THE QUEBEC SECESSION REFERENCE AND THE JUDICIAL ARBITRATION OF CONFLICTING NARRATIVES ABOUT LAW, DEMOCRACY, AND IDENTITY

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INTRODUCTION

On August 20, 1998, the Supreme Court of Canada delivered a judgment[1] which may well be perceived as being one of the most important decisions in Canadian legal history. Although this opening statement might sound cliché, there is certainly no doubt as to the legal and political importance of the Supreme Court's judgment on a possible unilateral declaration of independence by Quebec. The excitement that this judgment spawned is confirmed by the more than 20,000 people who consulted its on-line version at the University of Montréal's website in the few hours that followed its pronouncement.[2] In addition to being a legal landmark from a domestic standpoint,[3] the Supreme Court's judgment in *Reference re Secession of*

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1. Despite the fact that the Court's reference jurisdiction does not allow it to hand down "judgments" or "decisions" strictly speaking, but rather "advisory opinions," for the sake of linguistic style, I will interchangeably use these three words or expressions in this article to describe the Court's advisory opinion concerning the legal framework applicable to a possible unilateral secession by Quebec.

2. D. Poulin, "Le monde canadien de l'information juridique: du recueil au Web. Défis politique, juridique, économique et technique," text of a presentation given at the international conference "Computerized Legal Data and Information: Contents, Access and Circulation. The Political, Legal, Economic and Technical Issues to be Addressed," Association pour le développement de l'informatique juridique, Paris, October 22-23, 1998, at 1.

3. Numerous scholarly articles or books have examined the topic of Quebec secession from various angles in the few years before the reference. Besides those specifically quoted in this article, the following books and articles are especially interesting: Greg Craven, *Of Federalism, Secession, Canada and Quebec*, 14 DALHOUSIE L.J. 231 (1991); N. Finkelstein, et al., *Does Québec Have a Right to Secede at International Law?*, 74 CAN. B. REV. 225 (1995); J. Woehrling, *Les aspects juridiques d'une éventuelle sécession du Québec*, 74 CAN. B. REV. 293 (1995); R. Howse & A. Malkin, *Canadians Are a Sovereign People: How the Supreme Court Should Approach the Reference on Quebec Secession*, 76 CAN. B. REV.186 (1997); H.W. MacLaughlan, *Accounting for Democracy and the Rule of Law in the Quebec Secession Reference*, 76 CAN. B. REV. 155 (1997); K. Nielsen, *Liberal Nationalism, Liberal Democracies, and Secession*, 48 U. TORONTO L.J. 253 (1998); T. Franck, et al., *L'intégrité territoriale du Québec dans l'hypothèse de l'accession à la souveraineté du Québec, in* 1 COMMISSION D'ÉTUDE DES QUESTIONS AFFÉRENTES À L'ACCESSION DU QUÉBEC À LA SOUVERAINETÉ: LES ATTRIBUTS D'UN QUÉBEC SOUVERAIN 377 (Québec: Bibliothèque nationale du Québec 1992); R.A. YOUNG, THE SECESSION OF QUEBEC AND THE

Quebec has raised tremendous interest in other parts of the world, most notably in federations or in states that contain a substantial ethnic minority.[4] Beyond each state's specific situation, what makes the *Quebec Secession Reference* particularly interesting for international observers is the grid that it proposes for analyzing secessionist claims. This grid is created in the rather unusual setting of a liberal constitutional democracy, where a civil society exists, and where the rule of law prevails. Indeed, this is a setting which is quite different both from the one that has served as a background to recent secessionist claims and from the one that has marked actual secessions in former Eastern European countries.

This article will be divided into two parts. In the first part, I will provide an overview of some historical events that led the federal government of Canada to refer the question of Quebec secession to the Supreme Court. In doing so, I will emphasize the importance of historical memory in the construction of identity and in the development of specific narratives that are likely to affect constitutional politics and, to some extent, constitutional law. In the second part, I will highlight the most important features of the Supreme Court's judgment and make a few observations about its inscription into Canadian constitutional law, after which I will focus on the Supreme Court's approach to the question of the interplay between legality and legitimacy. I will ultimately conclude by examining both the criticism this judgment drew and its potential impact on constitutional rhetoric and politics in Canada.

Before proceeding any further, however, a preliminary remark is warranted. It is of utmost importance to emphasize at the onset a basic assumption on which the Supreme Court of Canada relied in answering the questions posed by the federal government in the *Quebec Secession Reference*: the assumption of complexity. In the very first paragraph of its judgment, the Court effectively acknowledges that this reference raised "questions of the utmost subtlety and complexity." One may think this affirmation is trite, and to some extent, it is. But one can also see this introductory remark as an epistemological commitment by the Court to a mode of *complex* thought.[5] This is a mode of thought which refuses the constant recycling of old dichotomies and their blind invocation, and, more importantly, one which refuses to adhere to the cult of the "clear givens" (as

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FUTURE OF CANADA (Montréal & Kingston: McGill-Queen's Univ. Press 1995); *see also* A. CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL APPRAISAL (Cambridge: Cambridge Univ. Press 1995); A.E. BUCHANAN, SECESSION: THE MORALITY OF POLITICAL DIVORCE FROM FORT SUMTER TO LITHUANIA AND QUEBEC (Boulder: Westview Press 1991).

4. Reference re Secession of Quebec, [1998] 2 S.C.R. 217 [hereinafter *Quebec Secession Reference*]. At the time of this writing, the exact page numbers of the Court's decision were not available. I will, therefore, refer to paragraph numbers in further quotes.

5. *See generally* E. MORIN, INTRODUCTION À LA PENSÉE COMPLEXE (ESF ed. 1990).

opposed to "constructs"), however legal they may be. According to French legal sociologist André-Jean Arnaud, a complexity-based legal epistemology presupposes an acknowledgment of the principle that "problems are not necessarily posited *a priori*, but must rather be constructed."[6] I believe this is what the Court did in the *Quebec Secession Reference*.

Moreover, I believe that, in general, the Court succeeded reasonably well in maintaining a complex approach to most of its discussion of the problem of unilateral secession, with the exception perhaps of its international law dimension.[7] As to domestic constitutional law, the Court certainly stayed the complex course by refusing to transform the case of Quebec's possible unilateral secession from a "hard" one, which I think it was and still is, to an "easy" one, to use the well-known Dworkinian terminology.[8] This commitment to complexity is further evidenced by the Court's treatment of the interplay between legality and legitimacy, as well as by its apprehension of what I term in French *l'identitaire*, in describing the various phenomena and mechanisms associated with the construction of cultural identities and, ultimately, the establishment of political communities. Not surprisingly, my fundamental agreement with what I see as the basic epistemological postulate of the Supreme Court's judgment undoubtably influences my assessment of it. Let me therefore disclose at the onset that I believe this judgment to be a very good one overall, despite some inevitable flaws and omissions.

I. REMEMBRANCES OF THINGS PAST: THE PATH TO THE *QUEBEC SECESSION REFERENCE*

For decades, even centuries, Canada has been involved in an existential debate about its identity. At the center of this debate is the Province of Quebec's place within the Canadian federation. The province is home to a huge majority of French-speaking citizens, who, for the most part, not only see themselves as distinct from their Anglo-Canadian and American neighbours, but seek to preserve and promote that distinctiveness. While a large number of French-speaking Quebecers still believe that their cultural identity can be

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6. A. J. ARNAUD, *Droit et société: du constat à la construction d'un champ commun*, 20-21 DROIT ET SOCIÉTÉ 31 (1992). As far as I know, the first jurist to talk about "givens" was François Gény in his book SCIENCE ET TECHNIQUE EN DROIT PRIVÉ POSITIF (Paris: Sirey, 1913-1924). My own use of the dichotomy between "givens" and "constructs" is inspired by Gaston Bachelard's writings on epistemology, especially in G. BACHELARD, LA FORMATION DE L'ESPRIT SCIENTIFIQUE: CONTRIBUTION À UNE PSYCHANALYSE DE LA SCIENCE OBJECTIVE (Paris: Vrin 12th ed. 1983).

7. It is beyond the scope of this paper to deal exhaustively with this issue. However, *see infra*, Conclusion, pp. 837-41.

8. *See generally* R. DWORKIN, LAW'S EMPIRE (Cambridge: Belknap Press of Harvard Univ. Press 1986).

preserved and promoted within Canada, an equal number, perhaps even larger, have come to consider that this identity would be more likely to flourish if Quebec became an independent country. Of the two major provincial political parties in Quebec, one of them, the *Parti québécois* (PQ), is openly advocating Quebec's secession from the rest of Canada.

To date, when in power, the PQ has held two referenda, one in 1980 and the other in 1995, in which the population of Quebec was asked whether or not it wanted Quebec to become a sovereign country, loosely associated with what would remain of Canada. In 1980, the "no" side won by a comfortable margin, but the picture was completely different in 1995. During the latter referendum, in which 94 percent of registered voters participated, the "no" side and the "yes" side virtually tied, with the "yes" side losing by 0.589 percent of the votes. After years of being perceived as an annoying, yet remote threat, the eventuality of Quebec's secession suddenly became a reality. This, coupled with a certain radicalization of the secessionist discourse and the promise of a third referendum, led the federal government to refer the question of the legality of a unilateral declaration of independence by Quebec to the Supreme Court of Canada.

A. History, Memory, and Identity

This very brief account of recent events only points to the obvious: that Quebec's secession threatens Canada's existence. Thus, the progress registered by the secessionist option over the past twenty years, which culminated in its narrow defeat in 1995, was likely to spark some reaction from the federal government. But this fails to reveal anything about the roots of Canada's everlasting existential crisis. Although it would be highly presumptuous to pretend in a few pages to give a full picture of the evolution of and the reasons for that crisis, a certain number of observations nevertheless can be made. They might prove especially useful for readers unacquainted with the subtleties of the Canadian constitutional debate and with the dominant narrative in Quebec society on which I will focus.

I am not using the word "narrative" by pure coincidence. At the heart of the Canadian constitutional debate lies a clash of stories about Canada's history. Far from reflecting a universally shared understanding of the meaning of Canada's founding historical events, these stories reflect divergent collective memories. This raises the question of the distinction that must be drawn between "history" and "memory." History refers to an intellectual undertaking which attempts to look at past events from an allegedly objective

standpoint and to view these events as unmediated material facts.[9] In contrast, memory describes a subjective interpretation of past events, that has been elaborated over a long period of time and that sheds light on contemporary events, while at the same time being fed by those events.[10] While history has more to do with the research of "hard facts,"[11] memory is related to the manner in which a community remembers and interprets its past, and, ultimately, to the manner in which it perceives itself. It crystallizes the community's particular remembrance of things past, to use the Proustian title I gave to this part.[12] This reference to Proust's *opus magnum* raises, in itself, an interesting linguistic paradox that reveals a lot about the dialectic between memory and history as it applies to Quebec's specific situation. The French title of Proust's *Remembrance of Things Past* is *"À la recherche du temps perdu"*,[13] which, when translated literally, means "in search of wasted time."[14] Indeed, secessionist claims in Quebec are fuelled by a certain interpretation of some key past events as well as by an underlying assumption that Quebec's accession to statehood would in a way "normalize" the status of the people of Quebec and "compensate" for all the time wasted before obtaining that status. Thus, the act of remembrance is a precondition to a future projection intended to culminate in an objective historical event, namely the creation of a new State. As a result, the "subjective" memory feeds on history, while in an ironic turn around, the "objective" history becomes the destination of the project inspired by this subjective memory.

As we can see, memory is essentially a locus where the past, the present and the future become intertwined. More than a simple act of remembrance, it is an act of reconstruction, where past is rebuilt not only according to the immediate needs of the present, but also according to the imperatives set forth by a projected and idealized future. This characterization of memory as an act of reconstruction emphasizes one of its central features, its selectivity.[15]

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9. *See generally* M. Wievorka, *Mémoire, histoire et intégration*, *in* MÉMOIRE ET INTÉGRATION 113 (Paris: Syros, F. Morgiensztern ed. 1993).

10. *See id.*

11. This is not to say that this kind of research is not in itself devoid of any subjective element. Moreover, one fundamental question remains: Is it even possible to provide an absolutely objective account of the "past?" See R. RUDIN, FAIRE DE L'HISTOIRE AU QUÉBEC 13-25 (Sillery: Septentrion, 1998) (discussing these issues). In any event, from an epistemological standpoint, both *history* and *memory* are "constructs," as opposed to " givens," in that both are interpretive rather than simply descriptive intellectual undertakings. As philosopher Gaston Bachelard wrote: "Nothing is self-evident. Nothing is given. Everything is constructed." BACHELARD, *supra* note 6, at 14 (author's translation).

12. *See* M. PROUST, REMEMBRANCE OF THINGS PAST (New York: Random House 1934).

13. M. PROUST, À LA RECHERCHE DU TEMPS PERDU (Paris: Gallimard 1954).

14. A more recent translation of Proust's work adheres more closely to the original French title. *See* M. PROUST, IN SEARCH OF LOST TIME (London: Chatto & Windus 1992).

15. We could say that the constitution of historical memory necessarily implies dialectical relationships between remembrance, forgetting and projection.

Memory is indeed selective. In the same way that it is about remembrance, it is also about forgetting.[16] Choices, often hard ones, underlie the constitution of historical memory.[17]

As such, memory is intertwined with the identity narrative of the community. It serves as the cornerstone of its "identity reference" (*référence identitaire*), which sociologist Fernand Dumont described as the set of identity-centered discourses of a community, "such as ideology, historical memory, [and] literary imagination."[18] This "reference," which plays an essential role in the community's self-definition processes, will in turn form the intellectual/ideological background against which this community assesses and reacts to contemporary socio-political events. It is therefore my belief that developing a minimal knowledge and understanding of the processes which led to the creation of this "identity reference," with its specific components and their interaction, is a precondition for any non-reductionist apprehension of debates pertaining to political/cultural identity, such as the Canadian constitutional debate. In other words, one cannot seriously approach problems of constitution-making and constitutional interpretation without due regard to the identity narratives at play,[19] which sometimes have a normative impact on legal interpretation.[20]

Accordingly, three final theoretical observations must be made about these identity narratives. First, a consideration of identity narratives implies a double acknowledgement of their materiality and legitimacy. Indeed, one must first recognize that, for interpretive purposes, these narratives are facts and not mere emotions to be discarded outright. In other words, to get a better grasp on identity-related issues, one must leave behind some—not all, I insist[21]—rationalist postulates of traditional legal epistemology. Instead, one

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16. Wievorka, *supra* note 9, at 114.

17. For an interesting analysis of "memory" (in French, "mémoire"), see P. NORA, LES LIEUX DE MÉMOIRE (Paris: Gallimard c1984-1992). *See also* M. HALBWACHS, LES CADRES SOCEIUX DE LA MÉMOIRE (Paris: Mouton 1976).

18. FERNAND DUMONT, GENÈSE DE LA SOCIÉTÉ QUÉBÉCOISE 16 (Montréal: Boréal 1993).

19. Unless, of course, one adopts a purely formalistic and positivistic concept of law and legal interpretation, which depicts the legal system as a completely autonomous social field, and law as a "pure" creation in the Kelsenian sense. However, to do justice to Kelsen's pure theory of law, it should be noted that his theory is much more complex than all the caricatures that have been made of it in recent years. In fact, it has been argued that his pure theory of law should probably be better understood as a "ideal-type" in the Weberian sense. *See* D. Shivakumar, *The Pure Theory of Law as an Ideal Type: Defending Kelsen on the Basis of Weberian Methodology*, 105 YALE L.J. 1383 (1996).

20. *See* Jean-François Gaudreault-Desbiens, *Du droit et des talismans: mythologies, métaphores et liberté d'expression*, 39 CAHIERS DE DROIT 717 (1998).

21. While I am advocating a legal epistemology that would be more open to the sensible dimension of social phenomena, I am *not* saying that rationality must be rejected from legal epistemology. Nor am I saying that what belongs to the realm of the "emotional" should uncritically and blindly be admitted into evidence, considered relevant, taken into account, or necessarily be seen as a sacred "given."

must open oneself to narratives that, for a long time, were relegated to the margins of legal discourse for not being legally relevant or objective enough, or, on the contrary, for merely being non-ascertainable feelings.[22] The fact that these narratives are essentially collective self-perceptions and, as such, are not easily ascertainable, should not permit us to treat them as non-facts, even though their degree of materiality is not as high as other hard facts.[23] Sometimes, social psychology and sociology not only can but should come to law's rescue. Moreover, attributing minimal consideration to these narratives involves refraining from denying them any legitimacy at the outset or, put another way, from applying to them an irrefutable presumption of illegitimacy.

This leads me to my second observation. Opening oneself to identity narratives and refusing to deny their legitimacy "without a fair hearing" should lead neither to a blind acceptance of the content of these narratives, nor to an abandonment of critical inquiry from all actors involved. The fact is that all identity narratives can potentially serve as obstacles to the acquisition of

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To the contrary, any epistemology which values inter-subjectivity must allow for a true dialogue and, as a result, must ensure that most viewpoints and experiences are at least given a say. This does not mean that these viewpoints and experiences are above criticism. Unfortunately, some legal theoreticians often come close to arguing this by claiming epistemological privileges for themselves as members of one group or another. For a *plaidoyer* in favor of the reintroduction of the "sensible" *within* rational argument, see MICHEL MAFFESOLI, ÉLOGE DE LA RAISON SENSIBLE (Paris: Grasset 1996). *See also* Stephen J. Toope, *Cultural Diversity and Human Rights (F.R. Scott Lecture)*, 42 MCGILL L.J. 169 (1997); *But see* K. Laster and P. O'Malley, *Sensitive New-age Laws: The Reassertion of Emotionality in Law*, 24 INT'L J. SOC. L. 21 (1996) (critiquing uncritical uses and abuses of emotionality in today's legal thought).

22. It should be noted that recent psychological studies have shown that "intelligence" cannot be effectively measured only by rational/logical criteria, such as those assessed in IQ tests. As a result, one cannot systematically relegate certain feelings or reactions to the realm of the subjective for the purpose of discarding them outright, especially since some of them are scientifically measurable. *See* J. Gauthier, *"L'intelligence émotionnelle,"* INTERFACE, vol. 20, no. 1, Jan.-Feb. 1999, at 28.

23. A directly relevant example of the Canadian constitutional debate is the famous battle on Quebec City's Plains of Abraham in 1759. The materiality of facts surrounding the battle itself, and of the events that followed, for example the "cession" of Canada by France to England pursuant to the 1763 Treaty of Paris, far outweighs the materiality of the battle's various interpretations. However, from a sociological standpoint, these interpretations are "facts" and have an impact on how each participant in the Canadian constitutional debate perceives the other and understands the issues at stake. For example, it would be hard to deny the impact on constitutional thought of the interpretive conflict between francophone Quebecers and anglophone Quebecers. For a long time, while the dominant narrative among francophone Quebecers has represented the outcome of the battle of the Plains of Abraham as a conquest, the dominant narrative among anglophone Quebecers and Canadians has characterized this result as a mere cession, and even as a liberation by an obviously enlightened British empire of a population, the Canadians (then necessarily French), under the obviously obscurantist yoke of the French kingdom. *See* DANIEL FRANCIS, NATIONAL DREAMS: MYTHS, MEMORY, AND CANADIAN HISTORY 92-93 (Vancouver: Arsenal Pulp Press 1997) (discussing these two conflicting narratives). It is interesting to note that, unsurprisingly, legal language is closer to the victors' interpretation. Indeed, using a very formal language, the Treaty of Paris of 1763 merely acknowledges a *cession* of the territory of New France from one European monarch to another. *See* F. LASSERRE, LE CANADA D'UN MYTHE À L'AUTRE.: TERRITOIRE ET IMAGES DU TERRITOIRE (Montréal: Hurtubise HMH 1998) (discussing Canada's conflicting mythologies).

knowledge. Identity narratives, or some of their components, may very well become part of a community's mythology. This is a phase frequently accompanied by the mythology's withdrawal from critical inquiry because it is always perceived as essentially and undoubtedly true by believers.[24] There may come a point when, mainly for ideological reasons, dominant interpretations become dogmas within a community. When this point is reached, huge consequences flow. Within the community, all individuals or subgroups who dare question the sanctity of what has now become a dogmatic narrative, risk either discrediting themselves or simply being ignored. In some extreme cases, they might even be ostracized as "traitors," "collaborationists," or euphemistically characterized (or caricatured) as "poor victims of false consciousness." As to this community's relations with other groups, the impact of dogmatic narratives can be just as detrimental. For example, if group "A" perceives itself as the historical victim of group "B" and this perception is so widely shared and so deeply rooted that it becomes part of the "collective unconscious," to borrow Jung's concept, it is likely that group "B" will always be depicted as the oppressor, and that any positive attitudinal change on the part of group "B" will be explained either as a mere epiphenomenon, a deceiving tactic, or, worst, the selfish expression of group "B's" own interests. I do not mean that these interests never play a role in such attitudinal changes, but that a narrative should neither prevent the recognition of progress or improvement when they occur, nor discard the possibility of a genuine and honest evolution of the other's attitudes, unless, of course, this other flirts with radical evil in the Kantian sense.

Thus, the impact of dogmatic narratives on relations involving otherness (*altérité*) is quite clear. These narratives constitute epistemological obstacles[25] in that they prevent one from truly knowing the other, because the monolithic and simplistic image they give of this other obscures his or her protean and evolutionary reality. Moreover, they lead one to deny the part of otherness within oneself,[26] which is easily understandable considering the possibly unsettling consequences stemming from an acknowledgment of one's own intrinsic otherness. As far as the internal consistency of the dogmatic

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24. *See* MIRCEA ELIADE, ASPECTS DU MYTHE 32-33 (Paris: Gallimard 1963).

25. *See* BACHELARD, *supra* note 6, at 14 (defining the concept of "epistemological obstacle" as being a generic concept that designates all causes of inertia, stagnation, or setback in knowledge). François Ost and Michel Van de Kerchove are more specific, when they describe it as follows: "The 'epistemological obstacle' is a category that plays the dual role of founding a theory and protecting it against any attempt at questioning or invalidating it . . . as a simple concept the role of which has been unduly expanded, the [epistemological] obstacle overvalues the said theory, induces one to ignore unsolved questions paradoxically raised by the theory itself, and allocates to that theory exaggerated explanatory powers." *See* FRANCOIS OST & MICHEL VAN DE KERCHOVE, JALONS POUR UNE THÉORIE CRITIQUE DU DROIT 121-22 (Bruxelles: Publications des Facultés Universitaires Saint-Louis 1987) (author's translation).

26. *See generally* PAUL RICOEUR, SOI-MÊME COMME UN AUTRE (Paris: Seuil 1990).

narrative is concerned, such an acknowledgment is, quite unsurprisingly, highly problematic since it might shake the very foundations of this narrative. More specifically, it might unfreeze the image that one has of one's own identity. If the whole narrative is based, as is often the case, on a preconceived, monolithic and fixed image of a given identity, then the recognition that this identity is neither as fixed nor as pure as one thought it was, and the realization that one cannot entirely control self-identification processes (which is even more true with respect to group identity), may surely be unsettling. In a way, it is like acknowledging the existence of cracks in the mythological walls that dogmatic narratives try to erect. As a result, the dogmatic dimension of the identity narrative may end up undermined.

For this to happen, however, one has to make the extra effort of extricating oneself from the rhetorical, logical cocoon which often protects the integrity of dogmatic narratives. Indeed, in addition to providing for blanket or monocausal explanations applicable to every single event of a community's history, these narratives will also frequently be wrapped in a rhetoric designed to shield them from both external and internal criticism.[27] This fact, coupled with the narratives' self-containing nature and circular reasoning, will render them apparently uncontradictable in the Popperian sense.[28] Although a thorough examination will prove the contrary, this superficial uncontradictability is tremendously effective at the political level, in that it rallies the faith of those who already believe in the dogmatic narrative. This

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27. This problem often plagues narratives inspired by one single meta-theory, such as marxism and its derivatives. The "grand narrative" takes so much space that it obscures all the complexities and paradoxes of social reality, which are then treated as mere theoretical "disturbances." *See* LUC FERRY & ALAIN RENAUT, LA PENSÉE 68: ESSAI SUR L'ANTI-HUMANISME CONTEMPORAIN 199-235 (Paris: Seuil 1985) (a stinging critique of a particular embodiment of that kind of thought). It should be noted that debates about the appropriateness of using meta-narratives or the soundness of meta-theories are at the center of the conflict between modernists and postmodernists. *See, e.g.*, J.-F. LYOTARD, LA CONDITION POSTMODERNE (Paris: Minuit 1979) (a "canonical" postmodernist book). I use here the word "canonical" while fully aware of the impossibility of a "canonical postmodernist book" from a strictly postmodernist standpoint.

28. *See* K. POPPER, THE LOGIC OF SCIENTIFIC DISCOVERY ch. IV (New York: Basic Books 1959). For example, some commentators have identified the following features in Pierre Bourdieu's sociological theory: (1) it is framed in such a way that it can never be contradicted by any empirical reality, something that is achieved through an *a priori* submission of all empirical facts to the ideological structure of the theory; (2) deemed uncontradictable, it cannot be discussed or questioned; (3) all objections to his theory are characterized as "resistances," which are considered as additional evidence of the theory's undoubtable truth because it assumes that only those who have an interest in denying that truth will do so (e.g. those who are privileged in a way or another and who are at risk of losing that privilege should it be exposed); (4) as a result, all objections are ignored, the focus of the examination being systematically distracted from their substantive content to the identity of their author; (5) this leads to the intellectual disqualification of all those who dare to think "otherwise" than according to the precepts of the dogma. *See* FERRY & RENAUT, *supra* note 27, at 219-24. It is to be noted that we find superficially uncontradictable theoretical discourses in most fields, including law or legal theory. A good example of this in the field of Anglo-American legal theory could be found in some of the works of Professor Catharine MacKinnon on pornography.

explains why, beyond their status as potential epistemological obstacles, dogmatic narratives also serve as discursive and political obstacles as well. They induce narcissism (especially based on small differences)[29] and hinder genuine dialogue, thereby compromising any chance of inter-subjective agreements. In other words, dogmatic narratives are vectors of closure, a closure which is even more problematic when it is absolute rather than only relative. This is likely to happen when the faith component of the narrative assumes such importance that it exercises a blinding effect on those who adopt the narrative as their own. Consequently, to exist, all narratives rely on the faith of their believers.[30] Therefore, faith is not, in itself, a problem. Problems start when faith becomes blind[31] and when believers rely on the mythological reality imposed by the dogmatic narrative rather than on the empirical reality which surrounds them. As a result, the believers thereby blind themselves both to their own and to the others' condition.

One last observation must be made. Not all narratives that have currency in a given community are universally believed or adopted. On the contrary, members of a same community can fight over which narratives should be accepted or rejected, a struggle that illustrates the evolutionary potential of identity narratives despite their apparent fixity. However, the simple existence of such a struggle cannot obscure the fact that some narratives prevail over others. Although this domination does not necessarily last forever, its inevitable outcome is that minority narratives will often be

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29. S. FREUD, *Civilization and its Discontents*, *in* CIVILIZATION, SOCIETY AND RELIGION: GROUP PSYCHOLOGY, CIVILIZATION AND ITS DISCONTENTS AND OTHER WORKS 251, 305 (London/New York: Penguin Books 1985). Freud argues that the narcissism of small differences arise in circumstances where two neighboring societies share numerous characteristics and values, such as, for example, the Scots and the English. This affects self-identification processes in that each society is inclined to place a lot of emphasis on what distinguishes it from the other, sometimes to the point of obscuring the commonalities between them. To this I would add that such an overdetermination of a given society's differences may lead to a retreat in a "differentialist" cocoon the purpose of which is to shield that society from the pressures of the external world. In this regard, if comfort may sometimes lead to indifference to one's own condition or to some other's condition, difference itself is often too comfortable, in that it allows one to refuse to face external (and potentially fruitful) challenges. Ideologies based on the comfort of difference enjoy a lot of popularity these days. It is also the case in legal thought, where, paradoxically, this adherence to this ideology is often triggered by the realization that difference is also uncomfortable, in that it is a cause for discrimination.

30. This is even the case in law, where the mythological dimension plays a huge role, and in constitutional law in particular, where the adherence to a specific mythology or narrative is likely to induce a constitutional faith. On legal mythology, *see generally* J. LENOBLE & F. OST, DROIT, MYTHE ET RAISON. ESSAI SUR LA DÉRIVE MYTHOLOGIQUE DE LA RATIONALITÉ JURIDIQUE (Bruxelles: Publications des Facultés universitaires Saint-Louis 1980); P. FITZPATRICK, THE MYTHOLOGY OF MODERN LAW (London/New York: Routledge 1992). *See also* SANFORD LEVINSON, CONSTITUTIONAL FAITH (Princeton: Princeton Univ. Press 1988) (discussing the role of mythology and faith in constitutional law).

31. *See* GAUDREAULT-DESBIENS, *supra* note 20, at 750.

overlooked, as dominant ones occupy all the space available in the collective imagination.

B. Two Visions of Canada

My next remarks will address some especially interesting indicators which evidence the existence of conflicts between the dominant narratives of Quebec and of the rest of Canada. This is not to say that there is only one hegemonic narrative in each of those two political communities,[32] nor that there are only two narratives about Canada.[33] However, one cannot escape the impact of some elements of the two dominant narratives on the framing of the Canadian constitutional debate. Needless to say, the account I provide of this "clash of narratives" is far from exhaustive and tends to oversimplify what is admittedly a much more complex story. This account will nevertheless be useful in providing my non-Canadian readers with a basic understanding of the persistence of nationalism in Quebec, and of what eventually led to the emergence of the secessionist movement in this part of the world.

If, as the saying goes, a picture is worth a thousand words, there is probably no better "picture" of a country than the one that is crystallized in its national symbols. This is especially true since this picture is generally idealized and is supposed to be at the source of a common project or, at the very least, to represent and remind one of such a project. I will focus hereafter on two different pictures of Canada, its national anthem and its Constitution, and will use them to show the different meaning of Canada in both the Quebec and Canadian dominant narratives.

To begin with, the existence of at least two different, if not conflicting, stories is evidenced in one of the most important Canadian symbols: the national anthem, the words of which are found in the *National Anthem Act*.[34] Simply looking at the official English and French versions of *O Canada*, and my own English literal translation of the French version, will show that the idea of Canada embodied in both the English and French official versions relies on distinct assumptions.

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32. While fully aware that boundaries between political communities are rarely self-evident, for the purpose of this article, I will treat Canada and Quebec as two distinct political communities. This practical choice is based on the fact that I am dealing with a secessionist claim that draws this clear boundary. Let me clearly state that even if I acknowledge the existence of a very deep misunderstanding, even a conflict, between "Canada" and "Quebec," I do not think that this misunderstanding or conflict prevents any possible reconciliation.

33. In fact, there are at least three *major* conflicting narratives in Canada, i.e. narratives that have a direct impact on the configuration of the Canadian polity: the Anglo-Canadian one, the Franco-Canadian one, and the Native one. This in no way diminishes other narratives, for example those centered around variables such as race, gender or geography, or any intersections of them.

34. *National Anthem Act*, R.S.C. 1985, c. N-2, schedule to s. 2.

Official English Words	***Official French Words***	**English Literal Translation of the Official French Words**
O Canada! **Our home and native land!** **True patriot love in all thy sons command.** **With glowing hearts we see thee rise,** **The true North strong and free!** **From far and wide,** **O Canada, we stand on guard for thee.** **God keep our land glorious and free!** **O Canada, we stand on guard for thee.** **O Canada, we stand on guard for thee.**	***O Canada!*** ***Terre de nos aïeux,*** ***Ton front est ceint de fleurons glorieux!*** ***Car ton bras sait porter l'épée,*** ***Il sait porter la croix!*** ***Ton histoire est une épopée*** ***des plus brillants exploits.*** ***Et ta valeur, de foi trempée,*** ***protégera nos foyers et nos droits.*** ***Protégera nos foyers et nos droits.***	**O Canada!** **Land of our ancestors,** **Your forehead wears glorious flagships!** **Because your arm knows how the wear the sword!** **It knows how to bear the cross!** **Your history is an epic of the most fantastic exploits.** **And your merit, of tempered faith,** **will protect our homes and our rights.** **Will protect our homes and our rights.**

Even a superficial analysis of these two versions is sufficient to grasp the geographically-oriented nature of the official English version, as opposed to the more historically-oriented nature of the French version. Indeed, the narrative underlying the official English version seems to depict Canada as a northern geographical entity that calls for the immediate and unconditional affection of its citizens. Also implied is the idea of an unconditional defense of Canada. The French version is substantially different, as can be seen from the literal translation. First, beyond the overall higher complexity of the lyrics, the justification for loving Canada is more developed than in the English version. At the very least, love for Canada does not seem self-evident and certainly does not flow from the mere existence of the country. To the contrary, the French version explains this love through constant references not only to the past, but to a past the constitutive elements of which must be

protected in the future. As the original version of *O Canada*, composed in the Nineteenth Century—hence the reference to a Christian imagery that may seem outdated today especially when applied to Quebec, arguably Canada's most secular region—the French version appears to make patriot love conditional upon the protection of a certain culture and lifestyle.

Despite some oversimplifications, this brief examination of one of Canada's most important cultural symbols shows the gulf that divides the Anglo-Canadian narrative from the French-Canadian one, especially the one in Quebec. As an aside, the reference to "history" in the French version is almost ironic considering that there is neither a single history nor a single memory in Canada. In a country where "English" history tells how British-commissioned John Cabot "discovered" Canada, while the "French" history attributes that discovery to French-commissioned Jacques Cartier, the "fantastic" exploits to which the French version of the national anthem refers may not be the exact same as those occurring in the "true North strong and free" of the English version. Meanwhile, thanks to the ideology of *terra nullius*, no mention is made of the fact that Canada was "discovered" by its native peoples long before the English or the French knew that Canada existed.

If we agree with geographer Luc Bureau that a country is first and foremost a spiritual construction,[35] one could be led to believe that Canada is no country at all because it lacks a common spiritual foundation.[36] I disagree with such a contention because a country can be built on a multiplicity of "spiritual foundations," historical memory being only one of them, albeit an important one. The existence, however, of at least two substantially different visions of Canada has affected constitutional law as well as constitutional politics since the early beginnings of Canada. Indeed, as Kenneth McRoberts pointed out:

> In embracing the concept of federalism, [Oliver] Mowat [a former Ontario Premier] and other English-Canadian leaders did not, however, embrace the spirit in which French Canadians viewed it. For most French Canadians the ultimate purpose of Quebec's provincial autonomy was to protect their cultural distinctiveness. For English-Canadian leaders the purpose of provincial autonomy was quite different. Indeed, time would show that they were quite

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35. L. BUREAU, LA TERRE ET MOI 161 (Montréal: Boréal 1991). Bureau's vision is very close to Benedict Anderson's, for whom a nation is an "imagined community," the importance of which is not diminished simply because it is imagined. *See* BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM 7 (New York: Verso 2d ed. rev. 1991).

36. This is what Quebec Premier Lucien Bouchard seemed to imply when he said that "Canada [is] not a 'real country'" for which he later apologized for saying. *See* FRANCIS, *supra* note 23, at 90.

> prepared to use provincial autonomy against the distinctiveness of French-Canadian minorities in their own provinces.[37]

This led to the belief, still widespread in Quebec, that:

> in the federal alliance thus formed, Quebec was to be the French-Canadian country, working together with the others on common projects, but always autonomous in the promotion and embodiment of the French-Canadian nationality. 'Our ambitions,' wrote [an] editor, 'will not centre on the federal government, but will have their natural focus in our local legislature; this we regard as fundamental for ourselves.' This was, no doubt, an exaggerated position . . . but what it exaggerated was the general tendency of the Confederationist propaganda. It underlined the Quebec-centredness of French Canada's approach to Confederation, and the degree to which French Quebec's separateness and autonomy were central to French-Canadian acceptance of the new régime.[38]

In turn, this belief gave life to the theory that Canada is composed of two nations, an English-Canadian one and a French-Canadian one. In fact, this "two nations" theory is nothing but the "cultural" variation of another one, the "compact theory," that Samuel LaSelva explains as follows:

> Confederation was itself described as a compact of provinces. In other cases, the affirmation of Canadian nationhood was less manifest, if not altogether absent. Some French Canadians focused on culture and race, and believed that Confederation rested on a compact between two races, in which each affirmed the right of the other to live according to its own culture. Confederation was understood as a racial *modus vivendi*, and Canada was taken to be a country that allowed two cultures or two nations to exist side by side. In both cases, central authority was eroded and the idea of a common Canadian nationality diminished.[39]

If, as a matter of fact, the cultural branch of the compact theory blossomed almost exclusively in Quebec, it is fair to say that its "legal"

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37. K. MCROBERTS, MISCONCEIVING CANADA: THE STRUGGLE FOR NATIONAL UNITY 17 (Toronto/New York/Oxford: Oxford Univer. Press 1997).

38. ARTHUR I. SILVER, THE FRENCH-CANADIAN IDEA OF CONFEDERATION, 1864-1900, at 50 (Toronto: Univ. of Toronto Press 1982).

39. S.V. LA SELVA, THE MORAL FOUNDATIONS OF CANADIAN FEDERALISM: PARADOXES, ACHIEVEMENTS, AND TRAGEDIES OF NATIONHOOD 43 (Montréal/Kingston: McGill-Queen's Univ. Press 1996).

branch, which envisions Canada as a compact of provinces, gained more acceptance in the rest of Canada. Indeed, soon after Confederation, a strong provincial-rights movement emerged all across Canada, fuelled by this variation of the compact theory.[40] This prompted opponents of that theory to propose the "statute theory," which:

> claims that Canada is the product not of agreement but of legislative act. 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.[41]

Strictly speaking, it is the legal branch of the compact theory that is immediately relevant to the purposes of a juridical examination of secession.[42] However, one can not simply deny the extent to which the "two nations" theory has permeated constitutional consciousness in Quebec. But unlike its "compact of provinces" counterpart, the judicial fate of the "two nations" theory did not meet its proponents' expectations. Indeed, while the "compact of provinces" branch received some judicial endorsement, especially in *Re Resolution to Amend the Constitution of Canada*[43] the "two nations" variation of the compact theory did not fare as well, at least as to its potential impact on Quebec's constitutional status.[44] Not long after the *Patriation Reference*, the

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40. *See* G. STEVENSON, EX UNO PLURES: FEDERAL-PROVINCIAL RELATIONS IN CANADA, 1867-1896 (Montréal/Kingston: McGill-Queen's Univ. Press 1993) (discussing this provincial-rights movement). *See also* R.C. VIPOND, LIBERTY AND COMMUNITY: CANADIAN FEDERALISM AND THE FAILURE OF THE CONSTITUTION (Albany: State Univ. of New York Press 1991); ERNEST R. FORBES, MARITIME RIGHTS: THE MARITIME RIGHTS MOVEMENT, 1919-1927, A STUDY IN CANADIAN REGIONALISM (Montréal/Kingston: McGill-Queen's Univ. Press 1979); RAMSEY COOK, PROVINCIAL AUTONOMY: MINORITY RIGHTS AND THE COMPACT THEORY, 1867-1921 (Ottawa: Queen's Printer 1969).

41. Jeremy Webber, *The Legality of a Unilateral Declaration of Independence Under Canadian Law*, 42 MCGILL L.J. 281, 304-05 (1997)[hereinafter Webber, *The Legality of a Unilateral Declaration*].

42. *See id.* at 304 n.72.

43. Reference re Amendment of the Constitution of Canada, [1981] 1 S.C.R 753 [hereinafter *Patriation Reference*] (the Supreme Court of Canada acknowledged the existence of a constitutional convention requiring a substantial degree of provincial consent for amending the Canadian Constitution). However, see the Court's comments quoted *infra* at footnote 49. The word "patriation" is a Canadian neologism that describes the bringing of the Canadian Constitution to Canada. Although this may sound strange to non-Canadian readers, Canada's formal Constitution was, before 1982, to be found in a U.K. statute. Therefore, only the U.K. Parliament was competent to amend it and to formally terminate its authority over future constitutional amendments. As a U.K. statute, the Canadian Constitution had never been in Canada. Therefore, it could not be "repatriated." Hence the use of the word "patriation."

44. To place this decision in context, and to help non-Canadian readers understand my comments, it is important to note: (1) At the time the Supreme Court was wrestling with the question as to whether or not provinces had to approve the constitutional amendments proposed in the "patriation package," the Canadian Constitution did not include any express amending formula (in fact, the "package" provided for

Supreme Court refused to acknowledge the existence of a constitutional convention granting the Province of Quebec a veto over constitutional amendments affecting its powers. In other words, the "substantial degree of provincial consent" that the Court deemed conventionally required to effect constitutional change did not have to include Quebec.[45] The bell had been tolled for the idea of a Quebec veto over amendments to the Canadian Constitution.[46]

To be fair to the Supreme Court, it must be noted that, despite its refusal to acknowledge the existence of a constitutional convention giving Quebec a veto over such amendments, the Court nevertheless recognized that a "principle of duality," which, as Peter Hogg puts it, "implied special protection of the powers of the only predominantly French-speaking province,"[47] could serve as a reason for the alleged constitutional convention. But since another condition for the existence of that constitutional convention was found to be missing, the Court's acknowledgement of this principle of

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one); (2) In the *Patriation Reference*, the Court acknowledged that the unilateral patriation of the Constitution by the federal government, although in conformity with the law of the Constitution, was nevertheless incompatible with constitutional conventions. These constitutional conventions, despite the important role they play, are constitutional rules recognized as binding but judicially unenforceable (for example, the fundamental constitutional principle of "responsible government" in Anglo-Canadian constitutional law is such a constitutional convention); (3) For a constitutional convention to exist: (a) there must be precedents; (b) there must be a reason for the constitutional practice giving rise to the argument that a convention exists; and, (c) actors in the precedents must have felt bound by the alleged conventional rule, which implies an examination of these actors' beliefs; (4) Constitutional conventions are constitutional rules that are political in nature. Accordingly, they cannot crystallize into common law rules. Nonetheless, although courts won't enforce them, they can acknowledge their existence; (5) While the sanction associated with the breach of a constitutional convention is political, the simple fact that a court of law acknowledges the existence of a constitutional convention and that a certain constitutional behaviour represents a breach is often enough to force the governmental actor purporting to induce that breach to change its plans. This is precisely what happened after the *Patriation Reference*, when the federal government, complying with the Supreme Court's findings, changed certain aspects of its proposed patriation package in order to gather the "substantial degree of provincial consent" required.

45. Re Objection by Quebec to Resolution to Amend the Constitution, [1982] 2 S.C.R. 793 [hereinafter *Quebec Veto Reference*].

46. It should, however, be noted that, prior to the judgment, the government of Quebec had itself agreed, during constitutional negotiations, to trade Quebec's alleged veto over constitutional change for an opting out provision in the Constitution. However, the reform package that was agreed to by the Quebec government was not adopted in the end.

47. P.W. HOGG, CONSTITUTIONAL LAW IN CANADA no. 1.10(c), at 22 (Scarborough: Carswell, 1998 student ed. 1998). In the *Quebec Veto Reference*, the Supreme Court found that the third criteria for the existence of a constitutional convention (e.g. that actors felt bound by the practice alleged to be a constitutional convention) had not been proven, since the actors in the precedents had never "articulated" their belief in a Quebec veto. *See* Quebec Veto Reference, [1982] 2 S.C.R. 793. As Hogg points out, this requirement that a constitutional convention be formally articulated had no basis, since many constitutional conventions are tacit and, as such, have never been expressly articulated. *See id.* at 23. It must be also noted that, beyond its acceptance of a principle of duality as a possible reason for the alleged convention, the Supreme Court also recognized that Quebec's consent to constitutional amendments affecting its powers had *always* been required in the past.

duality became almost meaningless, at least for constitutional purposes, in that it had no effect of its own, legal or political.

Given the aspirations of many, if not all, historic communities and minority cultures to see their existence formally or institutionally recognized in one way or another,[48] even if only purely symbolic, it is not surprising that the Supreme Court's decision in the *Quebec Veto Reference* was interpreted by many in Quebec not only as a threat to the province's jurisdictional autonomy, but also, and more importantly, as a fatal blow to the French-Canadian conception of Canada. As Woehrling puts it:

> It was the end of the old "dualist" dream of Quebecers, in which the federation was seen as a compact of two founding nations, only amendable with the consent of both. Even worst, the "patriated" Constitution now included an amending formula allowing further amendments, still without Quebec's assent. Moreover, not only had Quebec's claims for the past 25 years for a new division of powers not been addressed, but some provisions of the new constitutional Charter had the effect of reducing the National Assembly's traditional powers with respect to the crucial area of the protection of French language.[49]

Without a doubt, the series of events that led to the "patriation" of the Canadian Constitution in spite of the Quebec government's objections has had a lingering effect on Canadian constitutional politics.[50] First, a narrative of

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48. *See* C. TAYLOR, *The Politics of Recognition*, *in* MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION 25 (Princeton: Princeton Univ. Press, A. Gutmann ed. 1994).

49. J. Woehrling, *L'évolution et le réaménagement des rapports entre le Québec et le Canada anglais*, *in* SOUVERAINETÉ ET INTÉGRATION: ACTES DU COLLOQUE CONJOINT DES FACULTÉS DE DROIT DE L'UNIVERSITÉ DE POITIERS ET DE L'UNIVERSITÉ DE MONTRÉAL 125, 151 (Montréal: Éditions Thémis, 1993) (Author's translation). Indeed, as the Supreme Court bluntly noted in the *Patriation Reference*

> [t]he arguments from history do not lead to any consistent view or any single view of the nature of the *British North America Act*; selective interpretations are open and have been made. History cannot alter the fact that in law there is a British statute to construe and apply in relation to a matter, fundamental as it is, that is not provided for by the statute . . . . [t]heories, whether of a full compact theory (which, even factually, cannot be sustained) . . . or a modified compact theory, as urged by some of the provinces, operate in the political realm, in political science studies. They do not engage the law, save as they might have some peripheral relevance to actual provisions of the British North America Act and its interpretation and application.

Re Resolution to Amend the Constitution of Canada, [1981] 1 S.C.R. 753, 803. However, as noted earlier, the Supreme Court nevertheless acknowledged the existence of a constitutional convention requiring a substantial degree of provincial consent for the "patriation" of the Constitution.

50. It must be noted that both the governing Parti Québécois and the Québec Liberal Party, the Official Opposition, joined forces to oppose the patriation of the Constitution without the consent of Quebec. However, while the government not only objected to the process but also to the content of the

exclusion, explaining *how* Quebec had become isolated in discussions over the content of the patriation package, soon became dominant. Secondly, further constitutional initiatives were unsuccessfully launched to reintegrate Quebec "with honour and enthusiasm" into the Canadian constitutional family. Third, the specific failure of one of these initiatives, the Meech Lake Agreement, reinforced the sentiment of rejection felt by many Quebecers, and fuelled their secessionist feelings. Fourth, the enactment of the Canadian Charter of Rights and Freedoms as a result of the "patriation" of the Canadian Constitution induced changes in Canada's political culture as well as in the way many Anglophone Canadians defined their identity. This made it even more difficult to bridge the symbolic/cultural gap between the Anglophone majority outside Quebec and Quebec's francophone majority.

C. Further Adrift? The Canadian Constitution and the Modernization/Identitarisation of the Quebec State

As previously noted, soon after the Constitution's patriation, a narrative of exclusion became dominant in Quebec as a way of explaining how Quebec had been isolated by the other provinces. While federal politicians have always insisted that Quebec was responsible for its own marginalization during the patriation negotiations,[51] Quebec nationalist and secessionist accounts of the events are quite different.[52] According to them, Quebec was actively excluded when the federal government and the other nine provinces struck a deal the night preceding the last day of the conference, during a meeting to which the Quebec delegation had not been invited. This event was later described by nationalists and secessionists as the "night of the long knives."[53]

Whatever the "truth" is, it is fair to say that of these two competing accounts of the above-mentioned events, only one captured the hearts of a majority of francophone Quebecers, including nationalist federalists. Indeed, the narrative about the "exclusion" and the "betrayal" of Quebec as a result of the patriation process and the ensuing adoption of the Constitution Act of 1982, soon became dominant among francophone Quebecers, almost to the point of reaching mythological proportions.[54] Further attempts to reform the

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patriation package, the opposition only condemned the process.

51. *See* P.E. Trudeau, *Le rapatriement et la Cour Suprême*, 26(4) CITÉ LIBRE 65 (1998).

52. *See generally* JEREMY WEBBER, REIMAGINING CANADA: LANGUAGE, CULTURE, COMMUNITY, AND THE CANADIAN CONSTITUTION 90-120 (Montréal/Kingston: McGill-Queen's Univ. Press 1994) for a balanced and interesting account of the events that led to the patriation of the Canadian Constitution [hereinafter WEBBER, REIMAGINING].

53. *See id.*

54. Constitution Act, 1982, R.S.C. 1985, app. II, no. 44, enacted as schedule B of the Canada Act

Canadian Constitution were launched precisely to correct the "wrong" made to Quebec during that "night of the long knives."[55] Had they been adopted, both the Meech Lake Agreement of 1987 and the Charlottetown Accord of 1992 would have introduced sweeping constitutional amendments designed, *inter alia*, to meet Quebec's demands, including the explicit recognition of Quebec's distinctiveness in Canada. More specifically, the Meech Lake Agreement was expressly thought of as a means of inducing Quebec to sign the Constitution Act of 1982, something all Quebec governments, federalist and secessionist alike, had consistently refused to do.

The Meech Lake Agreement, however, did not become law, for procedural as well as substantive reasons.[56] Among the substantive reasons responsible for this failure was the express recognition in the Agreement that Quebec was a distinct society within Canada, an idea that was fiercely

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1982 (U.K.), 1982, c. 11. The Canadian Charter of Rights and Freedoms, which is incorporated in the Constitution Act, 1982, is to be quoted as follows: Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being schedule B to the Canada Act 1982 (U.K.), 1982, c. 11. For scholars such as political scientist Guy Laforest, this event marked the end of Quebec's Canadian dream. *See generally* GUY LAFOREST, TRUDEAU AND THE END OF A CANADIAN DREAM (Montréal/Kingston: McGill-Queen's Univ. Press 1995)(arguing that the constitutional reform of 1982 and the failure of the Meech Lake Accord signifies the end of the dualistic dream for Canada as it has been formulated within Quebec in the twentieth century).

55. The Meech Lake Agreement represents the first unsuccessful attempt to reform the Canadian Constitution after the 1982 "partition." (Constitution Amendment, June 3, 1987). The second attempt, also unsuccesful, was the Charlottetown Accord of August 28, 1991 (Draft Legal Text, October 9, 1992. The documents are available at <http:/www.solon.org/Constitutions/Canada/English/Proposals.html>).

56. By "procedural reasons" as a cause for the rejection of the Meech Lake Agreement, I mean, on the one hand, the very stringent constitutional requirements that were applicable to amending the Canadian Constitution in order to integrate the changes provided for in the Meech Lake Agreement—requirements that were not met—and, on the other hand, the "globalization" of the process of constitutional amendment, to borrow Woehrling's expression. Indeed, although this Agreement was initially supposed to be the "Quebec round," other provinces and various interest groups soon tried to have their own specific concerns addressed. *See* WOEHRLING, *supra* note 49, at 163-165. Other substantive reasons unrelated to the content of the Agreement itself may also have influenced its rejection outside Quebec. First, the Quebec political class, federalist as well as separatist, strongly endorsed the North American Free Trade Agreement (NAFTA) and was indifferent to the concerns many Canadians outside Quebec voiced against NAFTA, fearing that it would undermine Canadian sovereignty and culture. This unanimity of Quebec's political elites facilitated the reelection of the pro-NAFTA Progressive-Conservative government at the federal level, a government that eventually signed the NAFTA. This was interpreted by many Canadians outside of Quebec who, in the past, had been sympathetic to Quebec's quest for autonomy within Canada, as a form of disrespect for their own legitimate concerns. Second, after a Supreme Court judgment that struck down some provisions of Quebec's Charter of French Language prohibiting the use of English on commercial signs, the Quebec government, then led by the federalist Liberal Party, enacted a new sign law and shielded it from further constitutional challenge by using the Canadian Charter of Rights and Freedoms' "notwithstanding clause" (s. 33). This section allows a government to declare that a law will operate notwithstanding a set of rights entrenched in the Charter. This has the effect of preventing constitutional challenges of such acts on Charter grounds. This decision of the Quebec government caused an important controversy in the "rest of Canada" that also contributed to the failure of the Meech Lake Agreement.

opposed by many on the basis of provinces' juridical equality. The opposition was fuelled by an uneasiness about the constitutional entrenchment of collective rights, although Quebec's recognition as a distinct society was only intended to be an interpretive provision of the Constitution of Canada that did not give birth to any specific and independent rights for Quebec.[57]

The failure of the Meech Lake Agreement was a major development in Canada's everlasting constitutional crisis. Many francophone Quebecers interpreted its rejection by "English Canada"[58] not only as an outright refusal to recognize Quebec's cultural difference, but also as a refusal to admit that there are many ways to be Canadian and that allegiance to Canada may take different forms in different parts of the country. Indeed, this refusal to draw formal constitutional consequences from Quebec's sociological distinctiveness may legitimately be construed as evidence of a clash of narratives about Canada between the francophone majority in Quebec and the anglophone majority outside Quebec.[59]

Nationalist and secessionist feelings in Quebec have undoubtably benefited from this rejection of the Meech Lake Agreement. Once integrated in the collective memory, this rejection has been added to Quebec's already long list of grievances against Canada. In addition, other factors play a role in widening the gap between Quebec's francophone majority and the rest of Canada. Among them is francophone Quebecers' ever-increasing identification over the past thirty years with their provincial government, which they perceive to be their "national" government. As will be seen, this tendency triggered the transformation of Quebec nationalism.

The year 1960 is a turning point in Quebec history in that it marks the real beginning of the "Quiet Revolution," an expression that is used to describe the sudden modernization of Quebec society. Jeremy Webber ably explains this evolution and its effects on Quebec and Canada:

> The Quiet Revolution represented, above all, a period of re-evaluation in Quebec's social and political life, during which the nationalism of the past was discarded and the relationships between church and state and between government and economy were

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57. This opposition was even more surprising considering the fact that the Canadian Constitution already comprises provisions that recognize, in one way or another, collective rights.

58. It should be noted that although only two "anglophone" provinces refused to ratify the Meech Lake Agreement, polls showed that between sixty and seventy percent of the population of *all* anglophone provinces opposed the Agreement. *See* WOEHRLING, *supra* note 49, at 165.

59. The fate of the Charlottetown Accord of 1992, which also recognized Quebec's specificity, certainly evidenced this clash. This Accord was rejected both by Quebec voters and by voters from outside Quebec, but for different reasons. While many in Quebec saw the content of the Accord as giving too little to Quebec, many in the "rest of Canada" saw it as giving too much to Quebec and not enough to themselves (especially in Western provinces).

> transformed. The movement for change was not strictly anticlerical . . . [b]ut the Quiet Revolution nevertheless brought about a dramatic secularization of Quebec society. By stages, the [Catholic] church's role in education and health was reduced. A comprehensive system of state-delivered social assistance was devised. The government also pursued a much more interventionist policy in the economic sphere, nationalizing the remaining private power companies to give the state-owned Hydro-Québec a monopoly, increasing regulatory controls on industry, enacting labour legislation more favourable to unions, and rationalizing the government's administrative and procurement practices. . . .
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> The Lesage government's economic activism was designed in large measure . . . to overcome the material and psychological effects of the dominance of English in the economic life in the province, reasserting a French Canadian presence under the slogan "maîtres chez nous" (masters in our own house) . . . . [t]he turn away from the church, the secularization of social services, and the heavy emphasis on the economic sphere radically transformed nationalism in Quebec. No longer was the church the principal custodian of French Canada's national identity . . . . [f]or most francophone Quebecers, the state was now the focus of nationalist sentiment. It was the guardian of their culture, the vehicle that would establish the conditions necessary for the flourishing of French language and culture in Quebec . . . . [t]he reforms were about economic and political self-determination (in the broadest sense of that term, not necessarily implying secession from Canada) rather than the mere preservation of a culture and a language. . . .
>
> This placed a whole new cast on the constitutional positions of the Lesage government and its successors . . . . Quebec laid vigorous claim to [its own] jurisdiction, filling it with new and often innovative programs. At first, federal politicians welcomed this, hoping that Quebec would now become a full partner in the construction of the postwar welfare state, an enterprise Canadians outside Quebec generally associated with Ottawa. Soon, however, the potential for conflict became evident, and because the conflicts were now between two direct competitors they could be fiery indeed . . . .[60]

This transformation of Quebec society during the Quiet Revolution tremendously affected francophone Quebecers' self-identification processes. As the Quebec provincial government was becoming a quasi-state, a good number of its residents stopped identifying with Canada and its federal

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60. WEBBER, REIMAGINING, *supra* note 52, at 44-47.

government. This represented a major shift. Although in the past they had always perceived the government of Quebec as their national government, this perception had not necessarily led them to view the federal government as a foreign—even hostile—government. Moreover, they still had not abandoned their Canadian sensibilities.

The Quiet Revolution changed it all. The priority was to (re)build Quebec society and the Quebec state, leaving Canada as only an accessory, and this even in some federalist circles. This heralded a substantial evolution in Quebec nationalism. From a strictly defensive nationalism, in which the survival of the French-Canadian community across Canada was a categorical imperative, during the Quiet Revolution, Francophone Quebecers espoused a much more expansive nationalism. This nationalism emphasized the need to build a modern, social-democratic state, in which their francophone identity would flourish.[61] As the state was given the responsibility of protecting and promoting that identity and, as such, had almost become a second self, any encroachment on its areas of constitutional jurisdiction was perceived as an attack on something sacred or, put mildly, as an attempt to achieve uniformity at the expense of Quebec's specificity. Consequently, the number of federal-provincial conflicts increased after the sixties. Thus the Quebec state is now as much a product of a technocratic dynamic in which "the state breeds the state" as it is a manifestation of cultural assertiveness. This explains why many secessionist Quebecers, without denying the cultural objectives of their project, insist on its civic nature. They do not want to create a purely French-Canadian state, they just want to create a state where, without any ambiguity, the public culture will be primarily francophone. According to them, this is not possible as long as Quebec remains in Canada.

Even if one leaves aside the issue of the *identitarisation* of the Quebec state, the growing ambitions of that state were in and of themselves likely to induce conflicts with the federal state. Indeed, from a sociological standpoint, the existence of two bureaucracies not only competing for the allegiance of the same group of citizens but also involved in a normative competition over these citizens is likely to create conflicts. As such, Quebec nationalism is far from being solely "ethnic" or even "cultural,"[62] as it often appears in its caricatured form. It could nevertheless be argued that present-day Quebec nationalism still retains an "ethnic" component. It is "ethnic" in the sense that most of its proponents are members of a specific ethnic group, *e.g.*, the French-

61. WOEHRLING, *supra* note 49, at 138-45.

62. Without going into details, it is only because the ethnic/civic dichotomy is so often used in both the popular and scholarly press that I use the term "ethnic nationalism." I think that this dichotomy is too simplistic and reductionist to allow for a complex assessment of the multiple varieties of nationalist claims. As such, it has a very low heuristic value.

Canadians, which wants a state that, sovereign or not, would reflect, protect, and promote the distinctively francophone flavor of Quebec society.[63]

The enactment in the early eighties of the Canadian Charter of Rights and Freedoms also contributed to widening the gap between Quebec and the "rest of Canada." Beyond the relative lack of legitimacy that the Charter suffers in Quebec, as a result of the Quebec government's lack of support for the "patriation" of the Constitution,[64] the Charter has profoundly changed Canadian politics. While anglophone Canadians increasingly adhere to a procedural model of democracy, francophone Quebecers seem to remain more inclined to support the view that the state can legitimately try to achieve substantive goals of overarching importance even if this may entail some relatively mild encroachments on individual freedoms.[65] An example of such a goal would be the protection and the flourishing of Quebec's French character. Outside Quebec, the Charter has had a tremendous impact on self-identification processes, becoming "a focus of national allegiance."[66] Conversely, while francophone Quebecers share their fellow Canadians' concern about the protection of individual rights from the state's undue interference, many of them do not subscribe to the uniform vision of citizenship the Charter embodies or, at least, to some interpretations of the Charter. For them, the Charter was a tool used to trivialize Quebec's distinctive contribution to the Canadian polity:

> Quebec was required to be a province just like the others, and all governments (including Quebec) would have to treat English and French in precisely the same way throughout the country, even if francophone Quebecers knew that in practice French would always

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63. French sociologist Alain Touraine has noted that:

> [T]he more we enter into an internationalized economy, the more the political will to achieve autonomy and self-determination is based on a conscience of a common origin, or cultural or ethnic identity, and not, as was believed for a long time, on projects based on a rationalizing idea of modernity.

A. TOURAINE, POURRONS-NOUS VIVRE ENSEMBLE? ÉGAUX ET DIFFÉRENTS 264 (Paris: Fayard 1997) (author's translation).

64. On that respect, it is surprising to see how the Supreme Court ignores, in its opinion in the *Quebec Secession Reference*, the relative lack of legitimacy from which the Canadian Constitution in Quebec suffers since its 1982 patriation against the National Assembly's wishes.

65. *See generally* Charles Taylor, *Convergences et divergences à propos des valeurs entre le Québec et le Canada, in* RAPPROCHER LES SOLITUDES: ÉCRITS SUR LE FÉDÉRALISME ET LE NATIONALISME AU CANADA (Québec: Presses de l'Université Laval 1992)(describing the effects of federalism and nationalism in Canada). That being said, I want to emphasize that I am in no way saying that francophone Quebecers do not identify with individual rights or freedoms, quite the contrary.

66. WEBBER, REIMAGINING, *supra* note 52, at 116; *see also* A.C. CAIRNS, CHARTER VERSUS FEDERALISM: THE DILEMMAS OF CONSTITUTIONAL REFORM (Montréal/Kingston: McGill-Queen's Univ. Press 1992).

> face more challenges in the rest of Canada than English faced within the province.[67]

As such, the Charter certainly did not have the uniting effect expected by its proponents. It also introduced into the Canadian political culture a logic that may undermine reconciliation between the dominant narratives about Canada inside and outside Quebec. First, the logic of a single citizenship upon which the Charter is based may end up inducing people to equate equality with uniformity, even though equality, being a complex concept, can be conceived as equivalent rather than identical treatment.[68] Transposed to a collective level as the "provincial equality" doctrine, this logic of uniformity played a major role in the recent rejection of proposals to recognize and entrench Quebec's distinctive character in the Canadian Constitution. If this is true, the Charter paradoxically would encourage intolerance towards situations of "deep diversity," to borrow Charles Taylor's words,[69] and encourage only tolerance of mild or discrete forms of diversity. Second, the enactment of the Canadian Charter of Rights and Freedoms gave birth to a rights culture that further legalized the political discourse in Canada. Indeed, as is often the case in North America, rights are not understood in a relational perspective, but rather in a strictly antagonistic perspective, where, in practice, one may claim a right *against* others, thereby fostering the development of a zero-sum logic rather than a variable sum logic. The culture that emerges is likely to impede the political compromises that are needed to break deadlocks such as the one between Quebec's and Canada's dominant narratives. As historian Jocelyn Létourneau points out:

> instead of bringing together groups that are now constituted as legal opponents and to allow for the recreation of a sense of community, of democratic spirit and of civic friendship, public debate sinks in unsolvable confrontations, that further atrophy the concept of the political understood as a reflection of a will to live together and as a collective responsibility towards the ends of social life.[70]

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67. WEBBER, REIMAGINING, *supra* note 52, at 117.

68. ANDRÉ BURELLE, LE MAL CANADIEN: ESSAI DE DIAGNOSTIC ET ESQUISSE D'UNE THÉRAPIE 105-19 (Montréal: Fides 1995). It should be noted that, in its judgments on equality rights under the *Canadian Charter of Rights and Freedoms*, the Supreme Court of Canada has repeated that equality does not imply uniform or identical treatment, but may require different treatment. This was made clear in the first case involving s. 15 (equality rights) of the Charter, *Andrews v. Law Society of British Columbia*, [1988] 1 S.C.R. 143, and reiterated in several other cases, the most recent one being *Law v. Canada (M.E.I.)*, Supreme Court of Canada, file no. 25373, March 25, 1999.

69. Taylor, *supra* note 65, at 211-14.

70. JOCELYN LÉTOURNEAU, LES ANNÉES SANS GUIDE: LE CANADA À L'ÈRE DE L'ÉCONOMIE

In other words, the rights culture renders extremely difficult the creation of a public space open enough to encompass different, although equally legitimate, visions of what it means to belong to a political community. As such, the popular appropriation of the rights discourse outside Quebec tends to prevent people from fully assessing Quebec's legitimate claims, in the same way that Quebec's dominant political discourse focuses on small differences to justify its blindness to the legitimate concerns of other Canadians. This situation highlights the need to question, at a radical level, the political cultures at play in Canada's existential crisis.

The above explanation of the evolution of Quebec-Canada relations over the years reveals that Canada's constitutional crisis has very deep roots. It also focuses on some important constitutional events and the conflict between Quebec's and Canada's dominant narratives, to show how and why Canada came close to splitting in the 1995 Quebec referendum. The results of this referendum have in fact evidenced that it is not because Canada and Quebec societies share a good number of fundamental values that Canadian national unity will necessarily be secured: a sense of common belonging or identity must also be present, however weak or discrete it may be.[71] In that respect, failure to acknowledge that there are at least two major, distinct, and sometimes overlapping public spaces on Canada's territory (one mostly francophone in Quebec, the other mostly anglophone outside Quebec) and that there are at least three major "historical communities," *e.g.*, communities which share a specific identity based on a common historical memory and on a common set of representations[72]—the franco-Canadians concentrated in Quebec,[73] the anglo-Canadians concentrated outside Quebec, and the native

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MIGRANTE 198 (Montréal: Boréal 1996)(author's translation). *See also* M. Gold, *The Rhetoric of Rights: The Supreme Court and the Charter*, 25 OSGOODE HALL L.J. 375 (1987); G. BOURQUE & J. DUCHASTEL, L'identité fragmentée. Nation et citoyenneté dans les débats constitutionnels canadiens, 1941-1992 (Montréal: Fides 1996).

71. *See* Wayne Norman, *The Ideology of Shared Values: A Myopic Vision of Unity in the Multination State, in* IS QUEBEC NATIONALISM JUST?: PERSPECTIVES FROM ANGLOPHONE CANADA 137 (Montréal/Kingston: McGill-Queen's Univ. Press, J.H. Carens ed. 1995).

72. For further explanation of this concept, *see generally* DOMINIQUE SCHNAPPER, LA RELATION À L'AUTRE: AU COEUR DE LA PENSÉE SOCIOLOGIQUE (Paris: Gallimard 1998).

73. Despite the absence of any explicit recognition of Quebec as a historical community in the Canadian Constitution, the sociological fact of the existence of that community is expressly acknowledged by the Supreme Court in its examination of the impact of the federalist principle within the Canadian constitutional framework. The Court notes that federalism, in allowing for the flourishing of diversity, is also a vehicle for "the pursuit of collective goals by cultural and linguistic minorities which form the majority within a particular province." Reference re Secession of Quebec, [1998] 2 S.C.R. 217, at para. 59. Despite its broad wording, this assertion is only applicable to Quebec, in that only in Quebec can we find a cultural/linguistic minority on the global Canadian scale, which is at the same time a majority within the borders of a province. The Supreme Court goes on to remind us that it is "the social and demographic reality of Quebec [that] explains the existence of the province of Quebec as a political unit and, indeed, [that this] was one of the essential reasons for establishing a federal structure for the Canadian union in

peoples—jeopardizes Canada's chances of survival in the long term, because it amounts to a denial of Canada's intrinsically complex nature. Canada's ability to manage its deep diversity without falling prey to uncontrolled centrifugal forces, will prove critical in its attempts to remain united.

Overly zealous beliefs also contribute to undermining Canada's chances of survival. While such beliefs sometimes ground specific visions of the nature and the borders of a given political community, they can also be concerned with the durability or the divisibility of that political community. As a rhetorical tool, law may very well serve as a springboard for the creation of new beliefs or as a support to already existing beliefs about these issues. Moreover, beliefs may also be held about law itself, and the power of legal discourse. In particular, beliefs about the intangible nature of political communities and about law's power are likely to inform opinions concerning what would happen should Quebec actually decide to secede unilaterally from Canada. On that subject, secessionists and federalists alike have their own sets of beliefs, as we shall see in the following examination of the Supreme Court's decision in the *Quebec Secession Reference*.

II. THE *QUEBEC SECESSION REFERENCE* IN CANADIAN CONSTITUTIONAL LAW

How does the Supreme Court of Canada's decision in the *Quebec Secession Reference* fit within the Canadian constitutional framework? What are the most important features of this decision? What were the questions posed to the Supreme Court? These questions will be answered in this second part. But first, some clarifications are needed about the "reference" procedure itself. Indeed, an American reader might wonder about the nature of a procedure that allows a government to ask advice from its country's highest court. How can a court of law give an opinion on an event that hasn't happened yet and which is, in that sense, purely academic? Moreover, by providing an opinion, does the Court not risk being accused of ignoring the separation between the judiciary and the executive?

A. The Reference Procedure

The reference procedure used by the federal government of Canada in the Quebec secession case allows the government to ask the Supreme Court for a legal opinion on any question pertaining to the interpretation of the constitution, the constitutionality of federal or provincial legislation, as well

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1867." *Id.*

as the constitutional powers of either the federal Parliament or the provincial legislature, and of their respective governments.[74] To acquire a broader picture of the issues at stake, the Supreme Court generally allows provincial attorneys-general to be heard, in addition to any other interested party to whom the Court may grant permission to intervene. The Court may also ask a lawyer to act as *amicus curiae* and argue the case on behalf of a party who is not represented, but whose interests could be affected as a result of the opinion. This is precisely what happened in the *Quebec Secession Reference* when the Supreme Court, confronted with the refusal by the Government of Quebec to participate in the proceedings, appointed an *amicus* to defend the secessionist point of view on the legality of a unilateral declaration of independence.

One may wonder about the legal effect of such an advisory opinion. More specifically, is it binding on the parties involved? The legal answer is no. Technically, the opinion given by the Court when it adjudicates on a question referred to it by the federal government is binding neither on the federal government itself nor on any party whose interests may be affected. For practical purposes, however, these opinions are treated as ordinary rulings. It is therefore unlikely that a party whose interests may be affected by the ruling of a court having to deal with a question similar to the one "decided" by the Supreme Court would not abide by this Court's opinion. The weight given to the Court's opinion, even in the context of a reference, was evidenced in the Quebec secession case by the fact that both the federal government and the government of Quebec, through their official representatives, felt that they were bound by that ruling.

Is the Supreme Court of Canada systematically bound to answer all questions referred to it by the federal government? The answer is no. The Supreme Court has the discretion to decline jurisdiction if it considers that the question asked is not "justiciable." This notion of "justiciability" raises the issue of the proper role of a court within the constitutional framework of a democratic government.[75] Although the reference procedure does not involve a judicial disposition of rights, and as a result the court is not technically bound by the ordinary rules preventing it from deciding on academic issues, the Supreme Court still has to consider whether the questions asked can appropriately be addressed by a court of law and whether the reference procedure contains sufficient legal components to warrant the intervention of such a court.[76] This means that if the questions are too imprecise or

74. Supreme Court Act, R.S.C. 1985, c. S-26, s. 53.
75. *See* Reference Re Canada Assistance Plan, (B.C.) [1991] 2 S.C.R. 525, 545.
76. *See id.*

ambiguous to permit the court to give a complete or accurate answer, or if those questions are purely political in nature, the court will refuse to answer.

In the *Secession Reference* the *amicus curiae* argued that the question of a possible secession of the Province of Quebec from Canada was indeed political in nature, and that it was up to the population of Quebec to decide that question in a referendum. The Supreme Court rejected this contention, deciding that the question was not entirely political and that the outcome of its judgment would not "usurp any democratic decision that the people of Quebec may be called upon to make."[77] Quite the contrary. The Court interpreted the questions posed by the federal government as being strictly limited to the application of the legal framework in which a democratic decision by the population of Quebec was to be taken.[78] This answer shows how broad the court's discretion remains in deciding whether or not to answer questions posed within the reference context. Not only is it free, at least to a certain extent, to decline to give answers, even in some cases to justiciable questions, but it is also free to interpret the questions asked so as to focus on their legal aspects, or to clarify both these questions and the answers the Court wishes to give.[79] It shall finally be noted that despite the rather broad discretion it grants itself, the Supreme Court of Canada has shown some reluctance in the past twenty years to exercise that discretion negatively by declining to answer questions brought up by the federal government.[80]

This reluctance was once again obvious in the *Quebec Secession Reference*, where the Court chose to answer the three questions posed by the federal government, despite their high political charge. These three questions, which raise issues pertaining to both domestic and international law, read as follows: (1) Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally?; (2) Does international law give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right 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?; and (3) In the event of a conflict between domestic and international law on the right of the National Assembly,

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77. Reference re Secession of Quebec, [1998] 2 S.C.R. 217, at para. 27.

78. *See id.*

79. *See* Re Resolution to Amend the Constitution of Canada, [1981] 1 S.C.R. 753, 875-76.

80. For a critique of the Supreme Court's unwillingness to decline jurisdiction on the basis of the non-justiciability of a question, see HOGG, *supra* note 47, no. 8.6(d), at 226.

legislature or government of Quebec to effect the secession of Quebec from Canada unilaterally, which would take precedence in Canada?[81]

The first question raised the issue of the applicability of domestic law to a possible unilateral secession of Quebec from Canada. This question was conceived by the federal government to counter the longstanding secessionist claim that Canadian domestic law would no longer apply should Quebec decide to declare its independence, the issue of Quebec secession immediately becoming governed by international law. The third question, which dealt with the interplay between Canadian domestic law and international law, was also intended to assess the validity of this secessionist contention. As for the second question, through which the federal government asked the Court whether or not international law gave Quebec the right to effect unilateral secession, its framers clearly had in mind another longstanding secessionist claim. This claim is that international law supports their cause, in that it gives the people of Quebec the right to self-determination. In any event, they argued that the application of the principle of effectivity, as recognized under international law, would ultimately grant a legal basis to the new sovereign state of Quebec. We will see in the next section how the Supreme Court of Canada dealt with some of these issues, especially those pertaining to domestic Canadian law.

B. The Highlights from a Positive Constitutional Law Perspective

As far as positive constitutional law is concerned, it is fair to say that the Supreme Court's opinion in the *Quebec Secession Reference* did not bring about a major "legal revolution," in the sense that it did not alter radically the way we perceive constitutional law in Canada.[82] On the contrary, the Court's opinion essentially confirms a certain number of things the existence of which was already suspected. That being said, the Court nevertheless proved innovative on some accounts, or, at the very least, shed new light on some specific issues. Since it is not the purpose of this article to deal exhaustively with all possible constitutional issues addressed in the *Quebec Secession Reference*, I will confine myself to highlighting those which, I believe, are the most interesting or important.

1. Of Constitutional Law and Magic: A Possible Unilateral Secession of Quebec Would not Fall Outside the Ambit of the Canadian Legal Order Through the Operation of Some Mysterious and Unknown Force

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81. Order-in-Council, P.C. 1996-1497, September 30, 1996.

82. *See* REVOLUTIONS IN LAW AND LEGAL THOUGHT (Aberdeen: Aberdeen Univ. Press, Z. Bankowsky ed. 1991) (discussing the concept of "legal revolution").

I mentioned earlier that a longstanding secessionist claim was that Canadian domestic law would no longer be applicable to Quebec should Quebecers express the will to secede from Canada and should the government of Quebec decide to declare unilaterally the province's independence.[83] In its most extreme embodiment, this contention rests on the assumption that international law would immediately be applicable after a "yes" vote on Quebec's sovereignty. A supporting argument for this claim is that since the Canadian Constitution is silent on whether or not a province can secede from the federation, it does not prevent a seceding province from doing so.

In rejecting the above contention, the Supreme Court of Canada clarified what most jurists already suspected; that the Constitution's silence concerning a province's ability to secede cannot be interpreted as meaning that a secessionist province automatically falls outside the scope of the Constitution as soon the decision to secede is made.

Furthermore, the magnitude of the change needed to accommodate the wishes of the seceding province cannot be invoked to justify ignoring the required constitutional procedure. As Jeremy Webber noted prior to the Supreme Court's opinion in the *Quebec Secession Reference*, the above argument essentially "turns . . . on the concept of 'amendment'"[84] itself, by suggesting that:

> [s]ecession 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.[85]

Therefore, under the secessionist view, absent a situation that qualifies as an "amendment" strictly speaking, the "amending formula" would not be applicable. Not surprisingly, this contention was rejected by the Supreme Court of Canada, which held the Constitution's inability to adapt to a given situation, here the secession of a province, to be insufficient grounds for any claim that it ceases to apply.[86] This is especially true in the case of a unilateral secession, where the unilateral declaration cannot alone operate a form of

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83. *See* HENRI BRUN & GUY TREMBLAY, DROIT CONSTITUTIONNEL 263 (Cowansville: Yvon Blais, 3rd ed. 1997).

84. Webber, *The Legality of a Unilateral Declaration*, *supra* note 41, at 298.

85. *Id.*

86. For the argument about the "misadaptation" of the Canadian Constitution, see BRUN & TREMBLAY, *supra* note 83, at 263.

trans-substantiation in which domestic law would magically be superseded by international law.

Although the Supreme Court decided that the secession of a Canadian province clearly requires a formal constitutional amendment, it declined to say which specific amending formula would be applicable.[87] Opinions vary on this question. Indeed, some scholars argue that the general amending formula, requiring "the assents of both the House of Commons and the Senate of the federal Parliament and of the legislative assemblies of two-thirds of the provinces representing fifty percent of the population,"[88] would probably apply.[89] Others consider that the unanimous assent of both houses of the federal Parliament and the legislative assemblies of all provinces[90] would be mandatory given that the effects of a province's secession on the Canadian constitutional order would touch certain things that can only be amended through unanimity.[91]

The argument that Quebec secession would fall outside the ambit of the Canadian constitutional order rests, in a way, on the "belief" that, contrary to well-settled law,[92] a "yes" vote in a referendum would automatically entail juridical consequences—in that case radically altering the legal order. But, ultimately, the rationale underlying this argument has, strictly speaking, little to do with law: It relies essentially on a certain vision of democracy. More specifically, the discourse of democratic theory is used to justify an immediate and obligatory shift from the domestic legal order to the international legal order. As such, the secessionist contention goes far beyond the simple argument on the preeminence of a legal order over another in a given situation. It is in fact linked to another more radical claim that the secession of Quebec would be an intrinsically political act triggering only an extra-juridical solution. From the initial assumption flows the argument that, since secession is intrinsically political, only the population of Quebec is entitled to make that decision, and this without undue judicial interference. As we saw earlier, the Supreme Court rejected this contention on the basis that the

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87. Reference re Secession of Quebec, [1998] 2 S.C.R. 217, at para. 84. It is to be noted that the Court alluded to the possibility of adjudicating on the issue of the amending formula should a positive vote on Quebec's sovereignty occur.

88. HOGG, *supra* note 47, no. 5.7(b), at 133 (summarizing section 38 of the Constitution Act, 1982).

89. *See id.*; *see also* BRUN & TREMBLAY, *supra* note 83, at 263. (In this last case, this is only assuming that a formal amendment is needed, something that these authors rejected).

90. S. 41 of the Constitution Act, 1982, *supra* note 54.

91. For the most convincing argument, see Webber, *The Legality of a Unilateral Declaration*, *supra* note 41.

92. Indeed, in Canadian constitutional law, a referendum is a mere consultation that does not legally bind the legislature on the substance of the decision, because of the principle of parliamentary supremacy. In other words, the results of a referendum entail no legal consequences in themselves.

secession of a province was not entirely political and that the result of its judgment would in no way "usurp any democratic decision that the people of Quebec may be called upon to make."[93] By circumscribing the scope of its mission and confining it to the identification of the legal framework in which a democratic decision by the population of Quebec was to be taken, the Court linked democratic theory with constitutionalism, and legitimacy with legality. We shall see later, in section C, how it approached these issues. For now, let us turn our attention to a second interesting feature of the Supreme Court's opinion, that is its use of meta-principles in the context of constitutional adjudication.

2. A Non-formalistic Approach to Constitutional Law: The Use of Meta-Principles in Constitutional Adjudication

Another highlight of the *Quebec Secession Reference* is the use that the Supreme Court makes of the meta-principles underlying the Canadian constitutional framework. These principles, that constitute the intellectual superstructure of Canada's Constitution, help when interpreting the gaps or ambiguities in the text of the Constitution. As such, they "inform and sustain the constitutional text: They are the vital underlying assumptions upon which the text is based."[94] The Court also noted that these principles, as part of a constitutional *structure*, "function in symbiosis. No single principle can be defined in isolation from the others, nor does any one principle trump or exclude the operation of any other."[95] Moreover, as basic postulates of the Canadian constitutional order, they are normative and may in some circumstances give rise to general or specific substantive legal obligations, the effect of which will be to severely limit government action. As a result, both courts and governments are bound by them.[96]

It is fair to say that these meta-principles essentially serve an adaptative purpose in allowing constitutional interpretation to avoid sclerosis. As the Court points out, they have to be observed and respected because of their role in the "ongoing process of constitutional development and evolution of our Constitution as a 'living tree.'"[97] The Supreme Court's use of Lord Sankey's oft-quoted organic metaphor of the living tree to describe the Canadian Constitution is quite interesting here.[98] This metaphor marking the clear

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93. Reference re Secession of Quebec, [1998] 2 S.C.R. 217, at para. 27.
94. *Id.* at para. 49.
95. *Id.*
96. *See id.* at para. 54.
97. *Id.* at para. 52.
98. *See* Edwards v. A.-G. Canada, [1930] A.C. 114, 136.

rejection of "originalist" methods of interpretation in Canadian constitutional law envisages the Constitution as a flexible document, capable of adapting to new circumstances. The text of the Constitution sets up a framework that purports to ensure legal certainty and predictability. Hence the Court's insistence on the primacy of the Constitution's written text over its meta-principles and other unwritten norms that depend for their application on the presence of an interpretive space.[99] However, the text of the Constitution can be envisaged neither as pre-determining nor as encapsulating specific and conclusive solutions to all constitutional problems that may possibly arise over the years. To argue otherwise would entail important consequences.

First, it would lead us to perceive the written text of the Constitution as always giving transparent and final answers, thereby elevating this text to the status of a pure and absolute "given" that cannot suffer any interpretation. Second, this would imply not only a normative but also an informational closure of the Constitution. Being complete in itself, the constitutional text's meaning would not need to be discovered. In other words, its meaning would be self-evident and cast in stone from its inception or enactment, thereby not requiring any external, *e.g.*, judicial, mediation. Third, from this would flow a drastic reduction of the judiciary's role from an interpretive and therefore creative function, to a more administrative one. To some extent, pushed to its extreme, this logic would lead to the equation of judges adjudicating on constitutional law to civil servants responsible for a blind application of the law. Fourth, to expect the Constitution's written text to provide in and of itself, and in all circumstances, "right answers," to borrow Dworkinian terminology,[100] would be to allow *constitutional law* to be swallowed by the *constitutional text*. This reduction of constitutional law to its textual incarnation is, to say the least, antithetical to Canada's British-inspired constitutional tradition,[101] and paradoxically contradicts the *text* of the Constitution itself![102] Lastly, and most importantly, considering the

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99. Reference re Secession of Quebec, [1998] 2 S.C.R. 217, at para. 53.

100. *See* DWORKIN, LAW'S EMPIRE, *supra* note 8.

101. *See* H. Brun, *Une bien drôle de justice*, LE DEVOIR, (Feb. 12, 1998) <http://www.ledevoir.com/REDaction/AGOra/AGObrun120298.html>. It should be emphasized here that the Canadian Constitution is not included in one single document. Moreover, the definition given to the expression "Constitution of Canada" in s. 52(2) of the *Constitution Act, 1982*, *supra* note 54, is not exhaustive. *See* New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly), [1993] 1 S.C.R. 319.

102. The first paragraph of the preamble of the *Constitution Act, 1867* (R.S.C. 1985, Appendix II, No. 5) essentially provides that Canada's federal constitution is to be "similar in principle to that of the United Kingdom." This *Constitution Act, 1867*, formerly known as the *British North America Act of 1867* (U.K., 30 & 31 Victoria, c. 3) is Canada's founding constitutional document and establishes the country's institutional structure. Over the years, Canadian courts have used this mention in the preamble as a constitutional justification to recognize as sources of Canadian constitutional law various unwritten norms,

constitutional text as finite would ultimately amount to rejecting the view that the Constitution is capable of evolution and adaptation. In other words, it would herald the cutting down of what was once depicted as a "living tree."

In light of the above, the Supreme Court's use of the "living tree" metaphor and its further reliance on meta-principles is not surprising. In fact, it can be construed as an answer to a rather widely-held belief by the Canadian population outside Quebec about the nature of the Canadian constitutional framework applicable to a seceding province of Quebec. My colleague Yves-Marie Morrissette sums up this belief as holding that:

> "the question of Quebec sovereignty is *already solved,* [the solution] being entirely pre-determined by the law in force. Then, one only has to comply with clear legal norms [that are applicable] and to ensure that they are sanctioned. Ultimately, the subliminal message that this view conveys is as follows: "Let's send in the armed forces!"[103]

Therefore, the Court's reliance on meta-principles to interpret the Constitution's text so as to fill a constitutional void, as was the case here, can be construed as serving both a legal/epistemological purpose, *e.g.,* reintroducing complexity into the juridical analysis, and a political purpose, *e.g.,* influencing perceptions about the usefulness as well as the limits of the Canadian Constitution with respect to a possible Quebec secession. These perceptions, that are present in the "external legal culture" (simply put, the lay person's legal culture) as well as in the "internal legal culture" (the legal culture of the members of the legal community),[104] tend to associate legal certainty to a strict adherence to the supposedly always clear "word" of the Constitution. This is at the risk of equating legal certainty with legal sclerosis for the reasons mentioned above.

That being said, the meta-principles that were deemed relevant to the case of a possible unilateral secession of Quebec were federalism, democracy, constitutionalism and the rule of law, and, lastly, the protection of minorities. Since it is beyond the scope of this article to propose a thorough examination of each of these four principles, I will instead focus on their application to some specific issues. One remark is warranted, however, as to their potential

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be they legal ones such as judicial independence or parliamentary privilege, or political ones such as responsible government.

103. Yves-Marie Morissette, *L'incidence de la légalité sur la souveraineté / la sécession du Québec*, Conseil pour l'unité canadienne, at 1-2 <http://www.ccu-cuc.ca/fran/dossiers/cour5morissette.html>, (author's translation).

104. *See* LAWRENCE M. FRIEDMAN, THE LEGAL SYSTEM: A SOCIAL SCIENCE PERSPECTIVE 223 (New York: Russell Sage Found. 1975).

impact on the global dynamics of Canadian constitutional politics. Indeed, the identification of these principles may pave the way for a certain widening of what I term the "Canadian constitutional circle." More precisely, the conjunction of two of these principles, namely democracy and the protection of minorities, could have an empowering effect on various minority groups, whose interests were often neglected in the past either because they didn't fit squarely within the boundaries of specific positive entitlements, or simply because the holders of these interests were not formal partners of the federal union, i.e., they were neither the federal nor the provincial governments. To draw an analogy with corporate law, before the *Secession Reference*, only *shareholders*, namely the federal and provincial governments, had a real say in constitutional amendment processes. Now, after the *Reference*, other *stakeholders* will probably be entitled to make their voice heard in some circumstances and subject to certain conditions.

For example, should Quebec secede from Canada, negotiations following a "yes" vote would have "to address the interests of the federal government, of Quebec and the other provinces, and other participants, as well as the rights of all Canadians both within and outside Quebec."[105] Aboriginals and linguistic minorities would certainly be among those Canadians whose rights or interests would be taken into account. It is, however, difficult to say what legal weight that these interests will carry. In this respect, aboriginal peoples' legal position is stronger than that of linguistic minorities. Indeed, when involved in processes the outcome of which is likely to affect aboriginal peoples' rights or status, the Crown of Canada, *e.g.*, the federal government, "has the responsibility to act in a fiduciary capacity."[106] This fiduciary duty, being *sui generis*,[107] has been given a very broad scope and would surely encompass aspects of a negotiation between the federal government and a secessionist province that could affect the interests of the aboriginals residing in the secessionist province.[108] At the very least, the discharge of that duty

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105. Reference re Secession of Quebec, [1998] 2 S.C.R. 217, at para. 92.

106. R. v. Sparrow, [1990] 1 S.C.R. 1075, at 1108.

107. *See* Guerin v. The Queen, [1984] 2 S.C.R. 335.

108. That does not mean, however, that aboriginal groups would be parties to directly participate in the negotiations. Instead, it should be noted that the Supreme Court only says in the Secession Reference that aboriginal interests would be "taken into account" in the negotiations, and nothing more. *See* Reference re Secession of Quebec, [1998] 2 S.C.R. 217, at para. 139. *But see* s. 35.1 of the Constitution Act, 1982, *supra* note 54. Nor does it mean, a fortiori, that aboriginal groups, following successful negotiations, would be parties to the ensuing constitutional amendment. On the contrary, only the federal Parliament and the provincial legislatures would be parties to a *formal* amendment, this precisely because they are the only political actors referred to in the text of the amending formulas provided for in the Constitution Act, 1982, *supra*, note 54. Arguing the contrary would mean that the meta-principle that is the protection of minorities would prevail over the unambiguous text of the Constitution. For cases reiterating the need for gaps or ambiguities to trigger the application of these meta-principles, see Re Eurig

could impose upon the federal government the obligation to consult the aboriginals affected by this situation,[109] and a breach of that duty, whatever its content, could lead to a suit against the federal government. This fiduciary duty imposed upon the federal government is, it must be noted, peculiar to its relation with aboriginal peoples of Canada. This is why their position would be stronger than that of linguistic minorities in the context of a secession of Quebec, unless, of course, the latter could convince a court to "read into" the *Quebec Secession Reference* a similar duty, this time benefitting linguistic minorities. This result would stretch the words used by the Supreme Court in that decision too far. A better view would be to see the Supreme Court's requirement that various interests be addressed during negotiations following a "yes" vote as a moral/political obligation (of means, not of results) imposed upon the federal government, subject, of course, to the fiduciary duty it owed to aboriginals. That said, the fact that non-governmental groups other than aboriginals would have no legal claim, strictly speaking, against the federal government does not mean that they would be left powerless. Quite the contrary, they would retain substantial political clout as a result of the Supreme Court's decision not only in the specific context of a possible Quebec secession, but also, it could be argued, in other less dramatic episodes of constitutional reform. In any event, it remains to be seen how and for what purpose both aboriginal groups and linguistic minorities will use the Court's pronouncements in the *Quebec Secession Reference.*

3. A Constitutional Innovation: The Duty to Negotiate

While the two previously highlighted features of the *Quebec Secession Reference* were essentially judicial iterations or reiterations of the existence of constitutional parameters already known or suspected, the third highlight of the Supreme Court's opinion is quite different. The Court, relying on relevant organizing meta-principles, innovated by identifying in the constitutional sub-text (or "inventing", some would say)[110] a constitutional duty to negotiate. The identification of such a duty was premised upon the Court's initial depiction of the interplay between two of these meta-principles, democracy and the rule of law:

> The consent of the governed is a value that is basic to our understanding of a free and democratic society. Yet democracy in

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Estate, [1998] 165 D.L.R. 1 (4th) (Supreme Court of Canada) (per Binnie and MacLachlin JJ.); Samson v. Canada *(A.G.)*, [1998]165 D.L.R. 342 (4th) (Federal Court of Canada, Trial Division).

109. *See* HOGG, *supra* note 47, no. 27.5(a), at 574 n.85i.

110. *See* D. USHER, "The new constitutional duty to negotiate", 20(1) *Policy Options* 41, 42 (1999).

> any real sense cannot exist without the rule of law. It is the law that creates the framework within which the "sovereign will" is to be ascertained and implemented. To be accorded legitimacy, democratic institutions must rest, ultimately, on a legal foundation. That is, they must allow for the participation of, and accountability to, the people, through public institutions created under the Constitution. Equally, however, a system of government cannot survive through adherence to the law alone. A political system must also possess legitimacy, and in our political culture, that requires an interaction between the rule of law and the democracy principle. The system must be capable of reflecting the aspirations of the people. But there is more. Our law's claim to legitimacy also rests on an appeal to moral values, many of which are embedded in our constitutional structure. It would be a grave mistake to equate legitimacy with the "sovereign will" or majority rule alone, to the exclusion of other constitutional values.[111]

With this as a backdrop, the Supreme Court stated that, along with other meta-principles of the Canadian Constitution,[112] the democratic principle confers a right on each participant in the Confederation to *initiate*, and not to realize unilaterally, constitutional change. Comforted in its assumption by the fact that the Constitution Act, 1982 "gives expression to that principle," the Court further noted that "the existence of this right [to initiate change] imposes a corresponding duty on [these] participants to engage in constitutional discussions in order *to acknowledge and address democratic expressions of a desire for change* in other provinces."[113] Nothing more. How is this to be understood? What is the content of that duty? Is it judicially enforceable? These questions can be clarified by referring to the specific case the Court had to deal with, that is, the possible unilateral secession of a province.

The precondition for a "duty to negotiate" to exist is the presence of a "democratic expression of a desire for change."[114] According to the Court, for an expression to be considered democratic, it must be legitimate. In the case of a referendum on Quebec's sovereignty, this would require a "clear expression by the people of Quebec of their will to secede."[115] Such an expression would confer legitimacy on the efforts of the government of Quebec to initiate the amendment process in order to secede by constitutional

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111. Reference re Secession of Quebec, [1998] 2 S.C.R. 217, at para. 67.

112. The Court identifies as the "source" of the duty to negotiate the four constitutional principles earlier found relevant to the case of a possible unilateral secession by Quebec. *See id.* at para. 90.

113. *Id.* at para. 69 (emphasis added).

114. *Id.*

115. *Id.* at para. 87.

means.[116] The Court found as indicated that a clear majority would qualify as a "clear expression," the clarity of which would be assessed on a qualitative basis.[117] At the very least, both the numerical majority and the wording of the question on which the population will vote must be free of ambiguity.[118] In other words, a clear numerical majority and a clear question are required to legitimize referendum results that could lead to the secession of Quebec.[119]

Once ascertained, that clear expression of a desire to secede would trigger the application of the constitutional obligation "to negotiate constitutional changes to *respond* to that desire."[120] In the Court's words, a clear repudiation by Quebec of the present constitutional order would "place an obligation on the other provinces and the federal government to *acknowledge and respect* that expression of democratic will by entering into negotiation and conducting them in accordance with the underlying constitutional principles already discussed."[121] "Respond," "acknowledge," and "respect": Does this mean that the federal government and the nine other provinces would be forced to answer by an unqualified "yes" to all demands made by a secessionist government? Would this duty to negotiate necessarily lead to a negotiation the purpose of which would be the implementation of this

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116. *See id.*

117. *Id.*

118. *See id.*

119. For better or worse, the Court refrained from scrutinizing specific hypotheses, and left the determination of what would actually constitute a clear majority and a clear question to political actors. *See id.* at para. 100-01. As soon as the Court's opinion was issued, pundits offered comments on that question. *See* Yves-Marie Morissette, Le Renvoi sur la sécession du Québec: Son impact politique, Presentation at the Faculty of Law, McGill Univ. (Sept. 21, 1998) (presenting a critical appraisal of the most serious hypotheses raised). Without going into details, these questions warrant a few brief observations. First, as to the clarity of the question itself, I do not believe that a "clear question" can only be a question worded jointly by a secessionist Quebec government and the federal government. In any event, it is quite unlikely that such an agreement could ever take place. However, I think that there would be a strong presumption of "clarity" should the National Assembly (i.e. the Quebec legislature) unanimously or quasi-unanimously adopt a given question. This would necessarily imply that the federalist opposition at the National Assembly has agreed to its wording. It is indeed doubtful, after the *Quebec Secession Reference*, that a federalist opposition would agree to an ambiguous question. Second, as to the numerical majority required, a clear majority does not necessarily imply a qualified majority. But a simple majority of the people who actually participated in the referendum would probably not be enough either. However, an absolute majority of all registered voters on a clear question would probably constitute a "clear expression" of the population. *See id.* at 13-14. That being said, even a *technically* legitimate majority may not be enough to make Quebec's accession to statehood possible. Indeed, a very slim majority of fifty-one percent of all registered voters, although legitimate because it was obtained on a clear question, may still not be enough in practical terms, considering the possible reluctance of other States to recognize the new one. While international recognition is not, strictly speaking, a legal precondition for accession to statehood, such recognition may nevertheless provide useful support for a secessionist province if there is a crisis or a deadlock in negotiations.

120. Reference re Secession of Quebec, [1998] 2 S.C.R. 217, at para. 88. (emphasis added).

121. *Id.* (emphasis added).

government's will? Expressed differently, does this duty impose upon the negotiating parties an obligation of means or an obligation of results? The Court is very clear that the obligation to negotiate should not be interpreted to mean that the other provinces and the federal government would have a legal obligation "to accede to the secession of Quebec, subject only to negotiation of the logistical details of secession."[122] Therefore, under no circumstances could Quebec dictate the terms of secession alone since this would contradict the idea of "negotiation." Neither could it claim in an absolutist manner a legal entitlement to secession and the corresponding duty of other participants in the negotiation to comply with Quebec's desire to secede.

In fact, as noted earlier, should the federal government "cave in" to Quebec's demands without regard to the interests of aboriginal groups and linguistic minorities, it would do so in breach of its obligation (legal or moral/political, depending on the group concerned) to represent the interests of the latter in the context of the negotiation. That said, it is interesting to note that the Court extended its approach to federalist arguments, stating that it would also be legally unfounded to deny that a clear expression of self-determination by the people of Quebec would impose obligations upon the other provinces or the federal government.[123] As such, this constitutional duty to negotiate is essentially a duty to respond in good faith to the other's demands, a duty that represents an important step in the creation of a genuine constitutional ethics of discussion.

Would this duty to negotiate be judicially enforceable? Although the Supreme Court referred to it as constitutional in nature, it also noted that some constitutional rules, such as conventions, carry only political sanctions.[124] Such is the case of the constitutional duty to negotiate, the discharge of which would be non-justiciable. Indeed, leaving its "enforcement" to political actors and ultimately to the electorate,[125] the Court expressly stated that it would have "no supervisory role over the political aspects of constitutional negotiations."[126]

Other parties at the negotiating table would probably be the first to assess a government's failure to discharge its duty to negotiate. They would be

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122. *Id.* at para. 90.

123. *See id.* at para. 92.

124. *See supra* note 43 for comments about constitutional conventions.

125. Reference re Secession of Quebec, [1998] 2 S.C.R. 217, at para. 101.

126. *Id.* at para. 100. That said, it has been argued that this statement should not be construed as entirely preventing the Court from intervening in disputes arising from the discharge of this constitutional duty to negotiate, if there is indeed a sufficient legal component allowing for such an intervention. *See* D. Newman, *Reconstituting Promises to Negotiate in Canadian Constitution-Making*, 10 NAT'L J. CONST. L. 1, 32 (1999).

followed by its own electorate, and eventually, the whole Canadian people. However, residents of Quebec, after clearly expressing their desire to secede, and residents of other parts of Canada, still shocked by the expression of that desire, may very well have different perspectives as to what constitutes the discharge *by the other* of its duty to negotiate. For example, in a discussion concerning the boundaries of the new country of Quebec, the secessionist government would probably defend the integrity of its territory, while the "Canadian" parties, under pressure from some segments of aboriginal groups and linguistic minorities in Quebec, could be tempted to argue in favour of partition.

Would the "no, thanks" then expressed by the government of Quebec be characterized as a refusal to negotiate, in breach of its duty? On the basis of what criteria could this be assessed? The Supreme Court did not directly address these issues, and left them to the political realm. But the Court did note something very important:

> To the extent that a breach of the constitutional duty to negotiate in accordance with the principles described above undermines the legitimacy of a party's actions, it may have important ramifications at the international level. Thus, a failure of the duty to undertake negotiations and pursue them according to constitutional principles may undermine that government's claim to legitimacy which is generally a precondition for recognition by the international community. Conversely, violations of those principles by the federal or other provincial governments responding to the request for secession may undermine their legitimacy . . . . [b]oth the legality of the acts of the parties to the negotiation process under Canadian law, and the perceived legitimacy of such action, would be important considerations in the recognition process. In this way, the adherence of the parties to the obligation to negotiate would be evaluated in an indirect manner on the international plane.[127]

Through this acknowledgment of the dialectical relation between the domestic realm and the international realm, the Supreme Court of Canada indirectly appointed the international community as the ultimate arbitrator of Canada-Quebec disputes following a clear "yes" vote in a referendum. In fact, it virtually invites the international community's supervisory intervention. Although undoubtably accurate, this is a telling admission from the highest judicial authority of a sovereign country. It is also exceptional for a court to refuse to obscure the intrinsic limits of the legal framework within which it

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127. Reference re Secession of Quebec, [1998] 2 S.C.R. 217, at para. 103.

works and, as a result, the limits of its own authority, behind technical arguments precisely designed to obscure the hard fact that, ultimately, the outcome of a secessionist attempt is not something that is entirely under domestic control. Viewed in this light, it is not surprising that some have expressed strong reservations about this new constitutional duty to negotiate.

The Supreme Court's acknowledgment of this duty serves first and foremost a domestic purpose. In fact, it is to be understood in light of a familiar federalist argument outside Quebec that essentially states: (1) since the Constitution does not say that Quebec can secede, it cannot; (2) therefore, even if the population of Quebec clearly expresses a desire to secede, since the Constitution does not allow for that, we can stand still and do nothing; (3) furthermore, there is simply no need to negotiate something that is constitutionally non-negotiable (the implicit message is, to borrow once again from Professor Morissette, "send in the armed forces!"). This could be called "the straightjacket argument."

The problem with this argument, however, is that it uses a supposedly strict application of a rather twisted concept of the "rule of law" to deliberately ignore the democratic principle. Quite paradoxically, it encourages the breach of the "rule of law" in offering as the only answer to a clearly expressed will to secede a categorical "no, you won't"—the political equivalent of a concrete wall. The secessionist province could then either retreat, which is unlikely, or try to achieve secession notwithstanding the negative response of the other party. In such a case, this very answer would have the effect of inducing that province to pursue secession through illegal rather than legal means.

By reading into the Constitution a duty to negotiate triggered by specific circumstances, and by preventing categorical answers such as the one evoked above, the Supreme Court actually maximized the chances of an orderly secession, to the extent that it is possible, thereby increasing the possibilities of an ultimate prevalence of the rule of law.[128] Indeed, the idea of the rule of law implies more than the technical application of legal norms, however constitutional they may be. It also implies the creation of a political environment inducing respect for the law. The rule of law can only be sustained if such an environment exists, and it is up to the judiciary to provide legal tools that contribute to its creation. This, I submit, is exactly what the Supreme Court of Canada did in the *Quebec Secession Reference*.

Aside from these considerations, it remains to be seen what legal scope will be given to this duty to negotiate. The Court's very broad comments

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128. This is also consistent with another fundamental premise adopted by the Supreme Court in the *Quebec Secession Reference*, that is, a Canadian tradition of orderly change. *See id.* at para. 33.

seem to indicate that this duty could apply to contexts other than the secession of a province. If so, would it really make things more complicated than they already are? I do not think so, since recent constitutional practice shows that provinces that have very serious concerns about the working of the federation generally see their concerns addressed.[129] They may not be satisfied with the ultimate result, but in most cases, their constitutional partners have addressed their concerns in good faith.[130] Considering that the constitutional duty to negotiate identified by the Supreme Court in the *Quebec Secession Reference* does not impose any obligation of result, it is hard to see what difference it would really make should it be applied beyond the specific context of provincial secession. This is especially true given the difficulty of achieving formal and all-encompassing constitutional reform in Canada in the wake of the failures of the Meech Lake Agreement and the Charlottetown Accord.[131]

These are what I consider to be the highlights of the *Quebec Secession Reference*. But the Supreme Court of Canada's opinion in this case does much more than specify the constitutional framework applicable to a possible unilateral declaration of independence by Quebec. At a supra-legal level, it addresses the delicate question of the interplay between legality and legitimacy, and its impact on the formation (or destruction) of political communities.

C. The Supreme Court of Canada and the Interplay Between Legality and Legitimacy

If I were asked to caricature how both hard-liner secessionists and federalists represented the interplay between legitimacy and legality, I would be tempted to say that secessionists used law in a schizophrenic manner, while federalists tended to use it in a totalizing way. The latter depicted the law as a kind of transcendental and omnipotent discourse that had to be blindly obeyed without any regard to questions pertaining to legitimacy. They portrayed the law as entirely transparent in meaning and completely opaque in its openness to non-legal considerations. The secessionists' depiction on the other hand, relied on a double standard about the concept of law applicable before and after secession. Regarding the interplay between legality and legitimacy during the period of time preceding secession, secessionists

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129. For example, see the recent attempts to address Quebec's concerns in the Meech Lake Agreement and Western provinces' concerns about the Senate in the Charlottetown Accord. See *supra* note 55 for a discussion of the two agreements.

130. As explained earlier, these two agreements never became law. *See supra* notes 55-59.

131. This has recently led the present federal government and the provinces to privilege administrative agreements over constitutionally-entrenched reforms.

essentially established a radical opposition between democracy and law. In other words, the will of the people (without defining the said people) would necessarily trump legal considerations. However, in the period after secession, the law would predominate. While before secession the simple operation of the democratic principle was sufficient to allow the people of Quebec to secede despite legal considerations, after secession, these legal considerations were now to prevail. For example, Quebec's territory would undoubtably remain intact because of the controversial application of the *uti possidetis* doctrine, notwithstanding the opinion of Quebec's aboriginal population. The once unimportant law would now take on considerable weight. Hence the double standard and, to some extent, the "schizophrenic" approach to the law.[132]

This secessionist discourse on the primacy of democracy over law was representative of the uses and abuses of democratic theory by secessionist movements. In their discourse, popular sovereignty is often depicted as representing this pure and unambiguous "given" that is the expression of the political community. In some more extreme discourses, this "given" is the expression of the community's inner self, essence, or *volksgeist*. As far as Quebec secessionists are concerned, though most of them genuinely include non-francophones in their definition of the Quebec people, a hard fact remains: The secessionist project is first and foremost designed to ensure the survival and the blossoming of the cultural nation formed by the former French-Canadians concentrated in the Quebec territory. In other words, it is the subjectivity of Quebec francophones' discourse, fuelled as it is by a specific historical memory, that rests at the center of the secessionist project and that is its raison-d'être.

Although there is nothing illegitimate about it, Quebec nationalism's founding narrative of conquest, survival, and overcoming[133] is hardly inspiring for non-francophones and even for non-"pure wool"[134] francophones. While they may sympathise to some extent with the cultural fight of their fellow citizens, it is presumptuous to ask them to share a narrative that is rooted in a very specific historical memory, and with which they do not necessarily

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132. *See* GRAND COUNCIL OF THE CREES OF QUEBEC, SOVEREIGN INJUSTICE. FORCIBLE INCLUSION OF THE JAMES BAY CREES AND CREE TERRITORY INTO A SOVEREIGN QUEBEC 411-28 (Nemaska: Grand Council of the Crees 1995) (providing an analysis of this double standard).

133. This narrative was successfully elaborated by the historians of the Montréal School and soon adopted by a large segment of Quebec's political class, subject to some variations as to the "natural destiny" of the people (inside or outside Canada). *See* RUDIN, *supra* note 11, at 141; *see also* A.D. Smith, *Nationalism and the Historians, in* MAPPING THE NATION 175 (London/New York: Verso, G. Balakrishnan ed. 1996) (discussing the influence historians have always had on nationalist ideologies and secessionists claims).

134. This expression describes francophones of French origin who arrived in Canada under the French regime in the 17th and the 18th centuries.

identify. If this does not make Quebec nationalism inherently exclusive or illiberal, it nevertheless explains the difficulty the secessionist movement experiences in crossing ethnic boundaries.

Bearing this in mind, what impact could the Supreme Court's judgment in the *Quebec Secession Reference* have on the secessionist narrative and on the conception of Quebec identity it grounds? Although it would endow legal discourse with too much power to pretend that the Court's judgment will substantially affect Quebec's dominant narrative, this judgment nevertheless forces nationalist Quebecers and, a fortiori, secessionists, to question the foundations of their identity. Far from monolithic and stable, this identity is, on the contrary, multi-faceted and rapidly shifting.[135] As such, the Supreme Court's judgment is a kind of acid-test, in that it seems to say to nationalists as well as to secessionists, "*Your narrative is legitimate, but it is just that, a narrative. And other segments of the Quebec population also have narratives that cannot be so easily disregarded. Historical events may have created a special bond between you, but while you were participating in the creation of your nation by elaborating a set of myths, you may have willfully blinded yourself to the existence of equally legitimate but competing narratives. This, you can do no more.*" In making that clear, the Court certainly minimized future abuses of legitimacy-based or democracy-based arguments.

All this is achieved by implicitly asking a fundamental question that can be captured in two simple words: "*Which people*?"[136] In other terms, which political unit will exercise the precious popular sovereignty? How to identify it? On what criteria should membership in a political community be determined?[137] Quite clearly, the road to legitimacy is not a one-way street, because the application of democratic theory to the possible secession of a component of a federal country may lead to different results depending on the

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135. *See* S. Simon, *National Membership and Forms of Contemporary Belonging in Québec*, *in* LANGUAGE, CULTURE AND VALUES IN CANADA AT THE DAWN OF THE 21ST CENTURY 121 (Ottawa: International Council for Canadian Studies/Carleton Univ. Press, A. Lapierre, ed. 1996). Ironically, the pluralization/fragmentation of Quebec's identity can be partly attributed to the Quiet Revolution, despite the nation-building dimension of that revolution. Hence a certain disenchantment easily perceptible in large segments of the Quebec society. For a very thoughtful study of that disenchantment, see L. DION, LA RÉVOLUTION DÉROUTÉE, 1960-1976 (Montréal: Boréal 1998).

136. The Supreme Court has carefully avoided commenting on the peoples that could be affected by a possible unilateral secession by Quebec and on the criteria that must be used to distinguish them, both from a legal and a non-legal perspective.

137. *See* Diane F. Orentlicher, *Separation Anxiety: International Responses to Ethno-Separatist Claims*, 23 YALE J. INT'L L. 1, 34-35, 44-62 (1998). For an examination of the answers given to the above questions by different theoretical streams, as well as a discussion of democracy, membership in political communitites, and the boundaries of these communities, see generally *id.* at 44-62.

perspective one privileges.[138] Should only those immediately concerned be consulted? Or should all those affected in one way or another be consulted?

Moreover, how can the views of the "people" be expressed?[139] Can they express their views by voting directly or by being represented by their elected representatives? Assuming there is a direct vote, when will this vote be considered truly democratic? Other than the parameters set by the Supreme Court on the need for a clear majority on a clear question, are there any other considerations that should be taken into account? For example, is it truly democratic to hold many referenda in a relatively short period of time, where "[t]he government organizes a referendum, but is ready to nullify it as many times as it is needed, that is, until the electorate's vote meets the government's wishes or expectations?"[140] I doubt it. A government gambling on the population's constitutional fatigue to get the results that it wants, through the use of multiple referenda in a short period of time, actually undermines, rather than reinforces, democracy. Just as placing too much emphasis on the text of the law at the expense of its spirit may undermine the rule of law, democratic or electoral harassment is also likely to undermine democracy itself.

Furthermore, the Supreme Court's opinion in the *Quebec Secession Reference* questions the Hegelian rhetoric of normality that is recurrent in the secessionist narrative and that purports to present statehood as the natural or normal "destination" of the Quebec people,[141] as distinguished here from the Canadian people. The Court, however, also questions federalists' use of this rhetoric. Indeed, by recognizing the legitimacy of a secessionist attempt under certain conditions, the Court acknowledges what Diane Orentlicher calls the "historical contingency"[142] of all states, including established states such as Canada. Indeed, far from being "natural" entities, states are modern artifacts[143] that rely on and produce myths.[144] The Court's decision

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138. The Supreme Court made this clear when it stated that:

> [t]he relation between democracy and federalism means, for example, that in Canada there may be different and equally legitimate majorities in different provinces and territories and at the federal level. No one majority is more or less "legitimate" than the others as an expression of democratic opinion, although, of course, the consequences will vary with the subject matter.

Reference re Secession of Quebec, [1998] 2 S.C.R. 217, at para. 66.

139. *See* Orentlicher, *supra* note 137, at 34.

140. J. Freund, *Préface*, *in* LES THÉORIES DE L'EXCLUSION: POUR UNE CONSTRUCTION DE L'IMAGINAIRE DE LA DÉVIANCE 11 (Paris: Méridiens Klincksieck, M. Xiberras ed., 1994) (author's translation).

141. G.F. HEGEL, LEÇONS SUR LA PHILOSOPHIE DE L'HISTOIRE 22 (Paris: Vrin, 1987 (trad. J. Gibelin)).

142. Orentlicher, *supra* note 137, at 10.

143. M. CHEMILLIER-GENDREAU, HUMANITÉ ET SOUVERAINETÉ: ESSAI SUR LA FONCTION DU DROIT INTERNATIONAL 20-23 (Paris: La Découverte 1995).

144. *See* ERNST CASSIRER, THE MYTH OF THE STATE (New Haven: Yale Univ. Press 1946).

undermines the legitimacy of arguments based on a strict application of constitutional law that denies all possibilities of peaceful secession. As previously noted, the rule of law requires more than the blind and mechanical application of legal rules, however constitutional they may be. In that regard, the Supreme Court demonstrated a complex understanding of both the usefulness and the limits of law and legal discourse.

The Court also forces Canadians outside Quebec to question themselves about their definition of the Canadian people. It should be noted at this stage that the monolithic definition of identity that is adopted by some nationalist Quebecers is echoed more frequently outside Quebec by the assertion of an equally monolithic Canadian identity.[145] Their adherence to the credo "one country, one nation" makes it impossible for all those, including many Quebecers, who are "Canadians through being Quebecers," to use Charles Taylor's words, to feel accepted and respected within the Canadian political community.[146] This, in turn, only fuels secessionist feelings in Quebec.

In sum, it is quite remarkable to see how few *answers* the Supreme Court gives in its opinion in the *Quebec Secession Reference*. For the most part, the court is content to ask questions of all the parties involved. Ultimately, its opinion raises doubts about the mythology of a possible definitive solution to the identity crisis of Quebec and Canada. In fact, it is fair to construe the Supreme Court's opinion as acknowledging that, whatever happens, neither Canada nor Quebec are likely to experience in the near future any kind of

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145. This monolithic conception of the Canadian identity has emerged in parallel to another one, institutionalized by the Canadian state along with bilingualism, that depicts the country as a multicultural mosaic. *See Canadian Multiculturalism Act*, R.S.C. 1985, c. C-18.7 and Section 27 of the *Canadian Charter of Rights and Freedoms*, *supra* note 54, for examples of the institutionalization of multiculturalism in Canada.

146. This is not to mention the demonization of Quebec nationalists and secessionists in some Canadian circles. Indeed, despite the democratic nature of Quebec nationalism and secessionism, intolerance towards people who express nationalist or secessionist opinions seems to increase outside Quebec. For example, in 1998, a crisis erupted in Ottawa after the appointment as CEO of the new Ottawa Hospital of a former Parti québécois candidate, David Levine, who also happened to be a well-respected hospital manager. For Levine's opponents, his first sin was that he had been a candidate, in 1979, of a secessionist party and his second sin was that, as an anglophone, he was seen as a "traitor" to Canada, even though he had not been involved in partisan politics for twenty years. Demonstrations during Board of Trustees' meetings were organized by Levine's opponents, who asked for his immediate resignation or dismissal. They were backed by the popular press and, to some extent, by politicians such as Ontario Premier Mike Harris. Those who defended Levine's appointment, not only because of his competency to fill the CEO position, but also on freedom of opinion and freedom of expression grounds, were themselves characterized as "closet separatists." Ultimately, the hospital's board maintained its decision to hire Levine and the crisis faded. However, this incident showed the limits of tolerance in a society that praises itself on being tolerant. It would be too easy to dismiss these events as caused by a minority of extremists. Mainstream media and elected politicians did participate in what could be characterized as a hate propaganda campaign against everyone deemed "un-Canadian." For a very good analysis of this crisis, see R. MARTIN, THE DAVID LEVINE AFFAIR: SEPARATIST BETRAYAL OR MCCARTHYISM NORTH? (Halifax: Fernwood Publishing 1998).

"unbearable lightness of being."[147] Within the context of Canada's constitutional *zeitgeist*, where hard-liners from both sides seem increasingly inclined to advocate the mutilation of multiple identities, the Court's opinion is a worthwhile contribution to a more complex approach of Canada's existential crisis.

CONCLUSION

Although well-received both inside and outside the legal community, the Supreme Court's opinion in the *Quebec Secession Reference* nevertheless drew criticism in some circles. The sharpest attacks concerned the Court's approach to the dialectical relation between the juridical realm and the political realm. From a domestic constitutional law perspective, as opposed to an international law perspective, this criticism can be summarized as follows:

> This is not law; this is politics. The Court invents the law. The Court had just to answer "No," or to say that the unanimity of the federal government and all provinces is necessary to effect the kind of constitutional changes that the secession of a Canadian province would entail. Moreover, the Court had no business identifying some fuzzy organizing meta-principles of the Constitution when there is a constitutional text that expressly provides for amending formulas. Conversely, it had no business finding a duty to negotiate when the text does not expressly mention such a duty. Ultimately, the law as described and applied by the Court in the Quebec Secession Reference is so vague that it is of no help for the future. In fact, the Court only added an extra dose of uncertainty to a situation that badly needed to be clarified. From a situation of relative legal uncertainty we have moved towards a situation of extreme legal uncertainty.[148]

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147. MILAN KUNDERA, THE UNBEARABLE LIGHTNESS OF BEING (Michael Henry Heim, trans., New York: Harper & Rowe 1984).

148. I will not refer to any specific work criticizing the Court's opinion essentially because, at the time of this writing, no *scholarly* article had been published about it. Neither will I make any specific reference to scholarly articles still unpublished at the time of this writing, but published at the time of proof reading. Here are the references to these articles, which all provide interesting perspectives on the Secession Reference: J. LeClair, *Impoverishment of the Law by the Law: A Critique of the Attorney General's Vision of the Rule of Law and the Federal Principle*, 10:1 CONST. F. 1 (1998); B. Ryder, *A Court in Need and A Friend Indeed: An Analysis of the Arguments of the* Amicus Curiae *in the Quebec Secession Reference* 10:1 CONST. F. 9 (1998); R.A. Young, *A Most Politic Judgment*, 10:1 CONST. F. 14 (1998); D. Greschner, *The Quebec Secession Reference: Goodbye to Part V?*, 10:1 CONST. F. 19 (1998); A.C. Cairns, *The Quebec Secession Reference: The Constitutional Obligation to Negotiate*, 10:1 CONST. F. 26 91998). Therefore, my "summary" of the criticism it drew is based on various articles published in newspapers by

I disagree with this line of argument, essentially because of the concept of law underlying it. First, it is based on the worn-out postulate of a radical differentiation between social sub-systems, such as law and politics,[149] a postulate that is simply inaccurate. In any event, even if it were accurate, it would only be as an ideal-type in the Weberian sense. Second, it neglects the specific nature of Canadian constitutional law, which, besides its written text, includes many unwritten rules and principles, as noted earlier. As such, this argument says a lot about the theory of interpretation to which its proponents adhere. It must be restated here that the Constitution of Canada is silent as to the right of a province to secede, but this silence almost becomes vocal, in that it begs for some degree of judicial interpretation, rather than a mere mechanical application of a law deemed to be perfectly clear and unambiguous.

Third, the argument has a distinctively Tartuffian[150] flavour, in that it refuses to acknowledge that law, and constitutional law in particular, always has a political component, always involves policy choices, and always entails a certain degree of judicial creativity. Moreover, the fact that the Court took into account the global political context and moderately ventured into "what ifs" is by no means unusual or inappropriate.[151] On the one hand, most "political components" of the judgment are not made part of positive law.[152] On the other hand, the evolution of Canadian constitutional law has always been influenced by the social and normative contexts in which disputes arose. In fact, recent surveys of the Supreme Court's case law on the federal division of powers and the *Canadian Charter of Rights and Freedoms* have shown that the Court has always tried to respond in its decisions to the expectations of

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lawyers, political scientists, economists, or editorialists. A few scholars had, however, published more thorough articles about the Quebec Session Reference at the time of this writing. *See*. USHER, *supra* note 110; M. Nemni, *La légitimité selon la Cour suprême*, 26(4) CITÉ LIBRE 22 (1998); P.H. Russell, *La décision de la Cour suprême: une leçon de démocratie*, 26(4) CITÉ LIBRE 31 (1998). That said, I have not included in my "summary" the type of criticism that denies any legitimacy to the Supreme Court's decision in the *Quebec Secession Reference*, essentially by depicting the Court as the obedient agent of the federal government. As examples of that line of criticism, see Josée Legault, *How to Deny Quebec's Right to Self-determination*, THE GLOBE & MAIL (Toronto) Aug. 21, 1998, at A19; M. Mandel, *Une cour au service du gouvernement canadien*, LE DEVOIR (Montréal) Oct. 1st, 1998, at A9. Suffice it to say that while it is not surprising to see the Court trying to preserve the constitutional order it is institutionally responsible for enforcing, it is highly simplistic to depict it, without nuance, as the wilful servant of the federal government.

149. On the relative de-differentiation of social sub-systems in contemporary societies, see G. Gagné, *Les transformations du droit dans la problématique de la transition à la postmodernité*, 33 CAHIERS DE DROIT 701, 716 (1992).

150. This neologism obviously refers to Molière's Tartuffe. *See* MOLIÈRE, TARTUFFE (Christopher Hampton, trans., London: Faber & Faber Ltd. 1984).

151. This is especially true in the context of a reference procedure, where there is no adjudication of rights, strictly speaking, and where, as a result, courts enjoys more latitude.

152. *See* Morissette, *supra* note 103, at 4.

various audiences, both within and outside the legal community,[153] in view of maintaining its own legitimacy and, ultimately, that of the federal state.

Finally, any analysis of the Court's opinion in the *Quebec Secession Reference* and of its reliance on meta-principles is ultimately linked to one's perception of the courts' role in post-modern constitutional democracies and, more specifically, of their role in ensuring legal security. As noted earlier, the Court has been criticized for leaving too many questions unanswered or for relying on principles that are supposedly too vague, thereby creating, rather than reducing, legal uncertainty. However, while legal security undoubtably remains a core element of a regime governed by the rule of law, one should not to equate legal security with legal rigidity. As argued elsewhere,[154] since constitutional texts often express concepts with very broad wording that is inherently vague, and since Courts simply cannot escape being influenced both by factual and normative contexts in which disputes arise and by the expectations of their various audiences, then it should probably be more appropriate to describe their role with respect to the interpretation of constitutional instruments as producers of "positive judicial policies" rather than "positive law." In no way does this mean that their interpretation is unprincipled; it only acknowledges the fact that, beyond the formalism and the naïveté of some positivist depictions of their role, modern courts act more like managers of a relative legal uncertainty than as producers of absolute legal security.

In fact, if the Supreme Court can be faulted for something in its judgment on the *Quebec Secession Reference*, it is in its treatment of issues pertaining to international law.[155] There are at least two of the Court's findings that seem debatable in this regard. The first is a jurisdictional issue regarding the extent of the Court's power to decide the second question posed by the federal government, which, despite the Court's finding, really looked like a question of pure international law.[156] Without assessing the merits of the Court's

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153. These qualitative surveys have been conducted by Professor Andrée Lajoie. Based on their results, Lajoie has proposed a very interesting theoretical analysis of the judicial production of the law that refines Chaim Perelman's theory of interpretation based on the concept of "audiences" and blends it with Gérard Timsit's "systemal" theory of the law. *See* A. LAJOIE, JUGEMENTS DE VALEURS (Paris: Presses Universitaires de France 1997).

154. JEAN-FRANÇOIS GAUDREAULT-DESBIENS, LA LIBERTÉ D'EXPRESSION ENTRE L'ART ET LE DROIT 250 (Québec/Montréal: Presses de l'Université Laval/Liber 1996).

155. *See generally* S. J. Toope, *Case Comment on the Quebec Secession Reference*, 93 AM. J. INT'L. L. (forthcoming 1999) (criticizing the Supreme Court's approach on the interplay between international and domestic law, as well as the Court's understanding of the use of persuasive authoity in international law).

156. For an article supporting the Court's lack of jurisdiction over this second question, see Y. Le Bouthillier, *La Cour suprême du Canada peut-elle répondre à une pure question de droit international dans le cadre du renvoi sur la sécession unilatérale du Québec?*, 28 REVUE GÉNÉRALE DE DROIT 431

decision to answer this question, the Court appears to be glossing too easily over this problem. Second, at a more substantial level, one could fault the Court for adopting a rather simplistic view of the contemporary international legal framework governing secessionist claims. More specifically, its description of the legal framework governing the accession to statehood betrays an analysis that is, at best, traditionalist, and that tends to ignore more recent developments, such as in the former Yugoslavia, that *may* have affected international legal normativity.[157] That said, these possible weaknesses in the Supreme Court's opinion in the *Quebec Secession Reference* do not vitiate its overall quality.

Let me conclude with a few words about sponges—yes, sponges. Following French philosopher Gaston Bachelard, I will use the word "sponge" as a metaphor for concepts, ideas, or principles that, when used uncritically, absorb complexity and make it disappear.[158] Although valuable in themselves, these concepts, ideas, or principles are used to close discussion instead of fostering intellectual inquiry. They blind us to the existence of other equally pertinent concepts or conflicting realities. In short, they make inherently problematic things unproblematic. As such, they serve as epistemological obstacles.

One could legitimately ask what link there is between sponges and the Supreme Court's opinion in the *Quebec Secession Reference*. The answer is quite straightforward. By raising the problems associated with abusive and totalizing applications of both democracy and the rule of law, the Supreme Court helped in removing, or at least in undermining, the credibility of these concepts in their reductionist incarnation as epistemological obstacles. In a way, simply by raising doubts as to how these concepts are used and abused in the context of Canada's existential debate, the Court may have weakened the impact of some intellectual "sponges." As a result, the *Quebec Secession Reference* will probably contribute, although modestly, to circumscribing the effects of the rhetoric of denial that is widespread both in and outside of Quebec in relation to the definition of political communities and identities present in the Canadian territory.

Moreover, the opinion puts in place some procedural and substantive guidelines which are likely to elicit respect for the other, to entice constitutional actors to listen to each other, and eventually to create a climate

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(1997).

157. On the "implosion" of the international legal framework governing secessionist claims following events in Eastern Europe, see Orentlicher, *supra* note 137, at 62-63; CHEMILLIER-GENDREAU, *supra* note 143, at 27-29.

158. Bachelard used that metaphor to discuss the effects of epistemological obstacles. *See* BACHELARD, *supra* note 6.

that will foster a much needed dialogue.[159] As such, the judgment may well pacify Canadian constitutional politics.[160] However, what remains to be seen is the impact of the judgment on both internal and external legal cultures and on constitutional consciousness in Canada. To what extent will it be appropriated by various groups, both in legal and non-legal fora? What also remains to be seen is its impact in the international sphere, and in shaping an international law framework that seems rather shaken after its recent Eastern European experience.

The Supreme Court's judgment in the *Quebec Secession Reference* does not propose any magical solution to Canada's existential crisis. It may also be legitimately criticized for saying too much, and at the same time for saying too little. However, despite its flaws and silences, it asks the right questions and calls upon all Canadians to reflect on their concept of identity, and their ideas of Canada. Moreover, it invites them not to blind themselves to Canada's intrinsic complexity. This is indeed a worthwhile contribution.

159. On this much-needed dialogue, see A.C. Cairns, *Why Is It So Difficult to Talk to Each Other?*, 42 McGILL L.J. 58 (1997).

160. *See generally* Morissette, *supra* note 103.