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## A Court in Need and a Friend Indeed: An Analysis of the Arguments of the Amicus Curiae in the Quebec Secession Reference

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# A COURT IN NEED AND A FRIEND INDEED: AN ANALYSIS OF THE ARGUMENTS OF THE *AMICUS CURIAE* IN THE QUEBEC SECESSION REFERENCE

Bruce Ryder

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## INTRODUCTION

The *amicus curiae* took on a daunting challenge in assuming the task assigned to him by the Supreme Court of Canada in the *Quebec Secession Reference*.<sup>1</sup> In agreeing to fill the gap left by the absence of the Quebec government from the proceedings, and in presenting arguments opposed to the positions taken by the Attorney General of Canada, Maître André Joli-Coeur confronted a legal deck stacked against him. The federal government framed the reference questions in such a way as to minimize the risk that it would get answers that it did not like. The questions were aimed directly at the legal achilles heel of the sovereignty movement, namely, that their project prior to and following the 1995 referendum had relied ultimately on the possibility of pursuing a unilateral declaration of independence, a rupture of the Canadian constitutional order.<sup>2</sup>

The vast majority of legal scholars agree that Quebec has no right to unilateral secession in domestic or international law.<sup>3</sup> It came as no surprise, then, that the Supreme Court's opinion in the *Secession Reference* dismissed all of the *amicus*' arguments in short order.

What is perhaps more surprising is that the authority of the Supreme Court's opinion was nevertheless quickly accepted by the government of Quebec. Many of the arguments put forward by the *amicus* had formed the basis of the Quebec government's refusal to participate in the proceedings. Similarly, the *amicus* presented the same arguments used by sovereignists to portray the unilateral path to sovereignty as legitimate and ultimately lawful.

In this comment, I will briefly canvass the *amicus*' arguments and the Supreme Court's response to them. Then I will explore how the Supreme Court was able to bring sovereignists into a conversation framed by its opinion, at the same time as it was pulling the legal rug they had previously relied upon out from underneath them.

## ARGUMENTS OF THE *AMICUS CURIAE*

On the distinctly unfriendly legal terrain presented by the reference questions, the friend of the court pursued two basic strategies in his submissions.

The first strategy was to argue that the Supreme Court should not answer the questions. Me Joli-Coeur argued that the Court should refuse to issue an opinion because the questions were too theoretical,<sup>4</sup> too political,<sup>5</sup> too hypothetical,<sup>6</sup> were concerned solely with international law,<sup>7</sup> and, in any case, federal and provincial laws conferring the power to hear references on the Supreme Court and provincial courts of appeal, respectively, are unconstitutional.<sup>8</sup>

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<sup>1</sup> *Reference re Secession of Quebec* (1998) 161 D.L.R. (4th) 385 (all further paragraph references in the text are to this decision).

<sup>2</sup> Section 26 of Bill 1, *An Act respecting the future of Québec*, 1st Sess., 35th Leg., Québec, 1995, would have authorized the National Assembly to unilaterally proclaim sovereignty after a Yes vote in a referendum if negotiations with the government of Canada subsequently "proved fruitless". See also J. Parizeau, "La déclaration unilatérale est indispensable" *Le Devoir* (16 septembre 1997) A11.

<sup>3</sup> See, for example, T.M. Franck et al., "L'intégrité territoriale du Québec dans l'hypothèse de l'accession à la souveraineté" in Commission d'étude des questions afférentes à l'accession du Québec à la souveraineté, ed., *Les attributs d'un Québec souverain: Exposés et études, Vol. 1* (Québec: National Assembly, 1992) 377 at 419-25; S. Williams, *International Legal Effects of Secession by Quebec* (Background Studies of the York University Constitutional Reform Project, Study No. 3) (North York, Ont.: York University Centre for Public Law and Public Policy, 1992); N. Finkelstein et al., "Does Québec Have a Right to Secede at International Law?" (1995) 74 Can. Bar Rev. 225; J. Woehrling, "Les aspects juridiques d'une éventuelle sécession du Québec" (1995) 74 Can. Bar Rev. 293; J. Webber, "The Legality of a Unilateral Declaration of Independence under Canadian Law" (1997) 42 McGill L.J. 281.

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<sup>4</sup> Mémoire de l'*amicus curiae* (18 décembre 1997) paras. 28-37.

<sup>5</sup> *Ibid.*, paras. 38-41.

<sup>6</sup> *Ibid.*, paras. 42-45.

<sup>7</sup> *Ibid.*, paras. 46-53.

<sup>8</sup> *Ibid.*, paras. 8-23. The argument in the factum focuses on the constitutional validity of s.53 of the *Supreme Court Act*. In his responses to the written questions directed to him by the justices, Me Joli-Coeur took the position that the provincial statutes authorizing references were also invalid (Réponses écrites aux questions posées par la Cour Suprême du Canada à l'*amicus curiae*, 6 mars 1998, question 1).

The Court summarily dismissed each of these preliminary objections to its jurisdiction. The questions were justiciable: they had a sufficient legal component and were precise enough to permit a legal answer (paras. 28, 31). The reference jurisdiction was re-affirmed since the Canadian constitution lacks a rigid separation of powers that would prohibit the Court from issuing advisory opinions (para. 15). The argument that the Court should refrain from addressing an issue of international law was characterized as “groundless” (para.22). The legal rights and obligations of the government of Quebec in relation to secession could not be determined without a consideration of international law (para. 23). The position taken by the government of Quebec in the *Bertrand* and *Singh* proceedings in 1995 and 1996 — that the process of Quebec’s accession to sovereignty was purely a matter of international law and beyond the jurisdiction of domestic tribunals<sup>9</sup> — was thus firmly rejected.

Me Joli-Coeur’s second strategy for avoiding a contest he could not win was to answer different questions than those presented to the Court. Instead of pressing the argument that Quebec has a *right* of unilateral secession, and the federal government a corresponding obligation to facilitate the exercise of that right, Me Joli-Coeur’s submissions stayed for the most part on firmer ground. He argued that a legally effective unilateral secession is possible and is not prohibited by international law.<sup>10</sup> He conceded that the international right of all peoples to self-determination did not give the Quebec people a right to secede.<sup>11</sup> However, he argued, the unilateral establishment of a sovereign Quebec state will be recognized at international law if Quebec can establish effective control over its territory.<sup>12</sup> Domestic constitutional law, he said, eventually would have to yield to the reality of an effectively sovereign Quebec state.<sup>13</sup> When pushed, in questioning from the Court, to reveal details of his position — for example, how *le principe d’effectivité* would operate, and how it would deal with the competing rights of self-determination of the multiple peoples within Quebec (and Canada) — Me Joli-Coeur reverted to his first strategy (as counsel for

the Attorney General of Canada did in response to similarly difficult questions directed to him): the Court’s questions were too hypothetical, too political, or beyond the Court’s jurisdiction.<sup>14</sup>

The heart of the *amicus*’ submissions can be summarized as follows: Quebec may proceed unilaterally to accomplish the secession of Quebec from Canada by virtue of the principle of effectivity. A secession will be effective when the government of Quebec exercises all state authority over the territory of Quebec. The establishment of effective and exclusive sovereignty will be founded on the democratic legitimacy of a majority vote of the Québécois people exercising their right of self-determination. Me Joli-Coeur’s arguments were not novel or unusual in this regard; the principle of effectivity has been suggested as the legal basis of Quebec’s accession to sovereignty by a range of scholars. Frémont and Boudreault, for example, have argued that the Canadian constitution does not apply to secession and thus Quebec “serait alors lui-même condamné à procéder à sa propre révolution.”<sup>15</sup> Like the *amicus curiae*’s submissions, sovereigntist scholarship in recent years has shifted from reliance on a right of self-determination to reliance on the alleged legitimacy and eventual legality of an effective assertion of sovereignty.<sup>16</sup>

The view that a unilateral secession can lead ultimately to the establishment of a new sovereign state recognized by other members of the international community is as uncontroversial as the federal government’s position that a unilateral process would amount to an illegal rupture of Canadian constitutional continuity. Should the Quebec government and people choose to pursue the unilateral path to sovereignty, however, we are all in for a perilous journey. If Quebec were to follow the *amicus*’ approach and attempt to assert effective control to achieve international recognition of an illegal secession, and if the federal government were to continue to take the position that it has an obligation to uphold the existing constitutional order until a negotiated settlement is reached, then the spectre of civil disorder and violence would loom large. The failure to even acknowledge the risk of such disastrous consequences accompanying a unilateral secession was the most troubling aspect of the *amicus*’ submissions.

<sup>9</sup> The *Bertrand* and *Singh* actions, and the Quebec government’s motions to dismiss them, were described in the Attorney General of Canada’s factum at paras. 18-50. See *Bertrand v. Bégin* (1995) 127 D.L.R. (4th) 408 (Que. S.C.); *Bertrand v. Québec (Attorney General)*, (1996) 138 D.L.R. (4th) 481 (Que. S.C.); motion to dismiss, *Singh v. Attorney General of Québec* (30 April 1996) Montreal: 500-05-011275-953 (Sup. Ct.).

<sup>10</sup> Mémoire de l’*amicus curiae*, paras. 75-81.

<sup>11</sup> Mémoire de l’*amicus curiae*, paras. 92-112; Addendum au mémoire de l’*amicus curiae*, 5 février 1998, paras. 14-18. In his oral responses to the Court’s questions, Me Joli-Coeur put more bluntly what his written submissions said more obliquely: “nous ne croyons pas avoir soumis à la Cour que le droit à l’autodétermination égalait droit à la sécession” (Réponses écrites aux questions posées par la Cour Suprême du Canada à l’*amicus curiae*, question 15).

<sup>12</sup> Mémoire de l’*amicus curiae*, paras. 87-91, 109-112.

<sup>13</sup> *Ibid.*, paras. 73, 114.

<sup>14</sup> Réponses écrites aux questions posées par la Cour Suprême du Canada à l’*amicus curiae*, question 10.

<sup>15</sup> J. Frémont et F. Boudreault, “Supraconstitutionnalité canadienne et sécession du Québec” (1997) 8 N.J.C.L. 163 at 203.

<sup>16</sup> See, for example, H. Brun & G. Tremblay, *Droit constitutionnel*, 2d ed. (Cowansville, Que.: Yvon Blais, 1990) at 236-37; J. Woehrling, “Les aspects juridiques d’une éventuelle sécession du Québec” (1995) 74 Can. Bar Rev. 293 at 314-22; D. Turp, “Supplément” in J. Brossard, *L’accession à la souveraineté et le cas du Québec: conditions et modalités politico-juridiques*, 2e ed. (Montreal: Presses de l’Université de Montréal, 1995) at 800-801.

Moreover, the reliance on the principle of effectivity raises a host of practical and theoretical problems, some of them highlighted in the written questions members of the Court directed at the *amicus*. One basic problem is that the principle of effectivity will come into operation only when the government of Canada has ceased to exercise sovereign authority in Quebec. When asked by the Court how, when and according to what principles the federal government should or must withdraw, the *amicus* had nothing to say (other than that the question itself is beyond the jurisdiction of the Court).<sup>17</sup> This question highlights the difference between unilateral secession as an initially illegal course of action that might become legally effective if a new regime can exercise exclusive sovereignty, and unilateral secession as a right that imposes corresponding obligations on the government of Canada. As Professor Crawford stated in his reply to the *amicus*' experts, "international law permits the metropolitan state to oppose [secession] by all means consistent with non-derogable human rights and humanitarian law, permits the conduct [of secessionists] to be classified as criminal, and prohibits other states from providing any material assistance to [the secessionists]."<sup>18</sup> Moreover, the Attorney General of Canada took the position before the Court that the federal government has an obligation to ensure respect for the existing constitution.<sup>19</sup> Unless the government of Canada changes its position, the principle of effectivity would only come into play if the exercise of Canadian sovereignty is ousted by the use of force.

Another basic question raised by the *amicus*' position is whether *any* group can rely on the principle of effectivity to secede unilaterally from an established state such as Canada (or a future sovereign Quebec, for that matter). How does the principle espoused by Me Joli-Coeur contain such anarchic possibilities?

Me Joli-Coeur did not rely on the principle of effective control alone. He implicitly acknowledged that some secessionist attempts at establishing control through revolutionary means are worthy of respect and others properly resisted by the state. In Quebec's case, he argued that the assertion of effective control would be legitimized by the Québécois people's expression through democratic means of their right of self-determination. In other words, recourse to the principle

of effectivity is particularly legitimate when a people has exercised its right of self-determination by putting its political future to a democratic vote. Me Joli-Coeur conceded that the right of self-determination cannot be equated, in Quebec's case, to a right to secede.<sup>20</sup> But, he seemed to suggest, the right of self-determination may provide moral and political legitimacy to any attempt to assert effective control if secession is the choice of the people. In that sense, he says, the exercise of the right of self-determination by "le peuple québécois fait partie du processus de la sécession éventuelle du Québec."<sup>21</sup>

This position begs an important question: who exactly is "le peuple québécois"? Is there a single people within the province of Quebec? In the *amicus*' submissions, as in political discourse in Quebec more generally, there is considerable slippage between civic and ethnic understandings of the Quebec people. That is, sometimes "le peuple québécois" includes all persons living in the province, at other times it seems to include only Quebecers who are of French Canadian heritage. Pressed to clarify his position on this issue by the Court, Me Joli-Coeur conceded that there is not a single people living in Quebec. To his credit, and in contrast to the official Parti Québécois position, he said that the eleven Aboriginal nations in Quebec have the same rights as "le peuple québécois" to unilateral secession relying on the principle of effectivity as an expression of their right of self-determination.<sup>22</sup>

Further, when asked if there is a Canadian people, Me Joli-Coeur took the uncontroversial position that there is no single Canadian people. Rather, he said, there is at least an English-Canadian people, a Québécois people, Aboriginal peoples, and an Acadian people.<sup>23</sup> He acknowledged that all peoples have recourse to the same rights at international law. According to the *amicus*' own logic then, Aboriginal peoples and representatives of the English-Canadian people within Quebec may choose to exercise their democratic right to stay in Canada. The principle of effectivity, when it draws its legitimacy from a people's exercise of the right of self-determination, leads directly to partitionist scenarios given that Quebec, like the rest of Canada, is a multinational society.

Therefore, far from being compatible with the rule of law, as the *amicus* contended,<sup>24</sup> reliance on the principle of effectivity as the sole legal norm relevant to the achievement of sovereignty leads to a situation where we would have two competing regimes, one legal

<sup>17</sup> Réponses écrites aux questions posées par la Cour Suprême du Canada à l'*amicus curiae*, question 10.

<sup>18</sup> James Crawford, *Response to Expert Reports of the Amicus Curiae*, 12 January 1998, para. 17.

<sup>19</sup> The Attorney General's factum and reply contain no such statement. However, when asked by the Court whether the government of Canada is required to oppose secession, the Attorney General wrote that "it is the duty of the Government of Canada... to respect and uphold the Constitution of Canada and to preserve and maintain the rule of law" (Written Response of the Attorney General of Canada to Questions from the Supreme Court of Canada, 6 March 1998, para. 53).

<sup>20</sup> *Supra* note 11.

<sup>21</sup> Mémoire de l'*amicus curiae*, para. 112.

<sup>22</sup> Réponses écrites aux questions posées par la Cour Suprême du Canada à l'*amicus curiae*, question 14 et question 18.

<sup>23</sup> Réponses écrites aux questions posées par la Cour Suprême du Canada à l'*amicus curiae*, question 21.

<sup>24</sup> Mémoire de l'*amicus curiae*, paragraphe 138; Duplique de l'*amicus curiae*, 2 février 1998, paras. 87-91.

and constitutional, the other illegal and unconstitutional, both claiming authority over the same territory and peoples, both with passionate supporters relying on the exercise of their right to self-determination and the view that international law eventually will recognize the victor in the struggle for effective control. This is a scenario fraught with risks of social, economic, and political disorder.

In light of these difficulties, it came as no surprise that the Supreme Court rejected the proposition that the principle of effectivity gives rise to a legal right to unilateral secession. The principle of effectivity, the judges said, "proclaims that an illegal act may eventually acquire legal status if, as a matter of empirical fact, it is recognized on the international plane." However, the subsequent condonation of an illegal act does not "retroactively create a legal right to engage in the act in the first place" (para. 146). The Court commented that while unilateral secession would therefore be initially illegal according to both domestic and international law, "this does not rule out the possibility of an unconstitutional declaration of secession leading to a *de facto* secession" (para. 155).

## ROAD MAP OR ROADBLOCK?

The government of Quebec moved to dismiss the *Bertrand* and *Singh* declaratory actions in 1995 and 1996, and declined to participate in the Supreme Court reference itself, on the grounds that domestic law was irrelevant to the process of secession. Prior to the hearing, both federalist and sovereigntist Quebec politicians asserted the right of the people of Quebec alone to determine their political future and urged the Supreme Court to decline to answer the questions or risk jeopardizing its remaining legitimacy in Quebec.<sup>25</sup> After the release of the opinion, the government of Quebec did not continue to reject the Court's authority. Instead, it immediately entered into a debate regarding the requirements and implications of the Supreme Court's opinion.<sup>26</sup> Given that the arguments of the *amicus curiae* were summarily dismissed, and that these arguments were the ones most commonly relied upon by sovereigntists prior to the release of the opinion, why has a sovereigntist government opted for this course?

In reality, the Parti Québécois government had no choice. It is one thing to object to the Supreme Court's

authority over the legal framework for secession ahead of time, and quite another to reject the Court's authority after the legal basis of the objection has been dismissed. Legality and legitimacy are intertwined, and the government of Quebec's hopes of garnering international support for sovereignty will not be improved if it openly flouts the Supreme Court's views on the legalities of secession.

Moreover, the Court's opinion contained a number of gaps and ambiguities that sovereigntists could exploit to portray it as a road map, rather than a roadblock as they had feared, to the achievement of their ultimate political goal. For one, the Court managed to avoid discussing the rigorous requirements for amending the constitution set out in Part V of the *Constitution Act, 1982*. This was so even though the negative answer to the first question necessarily entailed the conclusion that either (i) the unilateral amending procedure set out in section 45 of the Act does not apply to secession<sup>27</sup> or (ii) an unwritten amendment procedure applies to secession rather than the apparently exhaustive written rules set out in Part V. The federal government had urged the Court to consider and reject the applicability of section 45, and to not go any further in its investigation of the application of the written amending formulas.<sup>28</sup> Remarkably, there was no mention whatsoever of any of the amending procedures in the opinion.

This carefully constructed silence suggests that at least some members of the Court have doubts about whether Part V applies to secession at all.<sup>29</sup> The Court did agree that a lawful secession requires a constitutional amendment (para. 97). The statement that negotiations would "require the reconciliation of various rights and responsibilities by the representatives of two legitimate majorities, namely, the clear majority of the population of Quebec, and the clear majority of Canada as a whole" (paras. 93, 152) suggests that the Court may be envisioning a bilateral or binational amendment process far less cumbersome than the dictates of the 7/50 or unanimity procedures set out in sections 38 and 41 of Part V, respectively. By leaving such questions open, the Court dodged, for the time being, the

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<sup>25</sup> Parizeau, *supra* note 2; Bouchard, "Le dernier mot revient au peuple québécois" *Le Devoir* (13 février 1998) A11; O'Neill, "Ryan et Johnson dénoncent le renvoi en Cour suprême" *Le Devoir* (4 février 1998) A6.

<sup>26</sup> Séguin, "Ruling legitimizes sovereignty drive, PQ leaders say" *Globe and Mail* (21 August 1998) A7; Cloutier, "Péquistes et libéraux satisfaits" *Le Devoir* (21 août 1998) A1; Bouchard, "La démarche souverainiste est légitime" *Le Devoir* (22 août 1998) A9; Ducas, "La souveraineté est renforcée, croit Bouchard" *Le Devoir* (22 août 1998) A5.

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<sup>27</sup> This point was made at length in the factum of the Attorney General of Canada at paras. 99-115.

<sup>28</sup> *Ibid.* at paras. 116-7.

<sup>29</sup> These doubts are shared by some scholars. See F. Gélinas, "Les conventions, le droit et la Constitution du Canada dans le renvoi sur la 'sécession' du Québec: le fantôme du rapatriement" (1997) 57 *Revue du Barreau* 291; W. MacLauchlan, "Accounting for the Democracy and the Rule of Law in the Quebec Secession Reference" (1997) 76 *Can. Bar Rev.* 155; R. Howse and A. Malkin, "Canadians are a Sovereign People: How the Supreme Court Should Approach the Reference on Quebec Secession" (1997) 76 *Can. Bar Rev.* 186; Frémont et Boudreault, *supra* note 15.

accusation that the written amending procedures place Quebec in a straitjacket.<sup>30</sup>

Second, extrapolating creatively from underlying constitutional principles, the Court forged a new legal obligation that would be imposed on the other provinces and the federal government to negotiate with Quebec following a clear repudiation of the existing constitutional order. The duty to negotiate secession would be triggered by a vote of a “clear majority” of the population of Quebec on a “clear question” (para. 93); it would not arise if the expression of Quebecers’ democratic will is “fraught with ambiguities” (para. 100). The Court indicated that whether the threshold of “a clear majority on a clear question” has been met in a future referendum is a determination to be made by unspecified “political actors,” not the courts (paras. 100, 153).

Sovereignists naturally have found great comfort in the Court’s affirmation that secession is a legitimate goal and that, indeed, a clear referendum result places an obligation on the other parties to Confederation to negotiate secession in good faith. Premier Bouchard and former Premier Parizeau have insisted that the Supreme Court opinion legitimizes the process followed in 1995 and nothing need change in any subsequent referendum campaign.<sup>31</sup>

This is a highly selective reading of the Supreme Court opinion. In fact, the Court’s opinion suggests, without saying so directly, that the relevant “political actors” for determining what is a clear question and a clear majority are all of the parties that would be involved in negotiations, namely, “all parties to Confederation.” If the Quebec government does not reach an agreement with other Canadian governments on the question and the required majority ahead of time, then it will not be able to claim that all parties have an obligation to negotiate secession in good faith.<sup>32</sup>

In addition, the Court clearly expressed the opinion that a unilateral declaration of sovereignty would be illegal and secession negotiations extremely difficult. Therefore, the Court said, negotiations could not proceed on the assumption that secession inevitably

would be successfully accomplished: “such a foregone conclusion would actually undermine the obligation to negotiate and render it hollow” (para. 91). It follows that if the government of Quebec continues to suggest that secession would be a *fait accompli* following a clear referendum result, and continues to openly contemplate the prospect of unilateral secession in case negotiations reach an impasse, then the “other parties to Confederation” would be entitled to insist that they have no obligation to enter negotiations.

## CONCLUSION

Maitre Joli-Coeur struggled valiantly to make legal arguments to support a position contrary to that taken by the Attorney General of Canada in the *Secession Reference*. His submissions, however, accomplished only one thing: they revealed the weakness of the best available arguments in support of a legal right to unilateral secession. In this sense, the *amicus* proved to be a friend of the Court indeed. His contributions lent greater authority to the Court’s rejection of the legal arguments that had previously undergirded the unilateral component of sovereignist strategy leading up to the 1995 referendum. The defective legal underpinnings of this strategy have now been effectively exposed, and the debate shifted to the threshold conditions that would have to be met before a duty to negotiate secession in good faith arises. The justices should be applauded for crafting an opinion that seeks to minimize the risks of social disorder that would accompany any unilateral declaration of sovereignty and to maximize the chances of a negotiated, peaceful accommodation of the political aspirations of a clear majority of Quebecers clearly expressed in any future referendum. □

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Osgoode Hall Law School, York University. These comments, originally presented at the Joint Session of CALT/CLSA/CPSA, Congress of Social Sciences and Humanities, University of Ottawa, June 3, 1998, have been revised following the release of the Supreme Court of Canada’s opinion in the *Reference re Secession of Quebec*.

<sup>30</sup> See D. Greschner, “The Quebec Secession Reference: Goodbye to Part V?” (1998) 10 Constitutional Forum 19.

<sup>31</sup> Bouchard, *supra* note 26; Parizeau, “L’avis de la Cour suprême se fonde sur un malentendu qui prend sa source dans la ‘démonisation’ systématique des souverainistes” *Le Devoir* (3 septembre 1998) A9; Parizeau, “Et si les négociations échouaient?” *Le Devoir* (4 septembre 1998) A11.

<sup>32</sup> In his letter of August 25, 1998 to Premier Bouchard, the federal Minister of Intergovernmental Affairs, Stéphane Dion, wrote that “the federal government, among others, cannot surrender its responsibility to evaluate the clarity of a question which could result in the break-up of the country.” The full text of the letter can be found on the Ministerial website at <http://www.pco-bcp.gc.ca/aia/ro/doc/eaug2698.htm>.