal government had “Plan B” motivations in mind when it initiated the Reference proceeding, Bouchard claimed that their plan had backfired. “Yesterday’s event thus embodied the Canadian government’s attempt to have its own Court and its own judges validate the central elements of its Plan B, its anti-

⁴¹⁹ Stéphane Dion’s Statement in Response to the Ruling of the Supreme Court, Ottawa, August 20, 1998. Found in Dion, *Straight Talk*, 240.

⁴²⁰ *Ibid.*, 241.

⁴²¹ Prime Minister Jean Chrétien’s speech on August 21, 1998. Found in Schneiderman. *The Quebec Decision*, 92.

⁴²² *Ibid.*, 92.

⁴²³ *Ibid.*, 93.

sovereigntist offensive,” Bouchard insisted. “What happened was the reverse: the Court demonstrated that Ottawa’s arguments do not stand up to analysis, and it struck at the very heart of the traditional federalist discourse.”⁴²⁴ Bouchard argued that the Court’s ruling contained an “element of good sense” that ensured that other governments in the federation could no longer threaten not to negotiate secession following future referendum campaigns.

Bouchard did not mention the Court’s repudiation of secessionists’ age old arguments that Quebecers had a right to declare independence unilaterally, that it had a right to maintain its provincial borders as an independent country, or that “Quebecers alone” would decide how Quebec would leave the federation. He correctly pointed out that the Canadian federation could not ignore a clear expression in favour of secession from the voters of Quebec; that Ottawa would have to negotiate if the voters of Quebec clearly wanted secession. However, after this Bouchard tried to make up for the secessionist losses by spinning the Court’s opinion in secessionists’ favour.

Bouchard argued that when the Court left the question of a “clear majority” and a “clear question” up to the “political actors” he insisted that those political actors would be only members of the government of Quebec. The Court had thus recognized, he argued, the right of the government of Quebec to choose, on its own, the wording of a referendum question and the threshold of the majority needed for secession.⁴²⁵ Bouchard went as far as to argue that the Supreme Court recognized a UDI as an option if negotiations between Quebec and the federal government broke down, noting the Court’s finding that a UDI

⁴²⁴ Statement of Premier Lucien Bouchard. August 21, 1998. Found in Schneiderman. *The Quebec Decision*, 95.

⁴²⁵ Ibid. Page 99.

could “eventually be accorded legal status by Canada and other states.”⁴²⁶ In short, while accepting the Court’s opinion, Bouchard insisted that it affirmed that the secession process used by the government of Quebec in 1995 was legitimate. “In 1995, we played by the rules.”⁴²⁷

The government of Quebec’s reaction to the Court’s ruling was a mixed blessing for the Government of Canada. On one hand, Bouchard’s praise for parts of the Court’s ruling the Court legitimized the Court’s role and minimised any chance that the Reference opinion might spark a backlash from the voters of Quebec. On the other hand, the Bouchard’s interpretation of the Court ruling posed a problem for the federal government. The purpose of the *Quebec Secession Reference* was to establish that secession could only occur through mega-constitutional negotiations, an agreed upon amending formula, followed by ratification. By suggesting that the Court’s opinion approved of the unilateral process that the government of Quebec used in 1995, Bouchard was also suggesting that if negotiations broke down then it would be acceptable for the government of Quebec to make a UDI. Bouchard’s spin on the Court’s opinion had to be contested so as to ensure that Canadians understood secession indeed had to occur within the framework of the Constitution of Canada.

In an attempt to clarify the Court’s opinion, Stéphane Dion wrote a letter to Premier Bouchard insisting that the Court’s opinion ruled out three major aspects of the government of Quebec’s 1995 secession process. First, Dion insisted that the government of Quebec could no longer claim to be the sole judge of the clarity of the question and of the size of the majority required in a secession referendum, because the

⁴²⁶ Statement of Premier Lucien Bouchard. August 21, 1998. Found in Schneiderman, *The Quebec Decision*, 98.

⁴²⁷ Ibid. Page 97.

Court insisted that all of the political actors that would be involved in negotiations would have to first agree that a will for secession existed. Secondly, Dion argued that the government of Quebec could no longer claim to effect unilateral secession. “After reading the opinion of the Supreme Court, no one can not know that such an attempt at unilateral secession would have no legal basis...Secession would be proclaimed only after a separation agreement accompanied by a constitutional amendment.” Moreover, Dion added that the government of Quebec could no longer claim that it alone would determine what would be on the negotiating table during negotiations to amend the Constitution.⁴²⁸

In spite of Dion’s efforts, for over a year, the government of Quebec maintained its narrow interpretation of the Reference decision, as well as its claim that it could unilaterally effect the secession of Quebec from Canada. This, notwithstanding the fact that opinion polls suggested that Quebecers agreed with the interpretation of Dion and the federal government. In a poll released in *La Presse* on 29, August 1998, 75% of Quebec respondents indicated that the government of Quebec should respect the decision of the Court.⁴²⁹ Not only was the Court’s opinion not causing a backlash in Quebec, but support for secession continued to drop in Quebec. In September of 1999, polls indicated that support for secession in Quebec had dropped significantly, with 58% of Quebecers indicating they were against it.⁴³⁰ Thus, while the government of Quebec was refusing to

⁴²⁸ Letter from Stéphane Dion to Lucien Bouchard, August 26, 1998. Found in Schneiderman, *The Quebec Decision*, 101-104. Dion accused Parizeau of only recognizing the parts of the ruling that he liked, ignoring the legal obligations it set for the Government of Quebec. “You praise those passages that interest you and ignore the content-however obvious-of those passages that displease you.”

⁴²⁹ As reported in *La Presse*. “Plus que 50% + 1.” Saturday, August 29, 1998. A1.

⁴³⁰ As reported in *The Globe and Mail*. “Quebecers’ support for sovereignty, PQ faltering, poll finds.” Saturday, September 18, 1999.

buy into the constitutionalization of Quebec secession, it appeared as though the citizens of Quebec were buying into it.

In August of 1999 Bouchard's patience wore out. Responding to rumours that the federal government was thinking of clarifying the matter for once and for all by passing legislation to set out the rules for a referendum on secession, Quebec's Intergovernmental Affairs Minister Joseph Facal declared that the government of Canada would have no role to play in determining whether or not a referendum produced a clear expression of the will of the voters of Quebec to separate Quebec from Canada.⁴³¹ In response, on August 30, 1999, Stéphane Dion issued an ultimatum to the government of Quebec by insisting that such legislation was a possibility if the government of Quebec continued to refuse to recognize the consequences of the Court's opinion.⁴³² "For the moment, the ball is in the Quebec government's court. It's up to [Quebec] to say that...the confusing and tricky process of 1995 will never be repeated."⁴³³

On September 16, 1999, Joseph Facal called Dion's bluff, and ignoring the recent Reference opinion, accused the government of Canada of trying to change rules that it had itself accepted for two referendums on secession. "May I remind you that the federal government participated under the umbrella of the NO committee in previous referendums and accepted the rules of the game? Why do they not now accept that we maintain the same rules?"⁴³⁴ He was even more blunt in an interview with the *National Post* on October 6, 1999. When asked whether or not Quebec was bound by the decision

⁴³¹ As reported in *The Globe and Mail*. "Ottawa plots referendum strategy." August, 27 1999. Page A1.

⁴³² "We are considering, if M. Bouchard does not clarify things, to clarify things as far as the government of Canada is concerned." As reported in *The Globe and Mail*. "Ottawa ponders moves after Quebec vote." September, 15 1999. A12.

⁴³³ As reported in *The Globe and Mail*. "Referendum Legislation is a possibility, Dion says." Tuesday, August 31, 1999. A5.

⁴³⁴ As reported in *The Globe and Mail*. "Dion trying to change vote rules, Facal says." Thursday, September 16, 1999. A6.

of the Supreme Court, Facal replied “Absolutely not. Absolutely not...[If] you submit the clear expression of the collective will of a nation to the constitutional rule of law of Canada, you are in effect using the rule of law as a prison.” When asked what the Government of Quebec would do if the Government of Canada refused to recognize a UDI, Facal replied “Just watch us.”⁴³⁵ Facal’s comments gave the government of Canada ample proof that there was a need to settle the matter by clarifying, in statute, the rules of any future referendum on secession.

4.3.5 The Clarity Act, Bill 99 and the Outcome of the Debate

Bouchard’s refusal of Dion’s ultimatum coincided with, or perhaps contributed to, a significant drop in support for secession in Quebec. In a poll conducted by Groupe Léger & Léger, 58% of respondents said that they would vote NO in a third referendum on Quebec secession. The poll also indicated that a majority of Quebecers supported the rules of the games established by the Supreme Court in 1998. 61% of respondents agreed that the government of Canada should have a role in forming the referendum question.⁴³⁶ Thus the government of Canada was in a good position to clarify the court’s opinion in federal legislation.

On December 13, 1999, the government of Canada acted upon Dion’s ultimatum and introduced Bill C-20, “*An Act to Give Effect to the Requirement for Clarity as Set Out in the opinion of the Supreme Court of Canada in the Quebec Secession*”

⁴³⁵ Interview between the National Post and Joseph Facal, Quebec’s Intergovernmental Affairs Minister. In *The National Post*. “If Ottawa won’t negotiate on sovereignty? ‘Just watch us.’” October 6, 1999. A6

⁴³⁶ As reported in *The Globe and Mail*. “Quebeckers’ support for sovereignty, PQ faltering, poll finds.” September, 18 1999. A10.

Reference.”⁴³⁷ Bill C-20, or the “Clarity Bill,” proposed to entrench, into law, three elements of the 1998 *Quebec Secession Reference*. The first section of the Bill established that within thirty days of a referendum, the House of Commons shall review the referendum question that was asked to determine whether or not it would result in a clear expression of the will of the population of a province to become an independent state.

The Second section of the Bill established that if the question was deemed to have been clear, then the House of Commons would consider whether or not a clear majority of the population of that province supported this clear expression in favour of independence. The Bill proposed to forbid the Government of Canada from entering into any negotiations to effect the secession of a province from the federation unless the House of Commons determined, “that there has been a clear expression of a will by a clear majority of the province” in favour of secession.

The Clarity Bill clearly established secession as a form of mega-constitutional reform, requiring a negotiated agreement to amend the Constitution of Canada. Section 3. (1) stipulated the following:

It is recognized that there is no right under the Constitution of Canada to effect the secession of a province from Canada unilaterally and that, therefore, an amendment to the Constitution of Canada would be required for any province to secede from Canada, which in turn would require negotiations involving at least the governments of all of the provinces and the Government of Canada.⁴³⁸

⁴³⁷ *An Act to Give Effect to the Requirement for Clarity as set out in the Opinion of the Supreme Court of Canada in the Quebec Secession Reference*. (The Clarity Act) In the Statutes of Canada. Chapter 26 Ottawa: The Queen’s Printer For Canada, 2000.

⁴³⁸ *The Clarity Act*.

The Bill added that no Minister of the Crown could propose a constitutional amendment to effect the secession of a province from Canada unless the government of Canada had addressed, in negotiations, the terms of secession including the division of assets and liabilities, any changes to the borders of the province, and the protection of minority rights. After introducing the Bill in the House of Commons, Stéphane Dion made it clear to reporters that the Clarity Bill was focused completely on the Government of Canada's commitment to the secession process advanced in the *Quebec Secession Reference*, and was not meant to address other matters related to the secession of Quebec from Canada. "So, this *Draft Bill* does not set rules for a referendum. It sets rules for the Government of Canada. It obliges the Government of Canada to negotiate if things are clear and not to negotiate if they are not."⁴³⁹

Two days later, the government of Quebec responded to the *Clarity Bill* by tabling *Bill 99, An Act respecting the exercise of the fundamental rights and prerogatives of the Québec people and the Québec State*.⁴⁴⁰ *Bill 99* reaffirmed that the Quebec "people" had a right to self-determination, which it described as the right to "freely decide the political regime and legal status of Québec."⁴⁴¹ It stated that the voters of Quebec "...shall determine alone the mode of exercise of its right to choose the political regime and legal status of Québec."⁴⁴² It also stated that the winning option in referendums in Quebec would always be 50% plus one. Although *Bill 99* conflicted with the *Clarity Bill*'s

⁴³⁹ Speaking notes, Press Conference by The Honourable Stéphane Dion Minister of Intergovernmental Affairs. Friday, December 10, 1999, available from <http://www.uni.ca/19991213.html>; archived at the Uni.ca Website; accessed 15 January 2004.

⁴⁴⁰ *Bill 99, An Act respecting the exercise of the fundamental rights and prerogatives of the Québec people and the Québec State*, National Assembly, Thirty-Sixth Legislature, First Session. Québec City: Québec Official Publisher, 2000. Also found in *The Government of Québec. Québec's Positions on Constitutional and Intergovernmental Issues*. Page 502.

⁴⁴¹ *Bill 99*. In *Québec's Positions on Constitutional and Intergovernmental Issues*, 505.

⁴⁴² *Bill 99*. In *Québec's Positions on Constitutional and Intergovernmental Issues*, 505.

stipulations that political actors from both inside and outside of Quebec would have a say in determining whether or not the clear majority of support for secession that was needed to begin negotiating secession was clearly expressed in Quebec, *Bill 99* did not claim that the Government of Quebec had a right to unilaterally leave the federation.

After tabling *Bill 99*, Premier Bouchard appeared on a province-wide televised “address to the nation” to warn Quebecers that their fundamental rights were under attack from Ottawa. In his address he explained the purpose of *Bill 99*, and urged Quebecers to support his government in its opposition to the Clarity Act.⁴⁴³ Bloc Québécois leader Gilles Duceppe responded to the Clarity bill by declaring “Parliamentary warfare” against the initiative, promising that his party would do everything it could to defeat or at least delay the Bill in Parliament.⁴⁴⁴

As with the Reference initiative, opposition to the *Clarity Bill* was not limited to secessionists. Federalist leaders were split over the need for this Bill. For example, the senior leaders of the Progressive Conservative Party were split. P.C. Leader Joe Clark insisted that the *Clarity Bill* was a “roadmap to secession” and that if it became law, “...this bill has the potential to lead Quebec and the rest of Canada into a confrontation from which there may be no way out.”⁴⁴⁵ Another federal Progressive Conservative, Saint John M.P. Elsie Wayne, on the other hand, supported the Bill. “There’s no question, if [Quebec Premier Lucien] Bouchard was going to have another referendum, you’ve got to spell out the real meaning of what that referendum is going to do...It should have been

⁴⁴³ As reported in the *National Post*. “Bouchard urges all of Quebec to fight Ottawa.” December 16, 1999. A1

⁴⁴⁴ As reported in *The Globe and Mail*. “Bloc vows war against referendum bill in Parliament.” Saturday, December 11, 1999. A7.

⁴⁴⁵ As cited in *The Globe and Mail*. “Clark blasts Ottawa’s ‘roadmap to secession.’” December 14, 1999.

done last time. It wasn't done last time.”⁴⁴⁶ Jean Charest, the Liberal leader in Quebec, thought the *Clarity Bill* was a waste of time because it would be impossible to predict reactions to a Yes vote.⁴⁴⁷ “Anyone who proposes to break up a country and walk down that path is walking into a black hole.”⁴⁴⁸

Opinion polls conducted after the Bill was tabled, however, suggested that Prime Minister Chrétien and Stéphane Dion were on the right track. On December 14, 1999, a poll conducted by Angus Reid Group/Globe and Mail/CTV found that 78% of Francophones in Quebec agreed with the need for a clear majority for Quebec secession.⁴⁴⁹ 60% of Quebecers polled believed that more than 50% plus one was required for a “clear majority.” Moreover, the poll showed that 71% of Quebecers did not want the Parti Québécois government to hold another referendum on secession during its current mandate. A more detailed poll conducted by COMPAS, reported in the *National Post* on February 17, 2000, showed that the a majority of Quebecers continued to support the Clarity Bill.⁴⁵⁰ The poll found that 51% of Quebecers believed the Bill to be “A reasonable effort to protect democracy” while 39% found it to be “an improper interference by the federal government.” The poll found that the Bloc Québécois had

⁴⁴⁶ As cited in *The Globe and Mail*. “Tory lieutenant breaks ranks over Quebec.” December 16, 1999.

⁴⁴⁷ P.C. leader Joe Clark and Quebec Liberal party leader Jean Charest had the most to loose if the nationalist voters in Quebec turned against the Clarity efforts of Chrétien and Dion. Both were trying to build support in the province of Quebec, and would not have wanted to alienate any Quebec voters unless it was absolutely necessary.

⁴⁴⁸ As reported in *The Globe and Mail*. “50% plus one a sufficient majority, Quebec maintains.” Saturday, December 11, 1999. A8.

⁴⁴⁹ As reported in *The Globe and Mail*, “New poll finds no groundswell for sovereignty,” Wednesday December 15, 1999

⁴⁵⁰ As reported in *The National Post*, “65% support Ottawa's plans on Quebec negotiations: Poll shows majority of Quebecers back bill,” February 17, 2000 A6

been unable to mobilize opposition to the Bill, even among its own electoral backers. Even among Franco-Quebecers, 47% were in favour of the bill with 42% against it.⁴⁵¹

Notwithstanding this opposition, during the spring of 2000 the government of Canada pushed the *Clarity Bill* through Parliament, making only one slight change to allow for the input of Quebec aboriginals in determining whether or not a clear majority of Quebecers voted on a clear question for secession.⁴⁵² The government of Quebec's *Bill 99*, however, was having a much more difficult time in the National Assembly. Premier Bouchard wanted the Bill to pass with unanimous consent. However, by late April it was clear to the government of Quebec that it would not receive the support of the opposition Liberals in the National Assembly for the original draft of *Bill 99*. In a desperate attempt to gain unanimous approval, Bouchard amended *Bill 99* in April of 2000 to include a section actually supporting the "political importance" of the *Quebec Secession Reference*.⁴⁵³ The Liberals still refused to support it. *Bill 99* fell off the political radar screen until a watered down version was eventually passed, with little fanfare, in mid-December of 2000.

By June of 2000, opposition to the *Clarity Bill* had all but vanished, at least from leaders of the secessionist movement in Quebec. The Bill was meeting staunch resistance in the Senate, however, from Senators who rejected the fact that they were excluded from the process of determining whether or not the Government of Quebec had received a clear expression of support for Quebec secession. During Senate hearings on the *Clarity*

⁴⁵¹ As reported in *The National Post*, "65% support Ottawa's plans on Quebec negotiations: Poll shows majority of Quebecers back bill," February 17, 2000 A6

⁴⁵² As reported in the *Calgary Herald*. "Clarity bill altered to give natives a say on secession." March 15, 2000. A5.

⁴⁵³ As reported in *The Globe and Mail*, "Sovereignty bill changes tabled," April 20, 2000 A4

Bill, experts were divided over whether or not the Senate should also be responsible for determining the clarity of a referendum on secession.

Constitutional expert Peter Hogg, for example, argued that Senate was not missing out on anything. “The only power you have lost is the power to participate in the question of whether the referendum question is a clear one and whether the referendum majority is a clear one...If this bill did not exist, the Senate would not be consulted on those issues, nor would the House of Commons.”⁴⁵⁴ However, Michael Behiels, a history professor from the University of Ottawa, argued that the Senate’s role of giving the regions of the country an equal voice made it an ideal body to ensure, on behalf of all of Canada, that the question was clear and the majority was clear. “I believe the Senate was designed to do that sort of job—to protect the weak, to protect minorities, to protect regions that could not have the kind of power and sway in the House of Commons.”⁴⁵⁵

Regardless of the debate over what role the Senate should play, the government of Canada refused to budge. The government of Canada responded by appointing two new *pro-Clarity Bill* Senators, to ensure that the vote would go through. On Thursday, June 29, 2000, the Senate approved of the Bill by a vote of 52 in favour and 34 against.⁴⁵⁶ With the Senate’s approval the Bill became federal law, and the government of Canada’s constitutionalization strategy was complete. Although it was impossible to predict whether or not the government of Canada’s *Clarity Act* would be respected by future governments of Quebec, what was clear by the summer of 2000 was that the government

⁴⁵⁴ Proceedings of the Special Committee on Bill C-20 Ottawa : Public Works and Government Services Canada, 2000. Volume 3, Page 64 5-6-2000.

⁴⁵⁵ Proceedings of the Special Committee on Bill C-20 (Ottawa : Public Works and Government Services Canada, 2000. Volume 7), 18

⁴⁵⁶ As reported in *The Lethbridge Herald*. “Referendum bill survives Senate.” Friday, June 30, 2000.

of Canada's strategy to constitutionalize Quebec secession had not produced an upsurge in support for secession in Quebec. Thus, along with its legal objectives, the political objectives of the Chrétien government in the *Quebec Secession Reference* were achieved.

CHAPTER FIVE

CONCLUSION

For close to thirty years the government of Canada fought the secessionist movement in Quebec without once establishing a position on *how* Quebec could be removed from the federation. The government of Canada left its position on how secession could occur in abeyance: during the election of the P.Q. in 1976; during the 1980 referendum on sovereignty-association; during the adoption of a referendum bill based on a UDI in 1991; and during the 1995 sovereignty-partnership referendum, which also based on a UDI. While this silence had worked wonders for Prime Minister Trudeau during the 1980 referendum, it actually worked wonders for Jacques Parizeau and the P.Q. after 1988. They were able to argue that the constitutional amending formula in the Constitution Act, 1982, which was always to be used to effect changes that would alter the Constitution of Canada, did not apply to the secession of Quebec from Canada. This politicalization of Quebec secession made secession seem easy to achieve, and may have been partly responsible for the close results of the 1995 referendum.

While the government of Canada, for political reasons, did not challenge the threat that Quebec's UDI legislation posed to its sovereignty in Quebec and to its duty to protect the territorial integrity of Canada and to maintain peace, order and good government, a Quebec citizen, Guy Bertrand, was not willing to allow the threat it posed to his individual rights and freedoms, which were entrenched in the very constitution that a UDI would overthrow, to stand. The fact that the government of Quebec ignored the ruling from his initial court action, prior to the 1995 referendum, which warned the government of Quebec not to hold a referendum based on legislation that included

provisions for a UDI, meant that there was a good chance that the courts would take stronger measures to convince the government of Quebec that it could not make a UDI during his second court action after the referendum.

If the close call and convoluted question in the 1995 referendum did not convince Prime Minister Chrétien to break the government of Canada's silence on *how* a province could be removed from the federation, then the continued judicial action of Guy Bertrand did. By taking the issue out of the hands of Bertrand, and referring the matter to the Supreme Court of Canada, the Chrétien government insured that the issue of making all political actions accountable to the Constitution was addressed, without prematurely opening a debate on all matters related to the secession of Quebec from Canada.

Indeed, the constitutionalization of Quebec secession required some disclosure of the basic rules of the game. The government of Canada had admitted since the 1960's that Quebecers would not be held in the federation against their will. In establishing that secession had to occur through negotiating an agreement on amending the Constitution through using one or more of the constitutional amending formulae, the obvious next question became: what would trigger those negotiations? Because of the reaction, or lack of reaction, from the voters of Quebec to the Reference opinion, the government of Canada was able to establish in the *Clarity Act* the government of Canada's conditions for recognizing the will of Quebecers to separate, without establishing any position on what the interests of the federal government would be in the negotiations that followed. The government of Canada's objectives in the *Quebec Secession Reference* were therefore met, even though many of the objectives of proponents of "Plan B" contingency plans were not.

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