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The Legality of a Unilateral Declaration of Independence under Canadian Law

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This paper explores the legality of a unilateral declaration of independence ("U.D.I.") by Quebec under Canadian law. It first addresses the role of arguments of legality in comparison to broader arguments of legitimacy. It discusses what branch of the amending formula would apply to secession (if the amending formula does apply), and whether Aboriginal peoples' consent would be required. It evaluates a variety of alternative means of secession — secession by revolution, and claims that a U.D.I. would be authorized by constitutional convention, by the compact theory of Confederation, by the incorporation of principles of international law, or by a direct appeal to democratic principle. Above all, it discusses whether the Canadian constitution's amending formula applies to the case of secession, and if so, whether it applies exhaustively. In the course of addressing this issue, it offers reflections on the role of constitutional norms, indeed on the nature of legal norms generally.

Cet article analyse la légalité, en droit canadien, d'une déclaration unilatérale d'indépendance («D.U.I.») de la part du Québec. Il examine d'abord le rôle des arguments sur la légalité en comparaison aux arguments plus larges portant sur la légitimité d'une D.U.I. L'auteur regarde ensuite quelle branche de la formule d'amendement s'applique à la sécession (dans l'hypothèse où elle s'applique) et si le consentement des Autochtones est nécessaire pour effectuer une sécession. Ensuite, divers moyens de sécession sont évalués, notamment la sécession par révolution et la possibilité qu'une D.U.I. puisse être autorisée par une convention constitutionnelle, par la notion que la confédération soit un pacte, par l'incorporation de principes de droit international dans le droit canadien ou par appel direct à la démocratie. Somme toute, l'auteur cherche à déterminer si la formule d'amendement de la Constitution canadienne s'applique à la sécession et, dans l'affirmative, si elle s'applique seule. Dans le cours de cet analyse, l'auteur propose des réflexions sur le rôle des normes constitutionnelles, voire même sur la nature de toute norme juridique.

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Conclusion

Introduction

This paper examines the legality under Canadian law of a unilateral declaration of independence ("U.D.I.") by Quebec. It is not directly concerned with whether a right to secede exists under international law, although it will consider whether international law might be used to identify the requirements of Canadian law.¹

Why should we care about the legality of a U.D.I.? The question deserves some comment, for in recent months many political actors (especially those in favour of secession) have argued that the law is, or should be, irrelevant.² I share the concern, voiced by many others, that we should not slip into a simple focus on legality. I believe that federalists' principal objective must remain the conclusion of a constitutional settlement that can attract the willing allegiance of Canadians in all parts of the country, and that federalists should not allow the question of legality to divert them from that end.³ It is especially wrong-headed to believe that the law can serve as a magic bullet, putting an end, peremptorily, to all prospect of separation. Even if a U.D.I. is illegal (as I argue here), there is no doubt that one could occur, and occur successfully. The

¹ This paper therefore addresses issues that are central to the reference by the Governor in Council to the Supreme Court of Canada of 30 September 1996 (see *Reference Re Secession of Quebec from Canada*, [1996] C.S.C.R. No. 421 (QL) (Order in Council P.C. 1996-1497) [hereinafter *Reference Re Secession*]). That reference poses the following questions:

1. Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally?
2. Does international law give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?
3. In the event of a conflict between domestic and international law on the right of the National Assembly, legislature or government of Quebec to effect the secession of Quebec from Canada unilaterally, which would take precedence in Canada?

The reference will probably come before the Court for argument in the fall of 1997. This proceeding has, in effect, superseded an earlier action for declaratory judgment brought by a private party, Guy Bertrand, against the government of Quebec, which sought to establish *inter alia* that a U.D.I. would be illegal (see *Bertrand v. Bégin*, [1996] A.Q. No. 2150 (QL), (30 August 1996), Québec 200-05-002117-955 (Sup. Ct.); this case has now been reported in unofficial English translation: *Bertrand v. Québec (A.G.)* (1996), 138 D.L.R. (4th) 481 (Sup. Ct.)).

² See e.g. E. Thompson & T. Wills, "Quebec Scoffs at Court Test: No Judge Can Stop Secession, Ministers Say" *The [Montreal] Gazette* (26 September 1996) A1-A2; D. Lessard, "'Un aveu d'impuissance': L'appel d'Ottawa à la Cour suprême ne change rien aux projets référendaires du gouvernement Bouchard" *La Presse [de Montréal]* (27 September 1996) B1.

³ Indeed, I have so argued in "Repression is not the Solution to Unity Crisis" *The [Montreal] Gazette* (4 December 1991) B3; "Caging Quebec is the Wrong Strategy" *The [Montreal] Gazette* (4 March 1996) B3. For my principal contribution to the positive debate, see *Reimagining Canada: Language, Culture, Community, and the Canadian Constitution* (Montreal: McGill-Queen's University Press, 1994) [hereinafter *Reimagining Canada*].

broader arguments of justification and legitimacy are therefore inescapable. They deserve federalists' concerted attention.

But the question of legality nevertheless remains crucial. Its importance is revealed implicitly in the statements of Quebec sovereignists themselves. Sovereignists' recent tendency to deny the relevance of law is disingenuous. They have long claimed the right of self-determination under international law.⁴ Some have even argued that a U.D.I. is permitted by the Canadian constitution, in its conventional if not in its legal dimension.⁵ In political discourse generally, arguments of political justification are often wrapped up with claims to legal entitlement. The secession debate is no exception.

Moreover, there are very good reasons, on both sides, for paying close attention to legality. On the federalist side, it is important to establish that a U.D.I. would be illegal, but not because this clarification of the law might help win the next referendum. The potential effect on the vote is unpredictable; by shifting attention away from the merits of confederation and suggesting that Quebecers might be kept in Canada by force, the issue may alienate more voters than it attracts. Nor does its importance lie in the pros-

⁴ See *Un gouvernement du Parti Québécois s'engage ...* (Montreal: Parti Québécois, 1973) at 11-12; J. Brossard, *L'accession à la souveraineté et le cas du Québec: conditions et modalités politico-juridiques*, 2d ed. (Montreal: Presses de l'Université de Montréal, [1976] 1995) at 159-202 [hereinafter *L'accession*]; J. Brossard, "Le droit du peuple québécois à l'autodétermination et à l'indépendance" (1977) 8 *Études internationales* 151 [hereinafter "Le droit à l'autodétermination"]; J. Brossard, "Le droit du peuple québécois de disposer de lui-même au regard du droit international" (1977) 15 *Annuaire canadien de Droit international* 84 [hereinafter "Le droit de disposer de lui-même"]; D. Turp, "Exposé-réponse: Processus d'accession à la souveraineté" in Commission d'étude des questions afférentes à l'accession du Québec à la souveraineté, ed., *Les attributs d'un Québec souverain (Exposés et études, vol. 1)* (Quebec: National Assembly, 1992) 655 at 657-65 [hereinafter "Exposé-réponse"]; D. Turp, "Le droit à la sécession: l'expression du principe démocratique" in A.-G. Gagnon & F. Rocher, eds. *Répliques aux détracteurs de la souveraineté du Québec* (Montreal: vlb éditeur, 1992) 49 at 53-59 [hereinafter "Le droit à la sécession"]; D. Turp, "Quebec's Democratic Right to Self-Determination: A Critical and Legal Reflection" in S.H. Hartt et al., eds., *Tangled Web: Legal Aspects of Deconfederation* (Canada Round, No. 15) (Toronto: C.D. Howe Institute, 1992) 99 at 107-15 [hereinafter "Quebec's Democratic Right"]; and the comments cited at note 47, *infra*.

⁵ See H. Brun & G. Tremblay, *Droit constitutionnel*, 2d ed. (Cowansville, Que.: Yvon Blais, 1990) at 237; Turp, "Le droit à la sécession," *ibid.* at 50-52; Turp, "Quebec's Democratic Right," *ibid.* at 103-107; Turp, "Exposé-réponse," *ibid.* at 662 & 664. Not all sovereignist constitutionalists have maintained that a unilateral secession would be lawful. José Woehrling, for example, has recognized that it would be illegal under Canadian law (see J. Woehrling, "Les aspects juridiques de la redéfinition du statut politique et constitutionnel du Québec" in Commission sur l'avenir politique et constitutionnel du Québec, ed., *Éléments d'analyse institutionnelle, juridique et démolinguistique pertinents à la révision du statut politique et constitutionnel du Québec* (Working Paper No. 2) (Quebec: National Assembly, 1991) 1, *passim* [hereinafter "Redéfinition"]; J. Woehrling, "L'évolution constitutionnelle du Canada et du Québec de 1867 à nos jours" in J.-Y. Morin & J. Woehrling, *Les constitutions du Canada et du Québec: du régime français à nos jours*, vol. 1, 2d ed. (Montreal: Thémis, 1994) 123 at 541 [hereinafter "L'évolution constitutionnelle"]; J. Woehrling, "Les aspects juridiques et politiques d'une éventuelle accession du Québec à la souveraineté" (1995) 1:12 *Choix* (Québec-Canada) 25 [hereinafter "Éventuelle accession"]; J. Woehrling, "Les aspects juridiques d'une éventuelle sécession du Québec" (1995) 74 *Can. Bar Rev.* 293 at 309-14 [hereinafter "Éventuelle sécession"]).

pect of keeping Quebec in confederation in the face of a clear vote in favour of separation; there seems to be little stomach outside Quebec for maintaining confederation by force. Rather, it is important for more sombre but no less compelling reasons, as a means of preparing for an orderly break-up of the country should the government of Quebec obtain a clear mandate for secession. In particular, the federal government must make clear that a U.D.I. would be illegal in order to allow it (1) to ensure that secession does not occur without a popular mandate; and (2) to require that in the case of such a mandate, the issues of disentanglement are settled by negotiation, not by the unilateral fiat of a seceding Quebec. Let us see how that is so.

Most Canadians would acquiesce in Quebec's secession only if it were based on an unambiguous popular mandate in Quebec. The precise nature of the mandate must remain a matter of controversy, but at least it would require a majority of votes cast, in a democratic process, on an unambiguous question. Now, the ability of Canadians outside and indeed inside Quebec to insist on such a mandate would be seriously compromised if it were assumed that the government of Quebec could act unilaterally. A secessionist government would gain considerable power of initiative, facilitating a rapid move towards a U.D.I. even on the basis of an ambiguous result or one tainted by voting irregularities. Faced with such a *fait accompli*, opposing governments would be forced onto their back foot, compelled to argue not merely that the mandate was unsound but also that they were entitled to have a say in the matter.⁶ In short, the practical ability of other Canadian governments to ensure that a genuine mandate is obtained, prior to an attempted secession, may well depend on establishing that Quebec has no right to secede unilaterally.

Second, even if there were a clear mandate in favour of separation, the federal and other provincial governments would undoubtedly want to protect certain fundamental interests as a prerequisite to secession. They would want, for example, to ensure that there was a satisfactory response to the concerns of Aboriginal peoples in the present territory of Quebec, that the rights of minorities were protected, that Quebecers who wished to relocate to the rest of Canada were permitted to do so with their possessions, that there was some agreement with respect to corridors of transportation and communication, and that there was an acceptable division of public assets and liabilities. Again, the ability to ensure serious and orderly engagement with these issues will depend on secession occurring through negotiations, not unilaterally.

For their part, sovereignists too have good reason to pay attention to questions of legality. First, the practical success of a U.D.I. would depend upon Quebec's ability to secure international recognition. An important element in other countries' decisions on recognition would be the extent to which acceptable procedures had been followed.

⁶ Indeed, sovereignists routinely use the argument that the matter is one for Quebecers alone to decide, not merely to demand respect for the referendum's outcome, but also to exclude the federal government from any influence whatever over the conduct of the referendum, including the wording of the question.

This inquiry would include, although it would not be limited to, the legality of those procedures according to domestic as well as international norms.⁷

Quite apart from this external significance, however, the question would be crucial internally. All Quebecers, of whatever political persuasion, would have a strong interest in the transition to independence occurring in orderly fashion. The authority of Quebec's institutions — and, in consequence, the extent to which the transition could be achieved peacefully — would be highly dependent on the extent to which institutional continuity could be maintained. Continuity would be best guaranteed by accomplishing separation by legal means. If illegal means were used, there would be a period of inevitable uncertainty over, for example, the allegiance of judges, with a secessionist government attempting to dismiss judges who still recognized the authority of Canadian law and purporting to appoint new judges in their place.⁸ The uncertainty with respect to the courts would produce uncertainty regarding the substantive law. Government officials, including police officers, would face difficult choices of allegiance: Should they obey the federally-appointed judges or the new provincial replacements? Should they continue to recognize the authority of Ottawa or should they obey the new orders issuing from Quebec, even in areas of federal jurisdiction?

Even if sovereignists were willing to accept the risks of discontinuity, they should nevertheless want to weigh whether a particular procedure would be seen to be illegal. Accomplishing an illegal secession creates special challenges of legitimation for any new state. They would be wise to anticipate those challenges and devise ways of meeting them.

It is no accident, then, that both sovereignists and federalists have been drawn to the question of legality. Sovereignists wish to resolve it in a manner that preserves for them the power of initiative (to the extent possible), maximizes the chances of international recognition, and increases the likelihood that Quebec's new institutions will benefit from the legitimacy of the old. Federalists — even those willing to acquiesce in a clear mandate for separation — must raise the issue if they want to ensure that separation occurs by democratic means, and in a manner that deals adequately with minorities as well as the continuing interests of the rest of Canada. Addressing the issue is not, therefore, as some allege, merely a device for frustrating the democratic will of Quebecers. It is a consequence of taking the prospects of sovereignty seriously.

I. The Issues

What, then, is the law applicable to the secession of a Canadian province? The answer is not straightforward, for the constitution does not expressly address secession. The protagonists can be divided into two broad camps, distinguished principally by

⁷ See text below, accompanying notes 40 to 45.

⁸ This possibility is anticipated in the discussion of accession to independence in Conseil exécutif national du Parti Québécois, *Le Québec dans un monde nouveau* (Montreal: vlb éditeur, 1993) at 66-67. See also Woehrling, "Redéfinition", *supra* note 5 at 94-95.

their position on the application of the amending formula contained in sections 38 to 49 of the *Constitution Act, 1982*.⁹

The first camp argues that all changes to the Canadian constitution, including one as far-reaching as a province's secession, must be accomplished by means of the constitutional amending formula. That formula specifies different procedures — different degrees of consent — for different classes of amendment. Within this camp, then, there remains significant controversy over which of the various procedures applies to an attempt to secede. The principal alternatives are the general procedure (which requires the assent of both houses of Parliament plus seven provinces that together represent fifty per cent of the population)¹⁰ and unanimity (which requires the assent of all provinces in addition to both houses of Parliament).¹¹

The second camp, on the other hand, argues that a legal secession can be accomplished by means other than those specified in the amending formula. Proponents of this position face two significant challenges. First, they must establish either that the amending formula does not apply or that it is not exhaustive. Their strongest argument is that the formula is inapplicable because secession involves much more than “an [a]mendment to the Constitution of Canada”.¹² According to this view, the amending formula should be limited to changes to the constitution as a going concern; the dissolution of the country is hardly an “amendment”. If members of this camp clear this hurdle, they face a second one. They must offer a persuasive account of the alternative norms that govern secession: What is the content of those norms? How do they arise within Canadian law?

In this paper, I examine the merit of these various positions. I begin with the less consequential issue: the determination of which branch of the amending formula governs if the amending formula does apply. I then turn to the heart of the problem — whether the amending formula applies, and if so, whether it applies exhaustively — at which time I also discuss alternative norms alleged to govern the process of secession.

II. Which Branch of the Amending Formula Would Apply to an Attempt to Secede?

Assuming for the moment that the amending formula is applicable to secession, which specific procedure would govern?

Two of the amending formula's procedures are manifestly inappropriate. Those contained in sections 44 and 45 of the *Constitution Act, 1982*¹³ deal with amendments to certain federal institutions and to the provinces' internal constitutions, respectively.

⁹ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11 [hereinafter *Constitution Act, 1982*].

¹⁰ See *ibid.*, ss. 38-40, 42.

¹¹ See *ibid.*, s. 41.

¹² These are the words used to introduce and therefore delimit the application of the relevant provisions of the amending formula (see *ibid.*, ss. 38(1) and 41).

¹³ *Supra* note 9.

The changes involved in secession go well beyond the scope of these provisions. Similarly, section 43 deals with amendments the effects of which are limited to a subset of the provinces. Secession would have far-reaching ramifications for the structure of federal as well as provincial institutions, thus placing it outside section 43.¹⁴

The two contenders, then, are the general procedure (contained in sections 38 to 40, and 42) and unanimity (section 41). The general procedure is residual, applying when no other is applicable.¹⁵ Thus, the critical question is whether this situation falls within the terms of section 41. In my view, it does.

Section 41 imposes its demanding requirements on amendments dealing with five enumerated subjects: (a) the office of the queen, the governor general and the lieutenant governor of a province; (b) the minimum number of members of the House of Commons to which each province is entitled; (c) the use of English or French, except when the provision only concerns a subset of the provinces; (d) the composition of the Supreme Court of Canada; and (e) the amending formula itself. An attempt by Quebec to secede would come within the first of these categories (again assuming that the amending formula does apply), for it would necessarily involve the elimination of the powers of the lieutenant governor of Quebec, or at least a dramatic change in the method by which the lieutenant governor is chosen.¹⁶ The lieutenant governor is, according to section 58 of the *Constitution Act, 1867*,¹⁷ the appointee of the Governor General in Council. By convention, the appointment is made, in effect, by the prime minister of Canada, on the advice of the federal cabinet. The office of the lieutenant governor lies at the core of provincial authority: the *Constitution Act, 1867*, vests the executive power of the province in the Lieutenant Governor in Council (although by convention it is exercised by the provincial government of the day);¹⁸ the lieutenant governor is also, along with the National Assembly, an essential component of the

¹⁴ Accord: Woehrling, "Redéfinition", *supra* note 5 at 9; J. Woehrling, *La Constitution canadienne et l'évolution des rapports entre le Québec et le Canada anglais, de 1867 à nos jours* (Edmonton: Centre for Constitutional Studies, 1993) at 152 [hereinafter *La Constitution canadienne*]; Woehrling, "Éventuelle accession", *supra* note 5 at 27; Woehrling, "Éventuelle sécession", *supra* note 5 at 310.

¹⁵ In addition, s. 42 sets out six defined areas that require use of the general procedure (see *Constitution Act, 1982*, *supra* note 9, paras. 42(1)(a)-(f)). None is applicable here.

¹⁶ Accord: N. Finkelstein & G. Vegh, *The Separation of Quebec and the Constitution of Canada* (Background Studies of the York University Constitutional Reform Project, Study No. 2) (North York, Ont.: York University Centre for Public Law and Public Policy, 1992) at 6-8; P.J. Monahan, *Cooler Heads Shall Prevail: Assessing the Costs and Consequences of Quebec Separation* (Toronto: C.D. Howe Institute, 1995) (Commentary, No. 65) at 7-9 [hereinafter *Cooler Heads*]; P.J. Monahan, "La sécession du Québec: considérations juridiques et politiques" (1995) 1:12 *Choix* (Québec-Canada) 4 at 7-9 [hereinafter "La sécession du Québec"] (an English version of this article has been published: P.J. Monahan, "The Law and Politics of Quebec Secession" (1995) 33 *Osgoode Hall L.J.* 1).

It might also be argued that the offices of the queen and the governor general would be fundamentally and directly altered by secession, although the effect on the lieutenant governor is sufficient to trigger the application of section 41.

¹⁷ *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3.

¹⁸ See *ibid.*, ss. 58-68.

provincial legislature, his or her assent being required for all legislation.¹⁹ It is inconceivable that an independent Quebec would acquiesce in an appointee of the government of Canada fulfilling such a role — or indeed that Quebec could acquiesce and still be considered independent. The elimination or transformation of the office of the lieutenant governor would therefore be a crucial part of any move to secede. It is treated as such by the Conseil exécutif national of the Parti Québécois in the Conseil's discussion of the institutional reforms required as part of Quebec's accession to independence.²⁰

This conclusion is resisted by some commentators. They argue that secession is not expressly included within any of the amending procedures and therefore falls under the residual one. They claim that the effect of secession on the lieutenant governor's position does not bring it within section 41 because that effect would be indirect, wholly consequential on the core of the amendment: the separation of Quebec from the rest of Canada.²¹

This rejoinder errs, however, by presuming that there is content to secession apart from its impact on the exercise of legislative and executive powers. The very essence of secession is the vesting of governmental authority for Quebec in a body completely autonomous from the rest of Canada. That necessarily requires transforming the office of the lieutenant governor. Another way of putting the argument is that a province — like any other governmental institution — is a juridical, not a natural, entity. Secession is thus concerned with juridical, not physical, separation. Currently, the very definition of the province, in its legislative and executive dimensions, includes the lieutenant governor. The severing of that connection is therefore an integral and not merely a consequential element in any move towards full juridical independence.²²

¹⁹ See *ibid.*, s. 71.

²⁰ See Conseil exécutif national du Parti Québécois, *supra* note 8 at 66.

²¹ See the following works by Woehrling: "Redéfinition", *supra* note 5 at 56-57; *La Constitution canadienne*, *supra* note 14 at 152-53; "L'évolution constitutionnelle," *supra* note 5 at 538-40; J. Woehrling, "L'évolution et le réaménagement des rapports entre le Québec et le Canada anglais" in J.-Y. Morin & J. Woehrling, *Demain, le Québec ... : Choix politiques et constitutionnels d'un pays en devenir* (Quebec: Septentrion, 1994) 15 at 104-105 [hereinafter "L'évolution et le réaménagement"]; "Éventuelle accession", *supra* note 5 at 27; "Éventuelle sécession", *supra* note 5 at 310-313. This also seems to be Peter Hogg's opinion (although expressed tentatively and without argument): see P.W. Hogg, *Constitutional Law of Canada*, 4th abr. stud. ed. (Toronto: Carswell, 1996) at 125.

Brun & Tremblay, *supra* note 5 at 236, do not deal with the issue of directness but simply conclude that secession is in substance a change to the division of powers, hence falling under section 38. The assumption by Quebec of plenary powers is indeed part of secession, but secession necessarily involves — indeed primarily involves — institutional disengagement.

²² Woehrling argues (see "L'évolution constitutionnelle", *supra* note 5 at 540 n.1363; "Éventuelle accession", *supra* note 5 at 39-40; "Éventuelle sécession", *supra* note 5 at 312 n.39), based on *Quebec (A.G.) v. Blaikie* (1978), [1979] 2 S.C.R. 1016, 101 D.L.R. (3d) 394, that the office of the lieutenant governor would not be directly affected by secession any more than it was affected by the abolition of provincial upper houses (a development almost certainly within provincial power). When the upper houses were abolished, the lieutenant governors no longer administered oaths to the members of those bodies; to that extent their functions were diminished. But there is a substantial difference between that modest impact on the office, wholly consequential on a reform directed against the upper houses, and the direct severing of the lieutenant governor's role that would be an integral compo-

This distinguishes secession's effect on the office of the lieutenant governor from truly consequential amendments — those amendments that might be a sensible sequel to secession but that are not strictly necessary for Quebec to become a separate country. Changes to the Supreme Court of Canada (assuming that the composition of the Court does form part of the "Constitution of Canada"²³) would fall in this latter category. It might be anachronistic and indeed silly to have Quebec judges sitting on the Supreme Court of Canada were Quebec to secede successfully, but their removal would not be necessary for Quebec to become a separate country. The same cannot be said of the office of the lieutenant governor.

The requirement of unanimity therefore applies to any attempt to secede by means of the constitutional amending formula. This requirement is onerous in formal terms, although for reasons I discuss below,²⁴ it is unlikely that the distinction in the degree of

ment of the accession of Quebec to full legislative independence. A better analogy is *Re: The Initiative and Referendum Act*, [1919] A.C. 935, 48 D.L.R. 18 (P.C.), in which Manitoba was unable to institute a system of direct democracy in a manner that would eliminate the lieutenant governor from the legislative process. Indeed, Woehrling's argument on this point seems inconsistent with his discussion of a province's ability to change the office of the lieutenant governor unilaterally under section 45 of the *Constitution Act, 1982*, *supra* note 9 (see "Redéfinition", *supra* note 5 at 46-49).

Woehrling also says (see "Éventuelle sécession", *supra* note 5 at 312) that secession's effect on the lieutenant governor would be "trivial" because the lieutenant governor's functions have little importance in the "fonctionnement effectif des institutions provinciales" [Woehrling's emphasis]. It is true that as a result of the conventions constraining the office, the lieutenant governor has no impact on the *content* of provincial decision-making (except in rare and frequently hypothetical cases). But this does not mean that the office can be ignored. Apart from the fact that para. 41(a) of the *Constitution Act, 1982*, *ibid.*, renders this conclusion inadmissible, the lieutenant governor remains an integral part of both the legislature and the executive, even if his or her role is purely formal. Indeed, the very fact that the role is generally, though not entirely, formal serves important constitutional purposes, as any serious republican initiative has had to acknowledge (see *e.g.* G. Winterton, *Monarchy to Republic: Australian Republican Government*, rev. ed. (Melbourne: Oxford University Press, 1994), especially c. 3).

Woehrling makes a better argument ("L'évolution constitutionnelle," *supra* note 5 at 540; "Éventuelle accession", *supra* note 5 at 27) when he insists that an interpretation favouring the general procedure would establish parallelism between the consent required for the admission of new provinces under the *Constitution Act, 1982*, *ibid.*, para. 42(1)(f), and that required for the secession of old provinces. But the secession of an established province is surely more consequential than the admission of a new province, especially when new provinces would likely be created in territories already forming part of the country. Comparable constitutions treat the two situations differently. In Australia, new states can be admitted by the Commonwealth Parliament alone (Constitution of Australia, s. 121); the process with respect to secession is unclear, but at any rate much more difficult (see G. Craven, *Secession: The Ultimate States Right* (Carlton: Melbourne University Press, 1986)). In the United States, new states can be admitted by Congress alone (U.S. Const. art. IV, § 3, cl. 1); secession is only permitted "through consent of the States" (*Texas v. White*, 74 U.S. (7 Wall.) 700 at 726 (1869)). Parallelism seems too weak a consideration to outweigh the arguments set out above.

²³ This is a matter of considerable doubt. For an introduction to the controversy, see Hogg, *supra* note 21 at 70-71.

²⁴ See text below, accompanying notes 111-113.

consent required under this procedure (as opposed to the general procedure) would affect the outcome in any practical move towards secession.²⁵

There is one further consideration that I should address with respect to the constitutional amending process. Patrick Monahan has argued that the consent of Aboriginal peoples would be required to any amendment designed to effect the secession of Quebec. His reasoning is founded on the fiduciary duty owed to Aboriginal peoples by the federal Crown, and specifically on what he suggests is the federal Crown's inability to terminate that obligation without Aboriginal consent.²⁶

The existence and importance of the fiduciary duty are not in doubt, but its incidents have not been extensively described.²⁷ It is difficult, then, to offer definitive conclusions as to its content. Nevertheless, it seems implausible that Aboriginal consent would be required as a matter of law. The fiduciary duty might well require intensive and substantial consultation with Aboriginal peoples, but it would not require formal approval of the amendments.²⁸

²⁵ Woehrling suggests that those who conclude that unanimity is required are motivated simply by the political objective of hampering separation (see *La Constitution canadienne*, *supra* note 14 at 152; "Éventuelle accession", *supra* note 5 at 27; "Éventuelle sécession", *supra* note 5 at 312-313; J. Woehrling, "Ground Rules for the Next Referendum on Quebec's Sovereignty" (1996) 4 *Canada Watch* 89 at 96 [hereinafter "Ground Rules"]). That suggestion (together with his equally gratuitous prediction that the same objective will motivate the Supreme Court of Canada in its decision on the federal government's secession reference (see *Reference Re Secession*, *supra* note 1)) is unworthy of one who is normally a fair-minded and insightful constitutional scholar. As he himself acknowledges (see "Éventuelle accession", *ibid.*), the legal issue calls for considerable judgment. Woehrling's allegations of bad faith, wholly by anticipation in the case of the Supreme Court, raise more doubts about his own dispassion than they do about the Court's.

²⁶ See *Cooler Heads*, *supra* note 16 at 9-10; P.J. Monahan, M.J. Bryant & N.C. Coté, *Coming to Terms with Plan B: Ten Principles Governing Secession* (Toronto: C.D. Howe Institute, 1996) (Commentary, No. 83) at 37-38; but see "La sécession du Québec", *supra* note 16 at 9, where Monahan tends to emphasize consultation rather than consent. The view that full consent is required is shared by the Grand Council of the Crees (of Quebec): *Sovereign Injustice: Forcible Inclusion of the James Bay Crees and Cree Territory into a Sovereign Québec* (Nemaska, Que.: Grand Council of the Crees, 1995) at 351-61.

²⁷ The leading cases establishing the duty are *Guerin v. R.*, [1984] 2 S.C.R. 335, 13 D.L.R. (4th) 321 [hereinafter *Guerin*]; *R. v. Sparrow*, [1990] 1 S.C.R. 1075, 70 D.L.R. (4th) 385 [hereinafter *Sparrow* cited to S.C.R.].

²⁸ Accord: Finkelstein & Vegh, *supra* note 16 at 18-25; R. Dupuis & K. McNeil, *Canada's Fiduciary Obligation to Aboriginal Peoples in the Context of Accession to Sovereignty by Quebec*, vol. 2 (*Domestic Dimensions*) (Ottawa: Royal Commission on Aboriginal Peoples, 1995) at 62-69; Woehrling, "Éventuelle accession", *supra* note 5 at 40 n.9; Woehrling, "Éventuelle sécession", *supra* note 5 at 313 n.41. Richard Falk apparently comes to a similar conclusion within the framework of international law: "The Relevance of the Right of Self-Determination of Peoples under International Law to Canada's Fiduciary Obligations to the Aboriginal Peoples of Quebec in the Context of Quebec's Possible Accession to Sovereignty" in S.J. Anaya, R. Falk & D. Plarand, *Canada's Fiduciary Obligation to Aboriginal Peoples in the Context of Accession to Sovereignty by Quebec*, vol. 1 (*International Dimensions*) (Ottawa: Royal Commission on Aboriginal Peoples, 1995) 41 at 62.

This is suggested first by the terms of section 35.1 of the *Constitution Act, 1982*,²⁹ which deals expressly with Aboriginal participation in the amendment of the provisions most directly relevant to Aboriginal peoples: subsection 91(24) of the *Constitution Act, 1867*,³⁰ and sections 25 and 35 of the *Constitution Act, 1982*. Section 35.1 requires consultation: a constitutional conference must be called to address the amendments and Aboriginal representatives must be invited "to participate in the discussions on that item."³¹ It does not require Aboriginal consent. It would be very strange if a wholly implicit obligation, founded on fiduciary duty and applying to a much broader range of amendments, should require a substantially greater degree of involvement than that required for changes to the primary guarantee of Aboriginal rights in section 35.³²

Indeed, there is good reason for caution generally in introducing implicit requirements into the amending process, especially if those requirements would result in the nullification of supposed amendments. Constitutional amendment has far-reaching consequences; the process should therefore have, if possible, a measure of clarity, so that at least the basic text of the constitution can be ascertained with confidence. Thus, it is reasonable to treat the written requirements of the amending formula as, presumptively, exhaustive. Moreover, the problems of uncertainty are magnified when one considers the possible content of a legal obligation to obtain Aboriginal consent. Precisely who would have to give their consent and how? To date, the Aboriginal participants in constitutional negotiations have been the representatives of national organizations: in the Charlottetown process, the Assembly of First Nations, the Inuit Tapirisat of Canada, the Native Council of Canada, and the Métis National Council. Such national associations would not be appropriate interlocutors in the case of Quebec's secession — or at least, they should not be the only interlocutors. Indeed, Monahan himself declines to specify how Aboriginal consent would be given,³³ and he uses various expressions to describe those peoples whose consent would be required: the "aboriginal peoples who would be directly affected by [secession]" and "the aboriginal peoples residing [in Quebec]".³⁴ These phrases are by no means equivalent when one considers that Aboriginal land use frequently crosses provincial boundaries.

²⁹ *Supra* note 9.

³⁰ *Supra* note 17.

³¹ *Constitution Act, 1982, supra* note 9, s. 35.1. There is some doubt about the constitutionality of the amendment that purported to enact section 35.1 (see B. Schwartz, *First Principles, Second Thoughts: Aboriginal Peoples, Constitutional Reform and Canadian Statecraft* (Montreal: Institute for Research on Public Policy, 1986) at 127-135; Finkelstein & Vegh, *supra* note 16 at 15-17). The outcome of that debate is of marginal relevance to the argument in the text, however. There is also some question as to whether section 35.1 creates a legal obligation or merely states a political commitment. Again, for the purposes of this argument that issue need not be resolved.

³² The argument that a right to consent to constitutional amendments is founded on the fiduciary duty, and hence protected under section 35, would also appear to run contrary to the decision of the Supreme Court of Canada in *Native Women's Assn. of Canada v. Canada*, [1994] 3 S.C.R. 627, 119 D.L.R. (4th) 224 at 252.

³³ *Cooler Heads, supra* note 16 at 33 n.27.

³⁴ *Ibid.* at 10.

It is difficult to specify the content of an implicit requirement of consent, and that very difficulty should make us reluctant to read it into the constitution. The problems are much less severe when the obligation is one of consultation. The federal government can be required by law to consult, in a meaningful fashion, with diverse groups, including peoples extending beyond the territory, or groups that have overlapping definitions of political community. Consultation does not generate the acute problems of representativeness and due authorization that afflict requirements of consent. A requirement of consultation is, moreover, consistent with fiduciary obligations generally, which do not normally subject the fiduciary's decisions to the beneficiary's veto.³⁵

Monahan bases his argument for a full requirement of consent principally on a supposed principle of the law of trusts, which stipulates, according to Monahan, that "a fiduciary relationship that arises from operation of law ... can be terminated only with the consent of the beneficiary ..."³⁶ It is hard to see what grounds Monahan has for this assertion. In the normal case, a fiduciary can be discharged entirely without the beneficiary's consent, although the courts will exercise a measure of control over the justification and conditions for withdrawal.³⁷ In the case of relationships that carry with them a fiduciary duty (such as the directorship of a company, or acting as a lawyer), the duty normally lasts only as long as the relationship persists (although more limited, residual obligations may continue). More fundamentally, however, any extrapolation from ordinary trust principles must take into account the *sui generis* nature of the duty owed to Aboriginal peoples. Here, we are concerned with the transfer of obligations that are intrinsically bound up with the exercise of sovereign powers — that operate essentially as a charge upon those powers. It makes a great deal of sense that in any plenary devolution of those powers, the fiduciary obligations should follow. It also makes sense that the Canadian government should be required to consider Aboriginal interests, and should, given the present state of the law, consult intensively with the Aboriginal peoples affected. A full requirement of consent, however, does not seem to accord with the general character of fiduciary relations (in which the fiduciary acts for the beneficiary), does not fit well with the express provisions of the amending formula, and takes insufficient account of the fact that the fiduciary obligations are, in this situation, ancillary to and ultimately dependent upon the possession of sovereign authority. Indeed, the Ca-

³⁵ Indeed, the leading case on the fiduciary duty, *Sparrow*, *supra* note 27 at 1119, emphasizes consultation with Aboriginal peoples prior to the limitation of Aboriginal rights, but does not require consent.

³⁶ *Cooler Heads*, *supra* note 16 at 10.

³⁷ Monahan's page reference — to D.W.M. Waters, *The Law of Trusts*, 2d ed. (Toronto: Carswell, 1984) at 691 — seems to be in error; that passage offers his argument no support whatever. For discharge, see Waters, *ibid.* at 678-82. Perhaps Monahan's assertion arises from the application of principles dealing with the delegation of trustees' powers. This, for example, is the basis for comparable discussions in Grand Council of the Crees (of Quebec), *supra* note 26 at 358; L.I. Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada* (Toronto: University of Toronto Press, 1996) at 207, 211 & 216 (although Rotman's discussion seems to be inconsistent, assuming at 214 and 219 that consultation alone was required for Britain to terminate its obligations, but asserting in a different context, at 255-258, that Aboriginal consent would be required).

nadian government itself acquired its obligations by devolution from the Imperial Crown, a devolution that was not subject to Aboriginal peoples' consent.³⁸

None of this is intended to minimize the federal government's responsibility, as fiduciary, to respect and act upon Aboriginal concerns if Quebec attempts to secede. But it does suggest that there exists no legal requirement that Aboriginal peoples consent to a potential constitutional amendment.³⁹

III. Is There a Legal Means of Secession outside the Amending Formula?

Section 41 thus furnishes the applicable standard if the amending formula applies. But is the amending formula the only means by which secession can occur?

A. *Secession by Revolution*

In one sense, secession can undoubtedly occur by other means — indeed even by illegal means — with legal effect. Part of a country can become independent simply by a new government firmly establishing its authority over the territory to the exclusion of the former regime. That is sufficient to make the new country independent in fact; it will have succeeded in establishing an autonomous governmental order, at least for its own internal purposes. Moreover, with time, international law will very likely adapt to that factual situation, ultimately treating the new state as independent. There is some debate over precisely when and by what means statehood is acquired. Most international lawyers now hold that statehood is acquired independently of international recognition (although recognition may be necessary for the new state to enjoy all the benefits of statehood).⁴⁰ There is no doubt, however, that an attempted secession, originally illegal, can give rise to a newly independent country.

For this reason, it is often said that sovereignty is fundamentally a matter of fact, not law. This has an element of truth, but it is also seriously misleading, for the assertion of sovereignty is always wedded to claims of justification, and those claims matter. As James Crawford shows, in disputed cases the very judgment as to whether "effective government" exists over a territory will be influenced by arguments of enti-

³⁸ See *R. v. Secretary of State for Foreign & Commonwealth Affairs* (1981), [1982] Q.B. 892, [1982] 2 All E.R. 118 (C.A.) (leave to appeal refused by the House of Lords ([1982] 2 All E.R. at 140-43) on grounds that confirm the substantive decision of the Court of Appeal); *Manuel v. A.G.*, [1982] 3 All E.R. 786 (Ch.D.) (affirmed on appeal, but on grounds not relevant to the argument here: [1982] 3 All E.R. 822 (C.A.)).

³⁹ Some commentators have also argued (albeit tentatively) that Aboriginal consent may be required as a matter of constitutional convention (see Finkelstein & Vegh, *supra* note 16 at 25-31; Monahan, Bryant & Côté, *supra* note 26 at 54 n.70). The requirements of conventions are discussed in the text below, accompanying note 66. Suffice it to say that the consistency and acknowledgement of present obligation one expects to find in a convention do not seem to be present here.

⁴⁰ For the criteria applicable to the acquisition of statehood, see J. Crawford, *The Creation of States in International Law* (Oxford: Clarendon, 1979) especially at 31ff.

tlement.⁴¹ Indeed, the observance of certain basic norms of international law may be an independent requirement for statehood.⁴² Justification becomes all the more important when the new state tries to achieve full international recognition. Other states will inevitably weigh the reasons for secession, the procedure by which it was accomplished, the extent to which the new state respects the rights of minorities, and generally the state's adherence to principles of democracy and human rights.⁴³ International disapproval can deprive a new state of many of the benefits of independence; international isolation can, in an extreme case, threaten a regime's existence. This was so, for example, with the former, whites-only government of Ian Smith's Rhodesia, which finally lost the Rhodesian civil war in part because of the regime's isolation.⁴⁴

But even in the establishment of factual authority over the would-be state's home territory, arguments of justification play a crucial role. Few states wish to survive, or could survive, on the basis of brute force alone. They require the collaboration or acquiescence of many within society, and securing that cooperation often involves a measure of moral persuasion. This is especially true in cases of contested secession, in which at least two contending authorities vie for the population's allegiance. In those circumstances, justification is critical. To take a straightforward example, a sovereignist government in Quebec is much more likely to carry the allegiance of judges and the police (and therefore establish factual control of the territory) if it declares independence after obtaining a clear democratic mandate, than if it declares independence without any mandate whatever.

Thus, the success of virtually any attempt to secede, even illegal, involves arguments of justification. An illegal secession nevertheless differs from a legal one in the scope and role of those arguments. In a legal secession, arguments for the validity of the process focus on its conformity with pre-existing legal norms. If the new state can establish that those norms have been satisfied, the secession is valid. The state's institutions therefore begin with an aura of legitimacy — and its officials begin with a single, uncontested allegiance — precisely because the new state has sprung from the institutions of the old. In an illegal secession, the new regime has no juridical connection with the previous order. It cannot rely on the authority of that regime's procedures and institutions because it has broken with them in the act of seceding. Its arguments, then, must be much more ambitious. It must justify the revolutionary break with the old, establish the legitimacy of the alternative process employed, and persuade both the officials who have sworn allegiance to the previous state and the putative citizens of the

⁴¹ See *ibid.* at 44-47, 57-60, 102-103, and, specifically with respect to secession, at 255-66.

⁴² See *ibid.* at 77ff.

⁴³ International recognition is not, then, simply a judgment about the creation of a state; even if a new state is implicitly acknowledged to exist, the granting or withholding of recognition can be and is used as a political tool. For a good discussion of the current practice, see J. Verhoeven, "La reconnaissance internationale: déclin ou renouveau?" (1993) 39 *Ann. fran. dr. int.* 7, especially at 21ff. For the criteria applied in the recognition of the republics of the former Yugoslavia, see M. Weller, "Current Developments — The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia" (1992) 86 *Am. J. Int'l. L.* 569 at 586-96, 603-606.

⁴⁴ For an often tendentious account, see M. Hudson, *Triumph or Tragedy? Rhodesia to Zimbabwe* (London: Hamish Hamilton, 1981).

new state to accept its authority — in each case in circumstances in which there are no clear standards of evaluation or procedures for decision-making.⁴⁵ In making the case for its legitimacy, the new regime may downplay the discontinuity by emphasizing the extent to which the new regime retains features of the old. But the fact remains that in an illegal secession, the new state cannot simply assume the mantle of the old. It has to refound that authority, creating it anew.

This appears to be the direction that the arguments of the government of Quebec have taken in recent months. The government has not conceded that a U.D.I. would be illegal; that would give too much ground, too clearly, in the struggle for legitimacy. But it has shifted its focus away from the legality of the process to the simple fact that a U.D.I. could give rise to a legally independent Quebec, and to the broader, not necessarily legal, claim that such a U.D.I. would be legitimate if it were in accord with the democratic will of Quebecers.⁴⁶ Now, the government has not stated that it is contemplating a revolutionary break, an illegal act, that may in time give rise to legal consequences. It has maintained as much ambiguity as possible, attempting to elide the issue of the process's legality with the undoubted fact that a new state might be created, valid

⁴⁵ The potential for a real struggle over judges' allegiance is implicitly acknowledged in Conseil exécutif national du Parti Québécois, *supra* note 8 at 66-67. Hogg suggests that judges would hold that Quebec had seceded only if the purported secession were effective, and that the courts would come to this conclusion only if the federal government had expressly or impliedly abandoned its authority with respect to Quebec (see Hogg, *supra* note 21 at 128-29). This, I believe, is too simple. To begin, there would be some judges whose decisions would be influenced by their own sympathies, or by such institutional considerations as the nature of their oath of office or allegiance to the level of government that appointed them. But beyond those concerns, judges sitting in Quebec would be faced with a more complex judgment than Hogg describes. They would have to decide whether they now found themselves within another sovereign framework, and in doing so, they would inevitably undertake some weighing of the contending claims of legitimacy. This weighing would include such factors as the extent of popular support for secession, the reasons for the government's failure to use legal means, and the motives for the federal government's refusal to acquiesce. This is true in part because the foundations of a legal order are inevitably bound up with broader issues of legitimacy. This is a central lesson of Canada's own accession to independence (see generally B. Slatery, "The Independence of Canada" (1983) 5 Supreme Court L. Rev. 369). Moreover, the use of military force aside, "effectiveness" is not a *chose donnée*, external to the judges' deliberations, which they can study and determine as a matter of fact. In practice, effectiveness would be largely dependent on whether those very judges *treated* the secession as effective. If they did, then the seceding government's writ would run and the secession would have been accomplished. The issue of whether a secession is effective is thus intrinsically bound up with whether it *should be* effective. Verhoeven, *supra* note 43 at 24-25 and 30-31, makes a related point when he notes that international recognition can itself be a constituent of a state's effectiveness.

⁴⁶ See e.g. G. Normand, "Jugement à la Salomon" *La Presse [de Montréal]* (9 September 1995) A1 (comments of Paul Bégin, Quebec minister of justice); Thompson & Wills, *supra* note 2; and the comments cited in Lessard, *infra* note 96. This was also the approach taken by the Bélanger-Campeau Commission (indeed, the change in argumentation seems to have been prompted by the expert reports prepared for that inquiry): *Rapport de la Commission sur l'avenir politique et constitutionnel du Québec* (Quebec: National Assembly, March 1991) (Co-chairs: M. Bélanger & J. Campeau) at 59-60. See also the approaches taken by Brun & Tremblay, Woehrling, Arbour *et al.*, and Morin, *infra* note 93. Daniel Turp has both noted and participated in this shift (see D. Turp, "Supplément 1995" in Brossard, *L'accession*, *supra* note 4, 797 at 800-801, 804).

within international law. Its spokespersons still assert that Quebec has a right of self-determination under international law,⁴⁷ although this claim has become muted in recent months, and they have not expressly conceded that a U.D.I. would be illegal under Canadian law.⁴⁸ But their arguments have tended to downplay the issue of legality to focus instead on legitimacy in the general terms sketched above. Arguments respecting legality may well remain important for the reasons discussed in the introduction to this paper, but the Parti Québécois government appears to be positioning itself to argue legitimacy *tout court*, if need be in the face of a finding of illegality.

B. Secession by Legal Means Other Than Those Specified in the Amending Formula

But does Quebec need to surrender the argument of legality? Do other legal procedures for secession exist? This brings us to the nub of the question, which involves two interrelated inquiries: (1) Does the amending formula apply, and if so, does it apply exhaustively, to secession? and (2) What other norms might apply, if the amending formula does not?

1. The Exclusive Application of the Amending Formula — Introduction

Two reasons have been advanced to suggest that the amending formula does not apply. One can quickly be dismissed. It was put forward for the first time by the Quebec government in the *Bertrand* action.⁴⁹ There, Quebec's lawyers contended that the entire *Constitution Act, 1982* (including the amending formula) was invalid because the competent legislatures had not adopted French translations of certain historic but still operative constitutional documents, as required by section 55 of the *Constitution Act, 1982*.⁵⁰ It is indeed regrettable that the translations have not been approved, but it is inconceivable that this omission could invalidate the entire *Constitution Act*. The constitution defines the fundamental structure of government throughout the country. It is utterly implausible that that authority — the basic allocation of rights and responsibilities on which all government rests — could be rendered null by the neglect of one constitutional obligation. From time to time, governments do fail in their constitutional duties; remedies exist short of the invalidation of the entire constitutional regime. In this case, Quebec's argument was manifestly aimed not so much at persuading the court of the legality of its claim, but at influencing the broader, popular debate over

⁴⁷ See *Bertrand v. Bégin*, *supra* note 1 at 11 (submissions of Quebec government); E. Thompson, "Partition forbidden: Brassard" *The [Montreal] Gazette* (30 January 1997) A1, A9 (comments of Jacques Brassard, Quebec intergovernmental affairs minister); P. Wells, "At heart of partition debate: what constitutes a people" *The [Montreal] Gazette* (8 February 1997) A1-A2 (comments of Jacques Brassard).

⁴⁸ The Quebec government appears, however, to have decided not to press the argument that a U.D.I. would be valid under Canadian law, probably because that argument appears to be difficult to win, and if one argues it, one implicitly concedes that legality under Canadian law matters (something a seceding government may well want to deny).

⁴⁹ See *Bertrand v. Bégin*, *supra* note 1.

⁵⁰ See *ibid.* at 12, 56-58.

legitimacy. It was used to reinforce two central weapons in the sovereigntist arsenal: (a) the claim that the *Constitution Act, 1982* is illegitimate (an illegitimacy usually ascribed to the adoption of that document over the objections of the then government of Quebec);⁵¹ and (b) the argument that bilingualism at the pan-Canadian level has been inadequate, even when judged on its own terms.

The second argument against the application of the amending formula has greater merit. Sketched earlier,⁵² it might be expressed as follows: The relevant sections of the amending formula apply only if one is faced with “an amendment to the Constitution of Canada”.⁵³ Secession would be much more than an amendment to the constitution; it would amount to the dissolution of the country as we know it. It would constitute a break with the Canadian constitutional order, not a change to it. The amending formula was never intended to regulate such a profound rupture. Moreover, the internal requirements of the amending formula (so the argument runs) are consistent with this reading: the complex pattern of provincial and federal approvals required under that formula is most appropriate to changes in which all parts of the country would have a continuing interest, not a change that would create two separate countries, interacting state to state.

This argument turns, then, on the concept of an “amendment”. It cannot be resolved, however, as a mere lexical exercise. As in many cases of contested definition, we are presented with two plausible alternatives: one expansive meaning, which covers any change whatever; and a more restricted reading, which only captures changes made to a subsisting constitution. The choice does not depend on the meaning of the word, “amendment”. There is no preordained definition of that word containing within it every denotation, for all circumstances. Instead, the choice will depend upon what seems to be the most plausible reading of that term in the context of the constitution as a whole. And to determine that, we have to look at the alternative norms that might apply were the restricted definition adopted.

We also need to consider potential alternative norms in order to evaluate arguments that the amending formula is not exhaustive, even if applicable. This family of arguments suggests that the amending formula can be supplemented by other norms to govern secession. It faces a particular hurdle in subsection 52(3) of the *Constitution Act, 1982*, which declares that amendments can only be made “in accordance with the authority contained in the Constitution of Canada.” But that subsection nevertheless leaves two potential avenues for the interpolation of alternative norms. First, it might be argued that the additional norms do not displace but merely gloss the relevant sections of the amending formula. All amendments would still be made according to the

⁵¹ For the controversy over the patriation of the constitution, including the adoption of the *Constitution Act, 1982*, see *Reimagining Canada*, *supra* note 3 at 92-120.

⁵² See text above, accompanying note 12.

⁵³ The relevant provisions of the amending formula are sections 38 and 41 of the *Constitution Act, 1982*, *supra* note 9, each of which is introduced by the words, “An amendment to the Constitution of Canada ... may be made by ...” Moreover, subsection 52(3) states, “Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada.” In each case, the relevant provision applies only to “amendments”.

amending formula, but that formula would be supplemented by additional requirements. This is the nature of Daniel Turp's argument that a constitutional convention now exists that requires all parties to do what is necessary to permit Quebec to secede, following a sovereigntist victory in a referendum.⁵⁴ Second, subsection 52(3) may be less definitive than it seems if the phrase "the Constitution of Canada" is taken to include additional, unstated, norms. Subsection 52(2) does define "the Constitution of Canada" as consisting of a number of listed documents, but that clause merely states that the constitution "includes" those items. It leaves open the possibility that there may be other constitutional sources.⁵⁵ Once again, the only way to decide between the competing readings is to explore the alternatives offered, in order to see if they do present a convincing account of the norms applicable. It is to those norms, then, that I turn.

2. What Rules Might Apply in Addition to or in Place of the Amending Formula?

a. *Canada As Indivisible*

Of course, if the amending formula does not apply, the alternative norms may make secession more rather than less difficult. Indeed, there are some commentators (although to date there seem to be very few, if any, constitutional lawyers) who claim that Canada should be considered indivisible, so that a legal secession would be radically impossible. Indeed, this position has an apparent affinity with the argument that secession is so fundamental a change that it escapes the application of the amending formula altogether. It could be seen as pushing that argument one step further, to suggest that since a secession would put a complete end to Canada, it is inconceivable that the Canadian constitution could permit such a change.

This argument is unconvincing, however. It may accord with the preferences of some federalists — promising as it does an unconditional guarantee of Canadian unity — but as a legal argument its foundations are weak. It is an all-too-direct translation of

⁵⁴ See "Le droit à la sécession", *supra* note 4 at 50-52; "Quebec's Democratic Right," *supra* note 4 at 103-107.

⁵⁵ The Supreme Court of Canada has held that the definition is not exhaustive and that unwritten principles may be part of the "Constitution of Canada" within the meaning of that subsection (see *New Brunswick Broadcasting Co. v. Nova Scotia*, [1993] 1 S.C.R. 319, 100 D.L.R. (4th) 212 [hereinafter *New Brunswick Broadcasting*]). Hogg, *supra* note 21 at 7-9, has argued that the list should be treated as exhaustive, at least for written instruments (and one has the impression that he defers only reluctantly to the authority of *New Brunswick Broadcasting*, *ibid.*). He bases his argument on the need for certainty when the relevant component of the constitution will impose constraints on legislative power and benefit from entrenchment, and notes that for other purposes, a broader definition of the term may be appropriate. That, it seems to me, leaves open the issue addressed here, even if Hogg's view is to be preferred (and it has much to recommend it). We are dealing with a principle that, if it exists, would not pose continuous constraints on legislative power but would operate in a very confined compass in the rarest of circumstances. Although it raises serious concerns of constitutional economy (addressed below), they are not those that motivated Hogg.

the desire for unity into the semblance of legal form, without support in Canadian or British constitutional tradition.

To begin, the purported absurdity of the Canadian constitution permitting its own demise is no absurdity at all. There is nothing illogical in an organization's constitution providing a means of dissolution. This is familiar from the corporate context. At the level of the state, some constitutions expressly stipulate how secession may occur.⁵⁶ The present Canadian constitution undoubtedly permits amendments that would radically transform the nature of the Canadian state — the role of the queen, the offices of the governor general and lieutenant governors, the numbers and territories of the provinces, the usage of the official languages of Canada — although the degree of consent required may be substantial.⁵⁷ The constitution's language certainly does not exclude the possibility of secession.

Furthermore, a complete ban on secession would run counter to the presumption, well ensconced within the British constitutional tradition, that all matters lie within the power of the state as long as the proper forms are followed. Canadian legislatures have not always enjoyed such plenary power. For much of Canada's history, certain kinds of changes (especially those affecting Canada's fundamental constitutional structure) were reserved to the Imperial Parliament at Westminster.⁵⁸ But the central purpose of patriation⁵⁹ was precisely to vest in Canadian institutions power over those matters affecting Canada that had previously been subject to imperial jurisdiction. The terms of the *Canada Act 1982*,⁶⁰ and its schedules (including the *Constitution Act, 1982*) appear to be sufficiently general to accomplish that purpose. Unless a specific restriction can be identified, it is a reasonable conclusion that, following patriation, Canadian institutions acquired all power previously possessed by Westminster.

⁵⁶ See the examples given in Monahan, Bryant & Côté, *supra* note 26 at 7-16. See also K.C. Wheare, *Federal Government*, 4th ed. (New York: Oxford University Press, 1964) at 85-87. A commentator who is not well schooled in the relevant country's constitution will often have difficulty distinguishing (1) between silence upon and prohibition of secession, and (2) between prohibition of unilateral secession and the complete prohibition of secession. To some extent, Monahan, Bryant & Côté fall prey to this difficulty. They treat Australia's constitution as prohibiting secession completely (see *ibid.* at 7), where the only significant study concludes, convincingly, that this is not the case (see Craven, *supra* note 22).

⁵⁷ See *Constitution Act, 1982*, *supra* note 9, paras. 41(a) & (c), 42(e) & (f), 43(a) & (b).

⁵⁸ Indeed, one essential consideration in the Privy Council's decision in *Re: The Initiative and Referendum Act*, *supra* note 22, was that the provincial legislature had been defined by imperial legislation (the *British North America Act, 1867* (U.K.), 30 & 31 Vict., c. 3) which in this respect the provincial legislature was incompetent to amend. The kind of change in issue in that case — one which purported to eliminate the lieutenant governor's role in legislation — would now be permitted by para. 41(a) of the *Constitution Act, 1982*, *ibid.* (although it would require the unanimous agreement of all provinces, the Senate, and the House of Commons).

⁵⁹ "Patriation" occurred in 1982, by virtue of the *Canada Act 1982* (U.K.), 1982, c. 11, which, *inter alia*, enacted the *Constitution Act, 1982*, *ibid.* As a result of that enactment, the Canadian constitution is fully amendable within Canada and all vestiges of British legislative sovereignty over Canada have ended. For a brief description of patriation, see Hogg, *supra* note 21 at 53-58.

⁶⁰ *Ibid.*

If one examines the scope of that power prior to the devolution of authority to Canada, it seems clear that there was no bar to changes equivalent to secession. Britain certainly exercised plenary authority with respect to colonial constitutions, extending boundaries and experimenting with various federal and unitary arrangements. Moreover, it was universally conceded that the imperial authorities could renounce British sovereignty over territory subject to the Crown, effectively severing a portion of the territory from the Crown's jurisdiction. This happened during the colonial period through the cession of lands by treaty, and it was accomplished by legislative means during the period in which the former colonies acceded to independence.⁶¹ Imperial authorities resisted secessionist movements in Nova Scotia, Western Australia and Ireland, but there is no doubt that, as a matter of law, they could have acceded to those movements' demands, as indeed they did following the hostilities in Ireland, and following a referendum in favour of secession in Jamaica in 1962.⁶²

If that is so, it is reasonable to conclude that there is no implicit prohibition, in the now-patriated Canadian constitution, against Canada renouncing a portion of its sovereignty. The only issue is the means by which this may be accomplished.⁶³ What, then, are the arguments for alternative norms that could permit secession?

⁶¹ See Sir K. Roberts-Wray, *Commonwealth and Colonial Law* (New York: Praeger, 1966) especially c. 4 & 6. There has, in fact, been a long debate over whether the Imperial Parliament could, consistent with the theory of parliamentary sovereignty, permanently sever its authority over territories subject to the Crown (see G. Marshall, *Parliamentary Sovereignty and the Commonwealth* (Oxford: Clarendon Press, 1957)). The consensus is that an effectual severance can occur, although there continues to be debate over the means. For a particularly insightful discussion, see Slattery, *supra* note 45.

⁶² In the attempted secession of Western Australia, all parties — the Western Australian and Commonwealth representatives, and the Joint Select Committee of the Imperial Parliament seized with the request — agreed that the Imperial Parliament had the power to accomplish the secession, and this even though the preamble to the Constitution of Australia described the federation as “indissoluble” (see Craven, *supra* note 22 at 46-55). There seems to have been a similar presumption in the Nova Scotia case (see K.G. Pryke, *Nova Scotia and Confederation 1864-74* (Toronto: University of Toronto Press, 1979) at 60-79; G. Stevenson, *Ex Uno Plures: Federal-Provincial Relations in Canada, 1867-1896* (Montreal: McGill-Queen's University Press, 1993) at 108-115). For Ireland, see K.C. Wheare, *The Statute of Westminster and Dominion Status*, 5th ed. (London: Oxford University Press, 1953) at 100-112. In Jamaica, the Federation of the West Indies was dissolved, under British legislative authority, after a majority of Jamaican voters voted in favour of secession in a referendum (see Roberts-Wray, *ibid.* at 840-41). Prior to patriation, most if not all academic commentators presumed that the secession of Quebec could be accomplished by legislation of the British Parliament (see J. Claydon and J.D. Whyte, “Legal Aspects of Quebec's Claim for Independence” in R. Simeon, ed., *Must Canada Fail?* (Montreal: McGill-Queen's University Press, 1977) 259 at 274-79; F.M. Greenwood, “The Legal Secession of Quebec — A Review Note” (1978) 12 U.B.C. L. Rev. 71; M.A. Thibodeau, “The Legality of an Independent Quebec: Canadian Constitutional Law and Self-Determination in International Law” (1979) 3 Boston Coll. Int'l. & Comp. L. Rev. 99 at 107-122.

⁶³ See also Finkelstein & Vegh, *supra* note 16 at 8-14; Monahan, *Cooler Heads*, *supra* note 16 at 7.

b. *Alternative Foundations for an Implied Right to Secede*

i. *Constitutional Convention*

Daniel Turp has argued that there is now a constitutional convention that Quebec can separate, if it obtains a clear mandate in a referendum. He argues, in other words, that even if the law stipulates a more demanding procedure for secession, political practice has given rise to a binding obligation to permit secession when a democratic mandate has been obtained. Turp bases this argument on a number of “precedents” which he claims establish the right to secession — in particular, the federal government’s acquiescence in the holding of the 1980 referendum on sovereignty-association, as well as a series of statements asserting Quebecers’ right to decide, made, above all, by political leaders in Quebec. He submits that the rationale for such a rule is rooted, quite simply, in democratic principles.⁶⁴

Conventions are indeed a recognized element in constitutions derived from the British model. They are rules, considered to be obligatory, that have emerged out of political practice. They can be profoundly important, enshrining such crucial principles as the cornerstone of responsible government — the rule that the government of the day should retain the confidence of a majority of members in the House of Commons. Conventions are, however, enforced through the political process, not through judicial proceedings (although in recent years the courts have shown greater willingness to pronounce on their existence and breach).⁶⁵

The important thing to realize about conventions is that they are in many ways akin to rules of common law, except that they are unenforceable before the courts. They are broadly conceded to be obligatory, and to have that character, they must possess from the precedents a real measure of definition. The great English constitutional lawyer, Sir Ivor Jennings, summarized the requirements for determining the existence of a constitutional convention in terms of three questions: “first, what are the prece-

⁶⁴ See “Le droit à la sécession”, *supra* note 4 at 50-52; “Quebec’s Democratic Right”, *supra* note 4 at 103-107; “Exposé-réponse”, *supra* note 4 at 662 and 664-65. See also C. Beauchamp, “De l’existence d’une convention constitutionnelle [*sic*] reconnaissant le droit du Québec à l’autodétermination” (1992) 6 R.J.E.L. 55; J.-M. Arbour *et al.*, “Référendum: le débat sur la légalité de la démarche est un faux débat” *La Presse [de Montréal]* (6 September 1995) B3 (although without detail on the procedural requirements of such a convention).

⁶⁵ The most illuminating discussion of conventions remains Sir W.I. Jennings, *The Law and the Constitution*, 5th ed. (London: University of London Press, 1959), but see also G. Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability*, rev. ed. (Oxford: Clarendon Press, 1986); A.D. Heard, *Canadian Constitutional Conventions: The Marriage of Law and Politics* (Toronto: Oxford University Press, 1991). For examples of courts pronouncing on conventions, see *Re: Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, [1981] 6 W.W.R. 1 [hereinafter cited to S.C.R.]; *Re: Objection to a Resolution to Amend the Constitution*, [1982] 2 S.C.R. 793, 140 D.L.R. (3d) 385.

dents; secondly, did the actors in the precedents believe that they were bound by a rule; and thirdly, is there a reason for the rule?"⁶⁶

Measured against Jennings' standards, the convention proposed by Turp comes up wanting. The comments he cites as precedents are mere statements of opinion; they are not actions that turned upon an acknowledgement of the rule, evincing an obligation to comply with it. Even as statements of opinion, they tend to be ambiguous on precisely the matters of interest to Turp. For example, one of the sources on which Turp relies contains the following quotation from former Prime Minister Pierre Elliott Trudeau:

Alors, voilà que dans ce pays énormément changé, les événements du 15 novembre [the election of the Parti Québécois, not the holding of the referendum] nous obligent à faire un choix. Et moi je trouve ça non seulement excellent, je trouve ça presque emballant ... J'ai l'impression qu'on va la gagner. Mais il faut que j'accepte les règles du jeu ... Il n'y en a pas beaucoup de pays qui donneraient la liberté démocratique à un parti dont le but c'est de détruire ce pays-là.⁶⁷

The source goes on to quote another comment by Trudeau in which he rejected the use of force to prevent Quebec from seceding.⁶⁸ Statements such as this are more naturally interpreted as statements of political opinion or intention — at most the intention to acquiesce in a referendum result⁶⁹ — rather than the acknowledgement of a binding rule. And if one were to assume that they invoked a rule, what would be its content? That Quebec becomes independent by virtue of the referendum result alone, no matter what transitional issues remain unresolved? That Quebec politicians have an obligation to negotiate secession from the rest of Canada? That political leaders throughout Canada have a binding obligation to pass the necessary amendments to secure the secession of Quebec?

Turp prefers the last interpretation, although it is difficult to see how he comes to that conclusion, given the vagueness of the actors' pronouncements. He concedes that the amending formula would continue to govern the process of secession, the convention merely imposing "the obligation of making the constitutional amendments necessary to give [the referendum] effect and thereby allow Quebec to withdraw from Con-

⁶⁶ Jennings, *ibid.* at 136. This formulation was adopted by the Supreme Court of Canada in *Re: Resolution to Amend the Constitution*, *ibid.* at 888.

⁶⁷ M. Adam, "Le droit à la libre disposition du Québec a été reconnu par P. Trudeau" *La Presse [de Montréal]* (15 August 1991) B2, cited in Turp, "Le droit à la sécession," *supra* note 4 at 62 n.9 and Turp, "Quebec's Democratic Right," *supra* note 4 at 104 n.11.

⁶⁸ See *ibid.*

⁶⁹ Indeed, this is the interpretation Woehrling makes of these statements (see "L'évolution constitutionnelle," *supra* note 5 at 590-91; "Éventuelle accession", *supra* note 5 at 32-33). The comments cited by Beauchamp are similarly equivocal. Those of actors at the federal level or in provinces other than Quebec speak only of their willingness to *negotiate* if Quebecers vote clearly for separation (Beauchamp, *supra* note 64 at 62). The New Democratic Party and Progressive Conservative resolutions recognizing Quebec's right of self-determination (cited by Beauchamp, *ibid.* at 63) are more to the point, but still are very unclear as to conditions or procedures.

federation.”⁷⁰ But if this were the content of the convention, how could the “precedents” cited by Turp support it? Those statements come overwhelmingly from politicians in Quebec, yet the alleged convention would ostensibly bind politicians in all provinces, dictating the manner in which they exercise their duties as members of their legislatures in the constitutional-amendment process. Statements issuing from politicians in Quebec are (to say the least) very poor evidence of the implicit norms binding politicians in other provinces. Nor do they take account of the other legislators’ obligations to their own constituents.

The constitutional convention proposed by Turp is no convention at all. There may be very good reasons for politicians to respect a “Yes” vote in a clear referendum, but that does not give rise to a determinate obligation, binding on all, to take specific steps towards accomplishing that aim.

ii. The Compact Theory of Confederation

In an article in the *Virginia Journal of International Law*, Gregory Marchildon and Edward Maxwell suggest that Quebec has a right to secede unilaterally based on the compact theory of confederation.⁷¹ That theory states that Canada was created by the agreement — by the compact — of the pre-existing colonies, and that this feature of Canada’s origin should be used to interpret the resulting constitutional order. The theory has many variations, all springing from that common foundation. Its proponents tend to share a commitment to the moral significance, if not the moral primacy, of the provinces as fundamental constituents of confederation, and to use the theory as a way of resisting constitutional developments that would erode the autonomy of the provinces ostensibly guaranteed in the initial accord.⁷²

The compact theory has a venerable history in Canadian constitutional thought. It has, at times, achieved wide popular acceptance and support from the courts.⁷³ It has not, however, gone unchallenged. A competing theory, the “statute theory”, claims that

⁷⁰ “Quebec’s Democratic Right”, *supra* note 4 at 106; see also “Le droit à la sécession”, *supra* note 4 at 52. Turp is much more frank about the ambiguity in “Exposé-réponse”, *supra* note 4 at 664-65.

⁷¹ See G. Marchildon & E. Maxwell, “Quebec’s Right of Secession Under Canadian and International Law” (1992) 32 *Va. J. Int’l L.* 583 at 593-98.

⁷² For discussions of the compact theory and the provincial-rights movement out of which it emerged, see R. Arès, *Dossier sur le Pacte fédératif de 1867 — La Confédération: pacte ou loi?* (Montreal: Bellarmin, 1967); R. Cook, *Provincial Autonomy, Minority Rights and the Compact Theory, 1867-1921* (Ottawa: Queen’s Printer, 1969); A.I. Silver, *The French-Canadian Idea of Confederation 1864-1900* (Toronto: University of Toronto Press, 1982); R.C. Vipond, *Liberty and Community: Canadian Federalism and the Failure of the Constitution* (Albany: State University of New York Press, 1991); Stevenson, *supra* note 62, especially at 17-18. There are, in fact, two principal variations on the theory, one focusing on provinces as the fundamental units, the other focusing on French-Canadian and English-Canadian nations. For the purposes of secession, the relevant version is the one based on provinces; I therefore deal with it exclusively.

⁷³ See e.g. *Re Regulation and Control of Aeronautics in Canada*, [1932] A.C. 54 at 70, [1932] 1 D.L.R. 58 (P.C.); *Canada (A.G.) v. Ontario (A.G.) (Labour Conventions)*, [1937] A.C. 326 at 351-352, [1937] 1 D.L.R. 673 (P.C.).

Canada is the product not of agreement but of legislative act.⁷⁴ According to this theory, confederation swept away the pre-existing units and replaced them with an entirely new structure of government, creating a new federal government *and* new provinces. That new structure owes nothing to the consent of the colonies; it possesses its own, independent basis of legitimacy. This theory too has, on occasion, received judicial approval.⁷⁵

Marchildon and Maxwell provide evidence to support the view that confederation was the result of a compact, and indeed there is much to be said for that argument. They do not, however, explain why the compact theory supports a right to unilateral secession. Presumably, the assertion depends upon the implication of a term that any partner can withdraw at will from the compact, or can withdraw upon a fundamental breach of the underlying agreement.⁷⁶ Each of these alternatives seems unlikely as the foundation for a legal right to secede given the history of the Canadian constitution. Even if confederation was the product of the agreement of the colonies, it was subsequently established under imperial authority. The new constitution was not created by the simple consent of the contracting parties, but by the act of the then imperial sovereign, and the terms of the agreement were enshrined in that act. At the time, all parties would have presumed that changes could only occur, within the legal order of that period, with the active collaboration of the imperial authorities, whatever the cause for dissatisfaction. This was certainly the presumption in 1868, when Nova Scotia made a concerted attempt to secede.⁷⁷ Since that time, the authority vested in the Imperial Parliament has been gradually assumed by institutions within Canada, first through the imperial authorities' decision to make changes to Canada's constitution only upon request from Canada, and later through the procedures for amendment contained in the *Constitution Act, 1982* (including implicit means, if any).⁷⁸ It is hard to see how any of these developments could have created a unilateral right to withdraw, founded on compact, if that right did not exist at the origin.⁷⁹

⁷⁴ For an influential statement of this position, see N. McL. Rogers, "The Compact Theory of Confederation" (1931) 9 Can. Bar Rev. 395. See also Arès, *supra* note 72. For a valuable discussion of the relationship between the two theories, see R.A. Macdonald, "... Meech Lake to the Contrary Notwithstanding (Part I)" (1991) 29 Osgoode Hall L.J. 253 at 278ff.

⁷⁵ See e.g. *A.G. Australia v. Colonial Sugar Refining Co.*, [1914] A.C. 237 at 252-253 (P.C.) [hereinafter *Colonial Sugar Refining*] (note, however, that this passage supports a hybrid theory: a "treaty" between the provinces subsequently enacted by statute); *Bonanza Creek Gold Mining Co. v. R.*, [1916] 1 A.C. 566 at 579, 26 D.L.R. 273 (P.C.).

⁷⁶ This was the use made of the compact theory by representatives of the southern states prior to the American Civil War (see e.g. J.C. Calhoun, "A Discourse on the Constitution and Government of the United States" in R.K. Cralle, ed., *The Works of John C. Calhoun*, vol. 1 (New York: D. Appleton, 1854) 111, especially at 225ff). In the American case, this argument was ultimately settled, against the southern states, by the Civil War. Note that the argument was more plausible in that context, given the process by which the American union was formed, than in Canada, where the country's initial development occurred under the aegis of imperial authority.

⁷⁷ See the discussions of the Nova Scotia events cited *supra* note 62. See also *Colonial Sugar Refining*, *supra* note 75 at 252-53.

⁷⁸ For brief overviews of this process, see Hogg, *supra* note 21 at 45-58; Slattery, *supra* note 45.

⁷⁹ For a similar analysis in the Australian context, see Craven, *supra* note 22 at 63-81.

The problem with Marchildon and Maxwell's argument is that it uses the compact theory in a manner quite unlike its usual role in Canadian jurisprudence. The compact theory has generally been used as an instrument of interpretation, one that offers a particular reading of the moral foundations of confederation. It emphasizes that Canadian federalism is coordinate in nature, that provinces have their own intrinsic integrity, and that the courts should not interpret the constitution in a manner that expands Ottawa's authority at the expense of the provinces. The theory operates, then, as an optic through which one can read the substantive provisions of the constitution, not as a self-sufficient foundation for a constitutional rule.

Another way of putting the objection is that the compact theory only says that confederation sprang from an agreement; it does not say what the terms of that agreement were. For that, one must look to the constitutional documents themselves. The theory can suggest the spirit in which those documents should be interpreted, but it does not replace them. Marchildon and Maxwell's argument fails because it is unable to propose any plausible foundation for their proposed rule, apart from the simple and ultimately vague assertion that confederation is a compact.

iii. International Law

This is one of the arguments most consistent with the justifications deployed by Quebec sovereignists over the years. Sovereignists have tended to claim a right to self-determination only at international law, without arguing that the right might also be operative within domestic law. There is good reason to explore the latter possibility, however. If the amending formula does not apply to secession, there is a reasonable argument that the void might be filled by recourse to international law.

In the British tradition, domestic legal rules take precedence over the rules of international law. To that extent, the two legal systems are capable of operating separately, and it is therefore perfectly possible to have two contradictory sets of rules, one binding Canada in international law, the other in force in the domestic realm. That said, the two legal orders are by no means impermeable. First, Canadian law recognizes a general obligation to interpret domestic law so that it conforms, as far as possible, to international norms. Second, most international lawyers hold that the rules of customary international law automatically form part of domestic law, unless they are clearly contradicted by domestic rules. The same is not true of rules created by treaty (which ordinarily require an act of the relevant legislature to have effect within domestic law), but even then, treaty-based rules are persuasive in the interpretation of domestic law. Thus, it is conceivable that international law might be used to interpret the express provisions of the Canadian constitution or to fill any lacunae.⁸⁰

⁸⁰ For the incorporation of international norms into domestic law, see I. Brownlie, *Principles of Public International Law*, 4th ed. (Oxford: Clarendon Press, 1990) at 43-50; J.-M. Arbour, *Droit international public*, 2d ed. (Cowansville, Que.: Yvon Blais, 1992) at 53-59, 107-111; H. Kindred *et al.*, eds., *International Law Chiefly as Interpreted and Applied in Canada*, 5th ed. (Toronto: Emond Montgomery, 1993) at 147ff.

What then are the relevant rules of international law? The argument generally made by sovereignists is that Quebecers, as a people, have a right of self-determination under international law and that this right includes a right to secede — unilaterally if necessary.⁸¹ If so, it is certainly possible that the right has force within Canadian law, for it now seems clear that the right is a rule of customary international law.⁸² The critical issue, then, is the content and application of the right of self-determination.

The assertion of the right raises a number of profoundly difficult problems. To take one fundamental matter, it is not self-evident that all residents of Quebec constitute a single “people” for the purposes of the right. There are a number of competing definitions of peoplehood: the Aboriginal nations have a strong claim to be considered “peoples”; self-determination may require a stronger cultural definition than that proposed by most sovereignists, the relevant “people” being French Canadians as a whole, or the French Canadian population of Quebec; certain strands of international law would support a more state-centred definition, the relevant “people” being the entire population of Canada. These problems are by no means simple to resolve. They depend heavily on one’s interpretation of the justification for the right in international law.⁸³ Their contested character underlies several crucial disputes in the current context, not least the question of partition of a seceding Quebec.

I will not explore these questions in detail. My concern is with the simple possibility that international law might serve as the foundation for a legal right to secede unilaterally, if the right of self-determination is held to be incorporated in Canadian law.

⁸¹ See sources cited *supra* note 4.

⁸² See Nguyen Quoc Dinh *et al.*, *Droit international public*, 5th ed. (Paris: Librairie générale de droit et de jurisprudence, 1994) at 493; *Affaire relative au Timor oriental*, [1995] Rapp. C.I.J. 90 at 102.

⁸³ Turp, for example, relies entirely on self-definition (see “Quebec’s Democratic Right”, *supra* note 4 at 110; “Exposé-réponse”, *supra* note 4 at 660). Although this is an element in most definitions, it cannot be sufficient. Depending on the “self” one consults, one may have conflicting answers to the question “Who is the relevant people?”. If one asks residents of Quebec collectively, the answer could well be “all Quebecers”. If one asks the James Bay Crees collectively, the answer could well be “the Crees”.

Brossard, *L’accession*, *supra* note 4 at 160-81, relies on a more conventional set of objective and subjective factors. The definitional problems surface, however, in his strenuous efforts to transfer the right of the “nation canadienne-française” to the “peuple québécois” (*ibid.* at 175-81), and his assertion that anglophone Quebecers, who do not form part of the “nation canadienne-française” or the “peuple québécois”, would not, in principle, have a right to vote on secession (*ibid.* at 183, 185). He would be willing to accord them a vote (*ibid.* at 184), but only because they would otherwise protest, not being willing to accept majority rule (which evidently, for Brossard, means that only the majority gets to vote!).

The prospect of contestation over the definition of “peoples” is by no means academic. In the midst of the 1995 referendum campaign, the Grand Council of the Crees (of Quebec) produced a massive study contesting Quebec’s right to secede and affirming Aboriginal peoples’ right to self-determination (*supra* note 26).

To that end, it is sufficient that I address the scope of that right, and specifically, whether it could extend to a right to secede in circumstances such as these.⁸⁴

There is a substantial gap between the popular understanding of the right of self-determination (in which the right is often taken to be synonymous with a right to secede) and the content of the right in international law. One way of accounting for this divergence is to say that although *prima facie* the right of self-determination gives peoples the right to choose their own political organization (including, if they wish, their own state), that right is constrained by the international community's commitment to protecting the territorial integrity of states. Only in rare circumstances, then, can self-determination be used to declare independence. Indeed, most international lawyers would have argued, at least until recently, that the right to secede is restricted to situations in which the seceding territory is a colony (or otherwise non-self-governing), moreover one that is geographically separate from the imperial power's home territory. Only in such cases of "blue-water colonialism" (in cases, in other words, of overseas colonies) will self-determination trump the imperial state's entitlement to have its integrity respected. Another way of coming to the same conclusion is through the meaning of the word "peoples". Given competing definitions of what constitutes "a people" (so this argument runs), the only safe course is to consider that "peoples" refers to entire populations of separate political units. Otherwise, states would be riven by conflicting claims. And only in the case of colonial rule is the degree of separation sufficient to conclude that a separate people exists.

Both these arguments are common in the postwar literature on self-determination.⁸⁵ On either view, the right to secede is much more limited than the popular perception would suggest, confined solely to the case of decolonization. Since the early 1990s there has been some speculation that the situation might be changing as a result of the international community's actions during the break-up of the Soviet Union, Yugoslavia and perhaps also Czechoslovakia.⁸⁶ But these examples now appear to be in the process

⁸⁴ For recent studies of the right of self-determination on which this discussion draws, see B. Kingsbury, "Claims by Non-State Groups in International Law" (1992) 25 *Cornell Int'l L.J.* 481; H. Hannum, "Rethinking Self-Determination" (1993) 34 *Va. J. Int'l L.* 1 [hereinafter "Rethinking"]; T.M. Franck, "Postmodern Tribalism and the Right to Secession" in C. Brölmann *et al.*, eds., *Peoples and Minorities in International Law* (Dordrecht: Martinus Nijhoff, 1993) 3; Nguyen *et al.*, *supra* note 82 at 490-502; A. Cassese, *Self-determination of Peoples: A Legal Reappraisal* (Cambridge: Cambridge University Press, 1995); H. Hannum, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights*, rev. ed. (Philadelphia: University of Pennsylvania Press, 1996) [hereinafter *Accommodation*].

⁸⁵ See Franck, *ibid.*; Nguyen *et al.*, *ibid.* at 493-501.

⁸⁶ See e.g. D.Z. Cass, "Re-thinking Self-Determination: A Critical Analysis of Current International Law Theories" (1992) 18 *Syracuse J. Int'l L. & Com.* 21; Turp, "Quebec's Democratic Right", *supra* note 4 at 113-115; Turp, "Exposé-réponse", *supra* note 4 at 664; L.S. Eastwood, Jr., "Secession: State Practice and International Law after the Dissolution of the Soviet Union and Yugoslavia" (1993) 3 *Duke J. Comp. & Int'l L.* 299 (but the author advances his conclusions with great caution); D. Murawiek, "The Issue of a Right of Secession — Reconsidered" in C. Tomuschat, ed., *Modern Law of Self-Determination* (Dordrecht: Martinus Nijhoff, 1993) 21 at 28-34; Sam Blay, "Self-Determination: A Reassessment in the Post-Communist Era" (1994) 22 *Denv. J. Int'l L. & Pol'y* 275; Falk, *supra* note 28 at 63-71.

of absorption into the previous consensus. The disintegration of the Soviet Union and Czechoslovakia are commonly considered to be instances of consensual, not unilateral, secession.⁸⁷ The more challenging Yugoslavian case is analyzed as a case of dissolution, where the predecessor state ceased to function in fact, leaving its components free to go their own ways.⁸⁸ The international community's actions may well demonstrate that the practice of recognition is evolving, perhaps in a direction more generous to seceding territories (at least in circumstances similar to the Yugoslavian conflict). But they do not demonstrate that there is an emerging *right* to secede.⁸⁹

Indeed, in recent years, the literature has tended to turn away from national independence as the goal of self-determination.⁹⁰ This recent trend suggests that the very focus on secession, in many previous accounts, may have been misplaced. Instead, this literature claims, self-determination is concerned primarily with affirming the right of citizens to participate in government. There are differing views as to what constitutes adequate participation. At the most basic level, it would involve a measure of political equality and respect for human rights, although some authors would graft onto this a robust commitment to democracy,⁹¹ or a right to autonomous governmental institutions for national minorities.⁹² In any case, on any of these views, the right to self-

⁸⁷ See Hannum, "Rethinking", *supra* note 84 at 51; Franck, *supra* note 84 at 15; Hannum, *Accommodation*, *supra* note 84 at 497.

⁸⁸ See *Conférence pour la paix en Yougoslavie — Avis de la Commission d'arbitrage, 29 novembre 1991*, (1992) 96 Rev. D.I.P. 264; Hannum, "Rethinking", *ibid.* at 51-53; Monahan, "La sécession du Québec", *supra* note 16 at 12; Woehrling, "Éventuelle accession", *supra* note 5 at 42-43, n.22; Hannum, *Accommodation*, *ibid.* at 497-98. Cassese treats the break-up of both Yugoslavia and the Soviet Union (apart from the secession of the Baltic States) as instances of *de facto* separation outside the principles of international law (see *supra* note 84 at 257-73). Nguyen *et al.* treat them as instances of dissolution (see *supra* note 82 at 501-502).

⁸⁹ In understanding the impact of the Eastern European events, it is useful to distinguish between the acceptance of an affirmative right to secede on the one hand, and a greater tolerance for secession, manifested in a greater willingness to recognize new states, on the other. Most of those who say that international law is changing concentrate on the latter (see *e.g.* Falk, *supra* note 28 at 63-71; Weller, *supra* note 43). A willingness to tolerate secession and recognize the resulting states is, however, quite different from the acknowledgment of an affirmative *right* to secede. Falk is on safest ground when he says, "the possibility of such claims of independence in non-colonial situations is certainly not legally precluded at this stage" (*ibid.* at 68).

Recently there have been some notable efforts to explore the philosophical foundations for an expanded right of self-determination (see A. Margalit & J. Raz, "National Self-Determination" (1990) 87 J. Phil. 439; A. Buchanan, *Secession: The Morality of Political Divorce from Fort Sumter to Lithuania and Quebec* (Boulder, Colo.: Westview Press, 1991) (Buchanan nevertheless doubts that Quebec would be justified in seceding unilaterally)). For an effective response, see B. Slattery, "The Paradoxes of National Self-Determination" (1994) 32 Osgoode Hall L.J. 703.

⁹⁰ See *e.g.* Kingsbury, *supra* note 84 at 498-504; Hannum, "Rethinking", *supra* note 84 at 57-69; P. Thornberry, "The Democratic or Internal Aspect of Self-Determination with some Remarks on Federalism" in Tomuschat, ed., *supra* note 86, 101.

⁹¹ See *e.g.* T.M. Franck, "The Emerging Right to Democratic Governance" (1992) 86 Am. J. Int'l L. 46.

⁹² See *e.g.* I. Brownlie, "The Rights of Peoples in Modern International Law" in J. Crawford, ed., *The Rights of Peoples* (Oxford: Clarendon Press, 1988) 1; S.J. Anaya, "The Capacity of International

determination is perfectly compatible with a high degree of respect for territorial integrity. A right to secede could still arise (even outside colonial situations), but only when the minority was excluded from political participation or was otherwise subject to severe persecution.

None of these theories supports the view that Quebec has a right to secede.⁹³ Quebec is certainly not a colony of the rest of Canada, nor is it geographically separate; it therefore lies entirely outside the circumstances in which the postwar orthodoxy would have recognized a right of secession. If one applies the standards enunciated in the more recent literature, one's conclusion is no different: Quebecers enjoy equal political rights to other Canadians, full participation in democratic institutions, and a substantial degree of political autonomy. Turp has suggested that the patriation of the constitution over Quebec's objections in 1982, and the rejection of the Meech Lake Accord in 1990, demonstrate that Quebecers do not have adequate political rights in Canada, thus

Law to Advance Ethnic or Nationality Right Claims" (1990) 75 Iowa L. Rev. 837; Hannum, *Accommodation*, *supra* note 84 at 468-77.

⁹³ This is the opinion of most scholars who have addressed the Quebec case (see U.O. Umozurike, *Self-Determination in International Law* (Hamden, Conn.: Archon Books, 1972) at 256-59; D. Cameron, *Nationalism, Self-Determination and the Quebec Question* (Toronto: Macmillan, 1974) at 82-106, 143-57; Claydon & Whyte, *supra* note 62 at 260-70; T.C. Carey, "Self-Determination in the Post-Colonial Era: The Case of Quebec" (1977) 1 Int'l L.S.A. Int'l L.J. 47; R. Chaput, "Du rapport Durham au 'rapport' Brossard: le droit des Québécois à disposer d'eux-mêmes" (1979) 20 C. de D. 289 at 308 (legality would depend on Canada's acceptance of the referendum result); T.M. Franck *et al.*, "L'intégrité territoriale du Québec dans l'hypothèse de l'accession à la souveraineté" in *Commission d'étude des questions afférentes à l'accession du Québec à la souveraineté*, ed., *supra* note 4, 377 at 419-25; S. Williams, *International Legal Effects of Secession by Quebec* (Background Studies of the York University Constitutional Reform Project, Study No. 3) (North York, Ont.: York University Centre for Public Law and Public Policy, 1992) at 8-9, 13-22; Marchildon & Maxwell, *supra* note 71; Eastwood, Jr., *supra* note 86 at 342; Cassese, *supra* note 84 at 248-54; N. Finkelstein *et al.*, "Does Québec Have a Right to Secede at International Law?" (1995) 74 Can. Bar Rev. 225).

For opinions to the contrary, see Brossard, *L'accession*, *supra* note 4 at 159-202; Brossard, "Le droit à l'autodétermination", *supra* note 4; Brossard, "Le droit de disposer de lui-même", *supra* note 4; Turp, "Le droit à la sécession", *supra* note 4 at 53-59; Turp, "Quebec's Democratic Right", *supra* note 4 at 107-115; Turp, "Exposé-réponse", *supra* note 4 at 657-65 (but note that both Brossard and Turp say that the exercise of the right depends purely on the will of the relevant people). Thibodeau gives no firm conclusion, but seems to lean against Quebec's right to secede (*supra* note 62 at 126-41). A number of sovereignist scholars in Quebec decline to state clearly that the province has the right to secede (indeed some appear to doubt that it does), but instead focus on the fact that secession can occur in any case, simply by the effective assertion of authority, perhaps mediated by international recognition (see *e.g.* Brun & Tremblay, *supra* note 5 at 236-37; Woehrling, "Redéfinition", *supra* note 5 at 90-92; Woehrling, *La Constitution canadienne*, *supra* note 14 at 154-62; Woehrling, "L'évolution constitutionnelle," *supra* note 5 at 584-91; Woehrling, "L'évolution et le réaménagement", *supra* note 21 at 123-30; Woehrling, "Éventuelle sécession", *supra* note 5 at 314-22 (in the preceding four discussions, Woehrling as much as concedes the absence of a right at international law); Woehrling, "Éventuelle accession", *supra* note 5 at 30-32; Arbour *et al.*, *supra* note 64, B3; J.-Y. Morin, "Démembrer le Québec?" (1996) 86 L'Action nationale 151 at 159, 163-64, 168). Turp himself has recently adopted this tack (see Turp, *supra* note 46 at 800-801).

fulfilling the requirement for a right of secession⁹⁴ — but this is hyperbole. It would mean, in effect, that unless a section of a state got precisely the constitutional settlement it requested, it would acquire a right to secede. The international literature clearly contemplates a higher standard than this, something involving real political repression.⁹⁵

International law is prone to divergent interpretations and, on occasion, rapid evolution as a result of changing state practice. That evolution would have to be substantial indeed for Quebec to secure a right of unilateral secession.

iv. Democratic Principle

Perhaps for that reason, sovereigntist politicians have in recent months generally avoided the language of self-determination, basing their arguments instead on a pure appeal to democratic legitimacy and popular sovereignty: if the sovereigntists win the next referendum, they claim, Quebec should be able to become independent simply because that would be the democratic will of its people.⁹⁶

For most commentators, it is not clear whether this is intended to be a legal argument.⁹⁷ If it is, it traverses much of the territory of self-determination without addressing, let alone resolving, the problems with which international law has long struggled. The claim of democratic legitimacy ignores, for example, the inherent difficulty of defining the appropriate constituency. Why should a majority of all Quebecers govern? Why not, in the Crees' traditional territory, the majority of all Crees? Or in the far north, the majority of the Inuit (or, if one wants to avoid ethnic definitions, all residents of those regions)?⁹⁸ International lawyers have faced those issues, recognized their in-

⁹⁴ See "Le droit à la sécession", *supra* note 4 at 58; "Quebec's Democratic Right", *supra* note 4 at 114; "Exposé-réponse", *supra* note 4 at 664. Brossard, writing in 1976, cites past injustices to francophone minorities outside Quebec and (in his view) the misinterpretation of the *British North America Act* as reasons justifying secession (*L'accession*, *supra* note 4 at 203-30).

⁹⁵ Woehrling comes to the same conclusion, relying principally on the Quebec government's reaction to the failure of the Meech Lake Accord (see *La Constitution canadienne*, *supra* note 14 at 160-61; "L'évolution constitutionnelle", *supra* note 5 at 590; "Éventuelle accession", *supra* note 5 at 32; "Éventuelle sécession", *supra* note 5 at 317-18).

I do not mean to belittle the political significance of the circumstances of patriation or the failure of the Meech Lake Accord. I have made clear where I stand in *Reimagining Canada*, *supra* note 3, especially at 117-20, 125-62. One must, however, retain one's sense of proportion.

⁹⁶ See e.g. D. Lessard, "Québec se retire du combat juridique" *La Presse [de Montréal]* (5 September 1996) A1; see also the statements cited in sources *supra* note 2.

⁹⁷ Turp and Brun & Tremblay, however, do make this claim as a legal argument (see Brun & Tremblay, *supra* note 5 at 237; Turp, "Le droit à la sécession", *supra* note 4 at 52; Turp, "Quebec's Democratic Right," *supra* note 4 at 107 (within domestic law) and 114-15 (assimilating this argument to the right of self-determination); Turp, "Exposé-réponse", *supra* note 4 at 666-67).

⁹⁸ In October 1995, at the time of the Quebec referendum, the Crees, Inuit and Montagnais of Quebec held their own referenda on Quebec secession. The results were, respectively, 96 percent, 95 percent, and 99 percent against secession (see A. Derfel, "'The Message is Clear: We Won't Go'" *The [Montreal] Gazette* (26 October 1995) A15; A. Derfel, "Quebec Inuit strongly reject sovereignty in own vote" *The [Montreal] Gazette* (27 October 1995) A10; A. Derfel, "Montagnais reject Quebec in-

tractability, and tailored the right of self-determination accordingly. If the sovereignists' arguments do amount to a legal claim, they are best understood as an attempt to re-express that right in different language and with different incidents, but with no attention to its difficulties. They are best considered, then, to be duplicative of and inconsistent with the existing right of self-determination under international law.

The inconsistency does not dispose of the claim. It is still imaginable that there might be an independent norm, latent within the Canadian constitution, that departs from the standard of international law. Turp argues for such a result when he says that the Canadian constitution might be amended by referendum alone, regardless of the amending formula, simply because that would accord with democracy⁹⁹ — a possibility that I address in the next section of this paper. But at the very least, the inconsistency with the international right should give us pause.

3. The Exclusive Application of the Amending Formula — Conclusion

There are therefore significant problems with each of the arguments canvassed above. The dissection of each argument individually, while instructive, is insufficient to carry the day, however. The alternative means of secession may be problematic — their content may be highly contested and it may be difficult to find a strong foundation for any of them within the current state of constitutional law — but their merit ultimately depends on a crucial comparison: whether they provide a cogent reading of the legal norms governing secession when compared to competing interpretations. In this case, the principal alternative is that the amending formula provides the exclusive mechanism for a legal secession. Only by examining this contention can we judge which reading is most convincing. It is now time to address that issue directly.

There certainly are unwritten norms in the Canadian constitution. The principle of parliamentary sovereignty (which plays a crucial role in structuring the relationship between legislature and executive, and which continues to shape the interpretation of

dependence" *The [Montreal] Gazette* (28 October 1995) A9). For background, see Grand Council of the Crees (of Quebec), *supra* note 26.

As Slattery has emphasized, self-determination is not simply about freedom, but rather about the creation of an alternative structure of authority (*supra* note 89). A commitment to freedom alone (or, in this case, a simple commitment to majority rule) is insufficient to justify why one structure of authority should be preferred to another. Turp, to his credit, was willing to contemplate that aboriginal peoples within Quebec might possess their own democratic right of secession (see "Quebec's Democratic Right", *supra* note 4 at 116-21), although he has since retreated from that position (see J. Dion, "Bouchard et Turp accordent leurs violons" *Le Devoir [de Montréal]* (27 May 1994) A5; Turp, *supra* note 46 at 811-14).

⁹⁹ See "Le droit à la sécession", *supra* note 4 at 52; "Quebec's Democratic Right", *supra* note 4 at 107; "Exposé-réponse", *supra* note 4 at 666-67. Turp's argument for this right is similar to the argument discussed in Woehrling, "Redéfinition", *supra* note 5 at 34-36, regarding the ability of the federal government (not a province) to use a referendum to by-pass the amending formula. Woehrling, however, assumes that this would be unconstitutional. I agree. Brun & Tremblay, *supra* note 5 at 237, also make an argument for an independent norm within Canadian constitutional law, but with much less clarity.

legislative powers even though it has been modified by Canada's federal structure and the *Charter*) is one such norm. So is the Crown's fiduciary duty to Aboriginal peoples.¹⁰⁰ There are many others, some of which substantially qualify express powers (as is the case, for example, with the Crown's fiduciary duty). Thus, there is no easy way of excluding the possibility that implicit norms govern secession. Mere invocations of the "rule of law" do not do the trick. The question is: What constitutes the law on this question, the amending formula or something else? What reading of the law should one prefer: one that accepts that there are unwritten norms, along the lines of one or more of those canvassed above, to govern this unprecedented event, or one that takes the amending formula as exhaustive, even for a change such as this? Although there are no utterly conclusive arguments, considerable headway can be made by reflecting first on the role of constitutional norms (indeed, on the very value of constitutionalism), and secondly on the nature of legal norms generally.

I begin with observations drawn from two of the most dramatic instances of constitutional reform in recent years. The first is the transition from communist to democratic regimes across Eastern Europe. There, the communist constitutions had come to be considered profoundly illegitimate, even repugnant. One might therefore have expected that the transition would have been accomplished by overthrowing those old, empty, dessicated forms — together with the elites governing under them — replacing them with popularly supported, thoroughly reformed, entirely new constitutions. Yet remarkably the old forms were not cast aside. Instead, their procedures were followed in the very act of dismantling the communist regimes, even though that meant that discredited communist-era legislators exercised considerable control over the outcome.¹⁰¹ The second example comes from the old Southern Rhodesia (now Zimbabwe). There, in 1965, the whites-only regime of Ian Smith unilaterally declared independence from Great Britain, setting off a long civil war. Eventually, the anti-Smith insurgents secured the upper hand by force of arms. Yet the new constitutional order was not declared by fiat. Instead, the parties acceded to the grant, from Britain, of a new constitution, one that established the new regime on a foundation of legality derived from the pre-1965 order.¹⁰² It is quite remarkable that in these two transitions, shot through with revolutionary consequences, the parties sought to use non-revolutionary means. Why?

Part of the answer lies in the fact that such victories are rarely complete. The continued presence of the vanquished, even in severely weakened condition, makes some compromise unavoidable. But apart from tactical considerations, there are solid reasons of principle for maintaining (or re-establishing) institutional continuity. The Eastern European and Zimbabwean examples point to the value of stable procedures and consistent and knowable structures of authority, even when the substantive legitimacy

¹⁰⁰ See text above, accompanying notes 26-28.

¹⁰¹ See A. Arato, "Dilemmas Arising from the Power to Create Constitutions in Eastern Europe" in M. Rosenfeld, ed., *Constitutionalism, Identity, Difference, and Legitimacy: Theoretical Perspectives* (Durham, N.C.: Duke University Press, 1994) 165, especially at 178-81.

¹⁰² See *Zimbabwe Act 1979* (U.K.), 1979, c. 60; *Zimbabwe Constitution Order 1979*, S.I. 1979/1600. See also *Halsbury's Statutory Instruments*, vol. 4 (1996 Issue) (London: Butterworths, 1996) at 458; Hudson, *supra* note 44, especially at 164ff.

of those institutions is open to profound question. That commitment to stability is, in a very real sense, conservative, but it is important to recognize that continuity is valuable for other than conservative ends. Even if one is committed to profound change, as was the case in the post-communist countries or in the new Zimbabwe, continuity carries with it substantial advantages.

First, continuity can be crucial to the very effectiveness of state action, even in the course of accomplishing the transformation. A state's effectiveness depends, in very large measure, on the authority that its institutions hold for its putative officials, the population at large, and other governments with which the regime must interact. That authority is best assured if based on established procedures, even if imperfect. An orderly and transparent transition preserves the ostensible lines of responsibility, the clarity of procedures, and the prominence of particular structures for decision-making. It minimizes the likelihood that a variety of competing claimants to state power will emerge, all fighting among themselves, with no generally accepted means of resolving the dispute. It minimizes, in other words, debilitating battles over the very foundations of the state's authority. The salience of the existing procedures — the mere fact that they are there and have been used in the past for the achievement of public ends — can provide an important bulwark against a drift into anarchic contention.

Second, continuity is especially important if one cares about democratic participation and accountability — even, paradoxically, if the previous institutions were less than democratic. Popular participation depends on the existence of stable, knowable, predictable procedures. Only then does one know when and how one can have input into public decisions. Even procedures that impose substantial hurdles to public involvement can hold more democratic potential than a context in which decisions are made by continually shifting and opaque mechanisms, by ersatz procedures, by competing claimants to state authority, or by self-appointed tribunes of the people. As Stephen Holmes has argued so well, democracy depends on stable mechanisms for broadly-based participation; the mob is not a democracy.¹⁰³

This is true even for those who deeply desire change, if they are genuine democrats. Surely that is the lesson of our various flirtations with revolutionary betrayal, not least the Bolshevik deformation of the Russian Revolution. It was a lesson well learned by the dissidents of Eastern Europe, and it found expression in their idea of a “self-limiting revolution”.¹⁰⁴ The essence of that notion was that if one wanted to establish a limited state — a state that embodied the values of democracy and legality — one had to be willing to confine oneself within institutions that might very often be awkward and inconvenient. And the best way to develop that ethic of limitation was to work through existing procedures. Clear procedures, stable procedures — even if defective — were better than none.

¹⁰³ See S. Holmes, *Passions and Constraint: On the Theory of Liberal Democracy* (Chicago: University of Chicago Press, 1995) at 8-10, 166-69. For a different but complementary argument, see J.-P. Derriennic, *Nationalisme et Démocratie: Réflexion sur les illusions des indépendantistes québécois* (Montreal: Boréal, 1995) at 83-102.

¹⁰⁴ See Arato, *supra* note 101 at 178-81.

I do not mean to suggest that legality is (or should be) the primary determinant of the outcome in cases such as these. On the contrary, in both Eastern Europe and Zimbabwe, the outcome was the result of a vigorous political or military struggle. But regardless of the process that led to the change, there was good reason to accomplish the transformation, ultimately, through legal forms, even if the legitimacy of those forms was in question.

How does this relate to the question of whether or not the amending formula should be interpreted as being exhaustive? The above arguments reveal the desirability of clarity and predictability, quite apart from the substantive merit of the rules themselves. The simple fact of being able to know how decisions should be made carries substantial benefits. Indeed, that is precisely why we inscribe fundamental procedures in a constitutional document. In this case, that is a strong argument for treating the amending formula as the only legal means of secession. Only then does one gain the benefit of a predictable process. Not only are each of the alternative procedures highly contested and contestable, but even if one imagines that they might be applicable, they are often very vague as to their requirements. All other things being equal, it is better to have a clear, express procedure for dealing with profound change, than to have a welter of contending alternatives, each of which is of questionable force and definition.

The case for the exclusive application of the amending formula becomes all the stronger if one concedes that one could achieve secession through that means (so that the argument is over the amending formula's exhaustiveness, not its applicability). I suspect that this is, in fact, the opinion of most who argue for alternative mechanisms for secession.¹⁰⁵ Few would say that if the legislatures followed the unanimity procedure, the resulting separation would be invalid. But if that is so, there are good reasons not to accept that there are parallel, implicit procedures. Otherwise, much of the benefit of having an express procedure would be lost. Any express procedure would become, potentially, merely one method among many. When attempting to address any particular issue, one would be thrown into a wide-open argument about which of a multitude of possible procedures, institutions and structures might apply, depriving society of much of the benefit of stable procedures, expressed in a written constitution. Thus, when faced with an express procedure, it makes sense to require that *that* procedure be followed, or at least that any implied procedure pass a very high threshold of justification. That indeed seems to be the spirit of subsection 52(3) of the *Constitution Act, 1982*,¹⁰⁶ even if its terms do not entirely rule out implied norms.

The same result is preferable for reasons connected to the role of legal norms generally. The positivistic dream of a closed universe of rules, conclusively determined by their sources, is a mirage. But arguments for the recognition of a rule of law are nevertheless conditioned by a regulatory ideal: one must make the case that the supposed rule is social in character, already in some manner part of the normative order of society. In that limited sense, it must be a positive norm, not one's own personal prefer-

¹⁰⁵ See e.g. Brun & Tremblay, *supra* note 5 at 236; Turp, "Quebec's Democratic Right", *supra* note 4; Turp, *supra* note 46 at 803.

¹⁰⁶ *Supra* note 9.

ences wished into law.¹⁰⁷ Moreover, to operate as a norm at all, a rule must have a degree of definition: it must suggest that some things are permitted, others are not, and provide criteria for deciding between them. Those criteria too must be advanced as having a social warrant, not merely the result of individual preference.

But if one takes the proposed alternative means of secession seriously, as legal procedures, and one then tries to state their requirements, they soon begin to dissolve — or at least, the only standards that have substantial social warrant operate at such a level of generality that they no longer look like legal procedures at all, but rather like broad and rather vague criteria of justification. Take, for example, the general proposition, probably widely held, that Quebec should be able to separate if a clear majority of its people desire that option, and that a referendum plays a critical role in testing that support. How does one derive from that (as Turp purports to do¹⁰⁸) a legal procedure for accomplishing secession, a *procedure* that can be said to be inherent in the social order? Would a referendum victory alone be sufficient to entitle the Quebec government to declare independence? Some sovereignists believe that it would not be, given inevitable uncertainty over the ultimate terms of separation; they suggest that a second referendum would be necessary.¹⁰⁹ This seems all the more compelling given the likelihood that many voters would have voted “Yes” in order to increase Quebec’s bargaining power *within* Canada. And even if a referendum were taken to be sufficient evidence of the electorate’s commitment to secession, would there be consensus, even among “Yes” voters, that following a “Yes” vote the government could proceed immediately to a U.D.I.? I imagine that many would expect that there would be further negotiations and probably some resolution of outstanding issues (both in relation to the rest of Canada and in terms of the institutional structure of an independent Quebec) before that step could be taken. And all this is quite apart from arguments over the extent of the required majority, rules for the conduct of the campaign, and so on. In other words, even if one accepts the general principle that the opinion of the majority of Quebecers should be respected, this does not amount to a legal mechanism of secession.

When one examines the proposed alternative means of secession — the alleged constitutional convention, the supposed force of the compact theory, the loose invocation of self-determination, the direct appeal to democracy — one is struck by the fact that they all operate at the level of generality one normally associates with arguments of political rather than legal justification. They may be powerful — for good reason — in the broader contest for legitimacy, but they do not provide alternative legal procedures for the achievement of separation. To claim that they do is to delude oneself and others. They provide none of the procedural clarity, predictability, and positivity we

¹⁰⁷ For a preliminary attempt to state this position, see J. Webber, “The Rule of Law Reconceived” in K. Kulcsár & D. Szabo, eds. *Dual Images: Multiculturalism on Two Sides of the Atlantic* (Budapest: Royal Society of Canada and Hungarian Academy of Sciences, 1996) 197.

¹⁰⁸ See “Le droit à la sécession”, *supra* note 4 at 52; “Quebec’s Democratic Right”, *supra* note 4 at 107; “Exposé-réponse”, *supra* note 4 at 666-67.

¹⁰⁹ This was *not* the official position of the Parti Québécois in the last referendum, but see e.g. Woehrling, “Éventuelle sécession”, *supra* note 5 at 308; Woehrling, “Ground Rules”, *supra* note 25.

normally expect of legal mechanisms. Instead, they form part of a broader struggle over justification and legitimacy, indistinguishable from political debate at large.

Conclusion

The better view is that the only legal procedure for secession is that stipulated in section 41 of the *Constitution Act, 1982*.¹¹⁰ If one wants to retain the benefits of legal continuity and transparency, that is the approach to follow. Otherwise, one is participating in a revolution in law, with the challenges and costs that implies.

In either case, political arguments remain primary. The determination of legality cannot resolve the issue of Canadian unity. I have no doubt that if federalists were to lose the political debate and a clear majority of Quebecers was to vote, unambiguously, for sovereignty, the legal requirements for secession would be rapidly satisfied, as long as acceptable solutions could be found to the demands of Aboriginal peoples and the other questions of transition. This last proviso is by no means negligible; to achieve an orderly secession, a secessionist government may very well face agonizing decisions, not least over retention of its northern lands. But the resistance to secession would not arise from a simple desire of non-Quebecers to compel Quebec to remain within Canada. The perception of allegiance to a common enterprise called Canada would have been broken irrevocably, there would be little desire in the rest of the country for forcible suppression, and an expeditious, legal resolution would offer significant advantages to all.¹¹¹ In those circumstances, even the onerous demands of section 41 could be quickly fulfilled.¹¹² And if a legal secession were blocked by opposition of one or two provinces, after the others had agreed on the terms of separation, I agree with Woehrling that both the rest of Canada and the international community would likely acquiesce in an illegal secession.¹¹³

Indeed, revolutions can occur and can be justified. Even such a sober anti-revolutionary as Edmund Burke acknowledged that it might be necessary to deviate from the fixed rule in a case of emergency.¹¹⁴ But he also drew attention to the perils of revolutionary change. These perils suggest that a very high standard of justification

¹¹⁰ *Supra* note 9.

¹¹¹ In this I follow, in general terms, Robert Young's analysis in *The Secession of Quebec and the Future of Canada* (Montreal: McGill-Queen's University Press, 1995). Like him, I suspect that secession would occur more rapidly and on less favourable terms than many "Yes" voters expect or desire. Monahan's very different conclusions (see *Cooler Heads*, *supra* note 16 at 16-25) suffer from an excessive reliance on Canada's experience of constitutional reform, failing to take account of the profoundly different context that would follow a "Yes" vote.

¹¹² This would be true even of the legislative requirements of referenda on constitutional amendments now in effect in B.C. and Alberta (see *Constitutional Amendment Approval Act*, S.B.C. 1991, c. 2; *Constitutional Referendum Act*, S.A. 1992, c. C-22.25). In the situation of crisis likely to prevail in the aftermath of a vote for secession, I suspect that those provisions would be repealed, at least for the purposes of secession, and the necessary amendments adopted by legislative resolution.

¹¹³ See "Ground Rules", *supra* note 25 at 96.

¹¹⁴ See E. Burke, *Reflections on the Revolution in France* (Harmondsworth: Penguin, [1790] 1968) at 99-107.

must be met even in limited revolutions. Chief among the perils is the loss of legal continuity and all that goes with it — the authority of the state, and potentially the very efficacy of democratic control. These are among the costs that have led international lawyers to limit the right of unilateral secession. Even if the cause is sufficient, Burke emphasizes that the revolution should occur by an impeccable process, one that maintains as far as possible the principles underlying the social order.¹¹⁵ This is so precisely because the process itself must be justified from first principles. One cannot take its legitimacy for granted without risking a very severe and disruptive fight for authority. If, therefore, a sovereigntist government wants to appeal directly to democracy in an illegal secession, it must make sure that its democratic morality is flawless.¹¹⁶

The adoption of legal means of secession would provide the sovereigntist movement with a certain economy of justification in the transition. It would also force a seceding Quebec to wrestle seriously with other concerns (especially those of minorities) and to resolve them through negotiations, not unilateral fiat. It denies, then, the dream of absolute freedom in the founding of a new Quebec. But such dreams are, in any case, illusory.

¹¹⁵ See *ibid.*

¹¹⁶ On this score, the standards of the Parti Québécois seem to have declined since the 1980 referendum, judging from its expressed willingness to rephrase the question solely in the interest of obtaining a "Yes", its decision to drop its longstanding commitment to a second referendum on the final terms of separation, and its organizers' attempts, in the 1995 referendum, to tamper with the counting of votes.