The Law and Politics of Quebec Secession

Patrick J. Monahan

Osgoode Hall Law School of York University

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Abstract
This paper considers the various legal issues that would arise in the context of Quebec's secession from Canada, and attempts to situate these issues politically. The author argues that, under the current constitutional amending formula, Quebec secession would require the support of the federal Parliament as well as the unanimous consent of the provinces; he also suggests that it is extremely unlikely that this level of support would be attained. The paper goes on to explore the possibility of Quebec seceding from Canada through a unilateral declaration of independence (UDI), suggesting that the success or failure of a UDI would depend upon the ability of Quebec to exercise effective and exclusive control over its own territory and population. The author also argues that a Quebec UDI would almost certainly be contested by Canada, thus precipitating a costly contest for legal supremacy between the Canadian and Quebec governments. The legal, economic, and political uncertainty associated with two rival regimes would impose enormous costs on everyone involved, leading to author to conclude that a Quebec UDI is a legal possibility, but quite impractical and unacceptable in pragmatic political terms. The final section of the paper considers the implications of the recent proposals for joint political institutions between a sovereign Quebec and Canada, claiming that joint political institutions are unlikely to be created following sovereignty.

Keywords
Constitutional amendments; Canada; National self-determination; National territory; Quebec (Province)
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* Associate Professor, Osgoode Hall Law School. This article is based on the 1995 Pierre Genest Memorial Lecture, delivered at the York University Management Centre on April 19, 1995. A French version of the article has also been published: see "La sécession du Québec: considérations juridiques et politiques," in Choix: série Québec-Canada, vol. 1, no. 12 (Montreal: Institute for Research on Public Policy) 4.
I. INTRODUCTION

While law will obviously not determine the outcome of the current debate over Quebec’s status within Canada, it will certainly have an important impact on its resolution. Most of the key issues in the debate—including Quebec’s “right to secede” from Canada, its obligations in respect of the existing Canadian public debt, its claims to territorial integrity, and its ability to negotiate a political and economic association with Canada following secession—raise important legal questions.

Of course, it is highly unlikely that any of these highly politicized issues will ever be resolved by judges and courts. Moreover, given the novelty and unpredictability of the scenarios associated with the secession of a province from Canada, it is difficult to offer confident assertions as to the correct legal position on many of the questions in dispute. But careful analysis of the relevant legal issues is both appropriate and necessary. Law is always a critical variable in any political controversy, since it provides the framework within which political decisions will be made and affects the relative bargaining strength of the decision-makers. Moreover, legal arguments have significant political currency. Both the federalist and sovereigntist forces have devoted considerable time and resources in order to demonstrate
that their preferred outcome is supported by either domestic or international law.¹

This paper considers the various legal issues that would arise in the context of Quebec's secession from Canada, and attempts to situate these issues within the larger political context in which they would be resolved. The analysis falls into three parts. The first section examines the manner in which Quebec could secede from Canada in accordance with a duly-authorized constitutional amendment, proclaimed in accordance with the amending formula contained in Part V of the Constitution Act, 1982.² I argue that Quebec secession would require the support of the federal Parliament as well as the unanimous consent of the provinces, since it would fall under section 41 of Part V. I also argue that it is extremely unlikely that a constitutional amendment authorizing Quebec secession would attain this level of support.

The second section of the paper explores the possibility of Quebec seceding from Canada through a unilateral declaration of independence (UDI), as opposed to a constitutional amendment. I suggest that Quebec has no right to secede under international law. Nor would Quebec's current borders be guaranteed under international law if it attempted to unilaterally declare its independence from Canada. The success or failure of a UDI, therefore, would depend upon the ability of Quebec to exercise effective control over its own territory and population, and to exclude the authority of the Canadian government.

Against this legal background, the second section of the paper goes on to consider the manner in which political events might unfold if Quebec were to attempt to secede from Canada through a UDI. I argue that a Quebec UDI would almost certainly be contested by Canada, thus precipitating a costly contest for legal supremacy between the Canadian and Quebec governments. The legal, economic and political uncertainty associated with two rival regimes competing for authority and legitimacy would impose enormous costs on everyone involved. Even with assurances that sovereignty can be achieved with a minimum of

¹ One recent illustration is the legal opinion commissioned by the Quebec government from an American law firm suggesting that an independent Quebec would likely be able to accede to NAFTA: see D. Bernstein & W. Silverman, Advisory Memorandum Regarding the Effect of Independence of Quebec Upon Treaties and Agreement with the United States of America (legal opinion prepared by Rogers and Wells, New York, 7 March 1995). This prompted the Quebec Liberal Party to commission a legal opinion from an American law firm which came to the opposite conclusion: see C.N. Brower, Advisory Memorandum Regarding the Effect of Independence of Quebec upon Treaties and Agreements with the United States (legal opinion prepared by White and Case, Washington, D.C., 21 March, 1995).

² Being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 [hereinafter “Part V”].
economic dislocation, barely one-half of the Quebec population supports this option. It seems implausible to imagine that more than a small minority of Quebecers would be prepared to contemplate the major dislocations associated with a legal revolution. I conclude that a Quebec UDI is a legal possibility, but quite impractical and unacceptable in pragmatic political terms.

The final section of the paper considers the implications of the recent proposals for joint political institutions between a sovereign Quebec and Canada, as reflected in the agreement signed in June 1995 by the Premier of Quebec, the Leader of the Parti Action Démocratique, and the Leader of the Bloc Québécois. I suggest that joint political institutions are unlikely to be created following sovereignty, since they are not in the interest of either Quebec or Canada. In any event, the only manner in which such joint political institutions could be created would be through an agreement reached prior to the effective date of sovereignty. In other words, a Quebec UDI (which, by definition, is a declaration of sovereignty issued without Canadian consent) would effectively rule out the possibility of creating joint political institutions.

II. THE LEGAL CONTINUITY SCENARIO

Quebec's accession to sovereignty could occur in one of two possible ways. The first is through an amendment to the Constitution of Canada, in accordance with the procedure set out in Part V of the Constitution Act, 1982. The second possibility is a Quebec UDI, in which Quebec seeks to jump outside of the rules governing amendment of the Canadian Constitution and establish a new constitutional order based on a revolutionary break with existing law.

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3 This section builds on the analysis I developed in Cooler Heads Shall Prevail: Assessing the Costs and Consequences of Quebec Separation (Toronto: C.D. Howe Institute, 1995) [hereinafter Cooler Heads]. For a competing view on the issues examined in this section, see J. Woehrling, "Les aspects juridiques d'une éventuelle accession du Québec à la souveraineté," Choix: série Québec-Canada, 1-12 (June 1995) 25 [hereinafter "Les aspects juridiques"], and "Les aspects juridiques de la redéfinition du statut politique et constitutionnel du Québec" in Éléments d'analyse institutionnelle, juridique et démolinguistique pertinents à la révision du statut politique et constitutionnel du Québec, (Document de travail no. 2) (Québec: Commission sur l'avenir politique et constitutionnel du Québec, 1991) 1 [hereinafter Éléments d'analyse institutionnelle]. Professor Woehrling's analysis is considered in detail below.
A. Quebec Secession is Legally Possible

The Constitution of Canada is silent on the right of a province to secede from the federation. Yet the absence of any explicit reference to secession should not lead one to suppose that it cannot occur under the terms of the existing amending formula.

The province of Quebec is referred to repeatedly throughout the Constitution Act, 1867. The secession of Quebec would therefore require the amendment or repeal of these various provisions. Since all the provisions of the Constitution Act, 1867 are part of the “Constitution of Canada,” and since amendments to the “Constitution of Canada” can only be made in accordance with the amending formula in Part V, this formula must govern the secession of Quebec from Canada.

The more difficult question is not whether Quebec could secede in accordance with the existing amending formula, but how secession could occur. More specifically, which of the various procedures set out in Part V would apply in the case of the secession of Quebec?

B. Quebec Secession Would Require Unanimous Consent

Some authors have argued that the general amending formula in section 38 of the Constitution Act, 1982 would govern Quebec secession. Accordingly, on this view, Quebec secession could be accomplished with

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4 (U.K.), 30 & 31 Vict., c. 3. Quebec is referred to in, for example: section 5 (“Canada shall be divided into Four Provinces, named Ontario, Quebec, Nova Scotia, and New Brunswick”); section 6 (creating Ontario and Quebec out of the Parts of the former Province of Canada); sections 22 and 23(6) (providing for representation in the Senate from Quebec, and specifying certain requirements for Quebec Senators); section 40 (providing for Quebec representation in the House of Commons); section 71 (providing for the Legislature of Quebec, consisting of the Lieutenant Governor and of Two Houses); section 93(2) (providing for denominational school rights in the province of Quebec); and section 133 (providing for rights to use the English or the French Language in the Quebec Legislature and Courts of the province of Quebec).

5 See section 52(2) of the Constitution Act, 1982, supra note 2.

6 See, ibid. at section 52(3).

the consent of the Senate, the House of Commons, and the legislative assemblies of seven provinces with at least fifty percent of the total provincial population.

In my view, however, section 41 of the *Constitution Act, 1982* would govern the secession of Quebec from Canada. The secession of Quebec would appear to involve an amendment in relation to at least three of the five matters referred to in section 41, including:

1. the office of the Lieutenant Governor of Quebec (Section 41(a));
2. the use of the English and French language (Section 41(c)); and
3. the composition of the Supreme Court of Canada (Section 41(d)).

1. Lieutenant Governor of the province of Quebec—section 41(a)

The Constitution of Canada provides that executive power in each province shall be vested in a Lieutenant Governor. In addition to a general reference to the office of Lieutenant Governor in section 58, there are a number of specific references to the Lieutenant Governors of particular provinces, including the province of Quebec. Thus, section 71 of the *Constitution Act, 1867* provides that “[t]here shall be a Legislature for Quebec consisting of the Lieutenant Governor and of Two Houses, styled the Legislative Council of Quebec and the Legislative Assembly of Quebec.” (The office of Lieutenant Governor in Ontario,

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8 *Constitution Act, 1867*, supra note 4, s. 58.

9 The Legislative Council was abolished by the National Assembly in 1965, pursuant to its authority under section 92(1) of the *Constitution Act, 1867*, supra note 4, to amend “the Constitution of the province, except as regards the Office of Lieutenant Governor.” The Supreme Court of Canada noted the fact that a number of provinces had abolished their upper houses in *Re Upper House*, [1980] 1 S.C.R. 54 at 74. Although section 92(1) excepted from provincial authority the “Office of the Lieutenant Governor,” the abolition of an upper house did not diminish the role and function of the Lieutenant Governor in the legislative process, and it is presumed on this basis that the provincial actions fell within the scope of section 92(1). For a discussion, see Hogg, *supra* note 7 at 352-53. Section 92(1) was repealed in 1982.

10 *Constitution Act, 1867*, supra note 4, s. 69.
The office of the Lieutenant Governor of Quebec, an appointee of the federal government, would necessarily be abolished upon the secession of Quebec. This is so even though the draft bill declaring the sovereignty of Quebec makes no reference to the office of the Lieutenant Governor. The reason is that the Lieutenant Governor is an appointee of the government of Canada. Quebec cannot attain the status of a sovereign state, as is declared in section 1 of the Draft Sovereignty Bill, and permit executive power to reside in an appointee of a "foreign," i.e., Canadian government. Therefore, the declaration in section 1 of the Draft Sovereignty Bill that Quebec is a sovereign country is, in substance, an attempt to abolish the office of Lieutenant Governor.

It is clearly not open to any province to unilaterally abolish the office of Lieutenant Governor. Therefore, inasmuch as the secession of Quebec would entail the abolition of the Lieutenant Governor of the

\[11\] Manitoba Act, 1870, S.C. 1870, c. 3, s. 6.

\[12\] See Prince Edward Island Terms of Union (Order of Her Majesty in Council admitting Prince Edward Island into the Union, June 23, 1870), which provides that "the Dominion Government shall assume and defray all the charges for ... the salary of the Lieutenant Governor."

\[13\] Alberta Act, S.C. 1905, c. 3, s. 10.

\[14\] Saskatchewan Act, S.C. 1905, c. 42, s. 10.

\[15\] Newfoundland Act (U.K.), 12 & 13 Geo. 6, c. 22, s. 8.

\[16\] It is arguable that the office of the Lieutenant Governor of British Columbia is also specifically referenced in the Constitution. Although the British Columbia Terms of Union do not explicitly refer to the office of Lieutenant Governor, they do state that all of the provisions of the British North America Act, 1867 apply to British Columbia, except to the extent that such provisions are clearly only applicable to one or more of the other provinces. The effect of this incorporation by reference is to create the office of Lieutenant Governor for British Columbia. The offices of Lieutenant Governor in the remaining two provinces, New Brunswick and Nova Scotia, appear to have been achieved through the operation of section 58 of the Constitution Act, 1867, supra note 4.

\[17\] See (Draft Bill) An Act respecting the sovereignty of Quebec, 1st Sess., 35th Leg., Quebec, 1994 [hereinafter Draft Sovereignty Bill].

\[18\] Also noteworthy is that under the Draft Sovereignty Bill, ibid., sections 2, 3, and 15 are to come into force on the day following the day the Act is approved by referendum: see s. 16. However, according to section 10 of the Referendum Act, S.Q. 1978, c. 6, no bill that is to be the subject of a referendum may be presented for royal assent until after a referendum. This raises the question of whether the assent of the Lieutenant Governor can be obtained in a timely manner, and even raises the possibility that assent may not be sought for the bill if there is a majority "yes" vote.

\[19\] Provincial power to amend the "constitution of the province" (Constitution Act, 1982, supra note 2, s. 45) is expressly made subject to section 41, which includes the office of the Lieutenant Governor of a province.
province, it would appear to amount to an amendment “in relation to” the office of Lieutenant Governor and fall under section 41(a).

Professor Woehrling, in two important articles, has argued that Quebec secession could occur in accordance with section 38 of the Constitution Act, 1982, and thus would require the consent of only seven provinces representing 50 per cent of the population.\(^2\) Professor Woehrling offers two possible responses to the claim that provincial secession would involve an amendment in relation to the office of the Lieutenant Governor of the province.

The first response is based on the “pith and substance” doctrine, under which courts classify legislation for constitutional purposes according to its “dominant feature.” The main purpose of any amendment authorizing the secession of Quebec is to alter the relationship between Quebec and Canada. The abolition of the office of Lieutenant Governor is a subsidiary and relatively unimportant aspect of the declaration of sovereignty. Therefore, Professor Woehrling claims, it is misleading to characterize the secession of Quebec as an amendment “in relation to” the Lieutenant Governor, since this suggests that the abolition of the Lieutenant Governor is somehow the primary or dominant focus of the amendment. The abolition of the office of Lieutenant Governor is merely an “incidental effect” of secession, rather than its main purpose.\(^2\)

The difficulty with this line of argument is that it seems to assume that a constitutional amendment must necessarily be classified as being “in relation to” only one of the various amending procedures set out in Part V. In fact, as the experience with the ratification of the Meech Lake Accord (MLA) made plain, a single constitutional amendment might simultaneously be subject to a number of different provisions in Part V. This is because a single constitutional amendment might simultaneously amend a number of different provisions of the Constitution of Canada, each of which is subject to a number of different procedures in Part V. The MLA would have amended a variety of constitutional provisions, some of which were subject to section 41,\(^2\) while others were governed by section 38. It was generally accepted that the entire constitutional package had to meet all applicable requirements. The MLA was therefore subject to the unanimity.

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\(^2\) The MLA amended the amending formula as well as the composition of the Supreme Court of Canada.
procedure, as well as to the three-year time limit applicable to section 38 amendments. In other words, the requirements of the amending formula were seen as being cumulative rather than disjunctive. It was therefore not possible to escape the unanimity requirements by coupling section 41 amendments with others that fall under section 38, and argue that the amendment as a whole was “in relation to” section 38 alone.

The same result would follow with respect to a constitutional amendment authorizing the secession of Quebec. In determining the requirements of the amending formula, it is necessary to identify those parts of the Constitution of Canada that are being amended. An amendment declaring the sovereignty of Quebec would involve the amendment of a wide variety of constitutional provisions, some of which fall under section 38, others under 41. Since the requirements of the amending formula are cumulative, the entire amendment must satisfy all applicable requirements, including that of unanimity under section 41.

This conclusion would be more obvious if the Draft Sovereignty Bill specifically provided in section 1 that the Office of the Lieutenant Governor of Quebec is to be abolished. Surely it is evident that any such provision would be an amendment “in relation to” the office of the Lieutenant Governor. If this is so, then the argument on this issue seems to boil down to the fact that the Draft Sovereignty Bill does not specifically state that the office of Lieutenant Governor is abolished. But the absence of an explicit reference to the office of Lieutenant Governor cannot be determinative for constitutional purposes. Provinces cannot avoid the requirements of section 41 of Part V simply by drafting legislation in such a way as to make no explicit reference to the matters set out in section 41. If, in substance, the province has purported to abolish the office of Lieutenant Governor, then the legislation must meet the requirements of section 41. Otherwise form would triumph over substance and the requirements of Part V would be rendered meaningless.

Professor Woehrling’s second argument on this issue is that as long as the office of the Lieutenant Governor is left intact in the provinces that are, from time to time, a part of Canada, there has not

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23 See, for example, the discussion in Hogg, supra note 7 at 83.

24 The only question would be whether such an obviously invalid provision could be “severed” from the remainder of the bill, or whether the entire enactment would necessarily fall along with the impugned provision. It would be impossible for Quebec to continue to operate with the existing Lieutenant Governor following secession. Therefore, the attempt to abolish the office of Lieutenant Governor is inextricably tied to the legislation as a whole, and the invalidity of such a provision purporting to abolish the office would mean that the entire statute would be rendered ultra vires.
been an amendment "in relation to" the office of the Lieutenant Governor. Thus, because the Lieutenant Governors in the other nine provinces are unaffected by the abolition of the office of the Lieutenant Governor of Quebec, section 41(a) of Part V is not implicated. Professor Woehrling believes that certain comments made by the Supreme Court of Canada in Quebec (A.G.) v. Blaikie with respect to Quebec's right to abolish its Legislative Council, support this interpretation of section 41.

This argument might be plausible if there was a generic reference to the office of Lieutenant Governor, without specifically providing for particular officers in named provinces. For example, suppose that the only reference to the office of the Lieutenant Governor was in section 58 of the Constitution Act, 1867. If this were the case, it might be thought that the abolition of the offices of one or more Lieutenant Governors would not amount to an amendment "in relation to" section 58, since that provision does not make reference to or assume the existence of any particular Lieutenant Governors in particular provinces. But, as noted above, section 58 is not the only reference to the office of Lieutenant Governor. The Lieutenant Governor of the province of Quebec is specifically created by section 71 of the Constitution Act, 1867 (as are the offices of the Lieutenant Governors of six or seven other provinces specifically created elsewhere in the Constitution). Therefore, regardless of whether the abolition of Quebec's Lieutenant Governor amounts to an amendment to section 58, it is unavoidably an amendment to section 71. The statement in section 71 that "there shall be a ... Lieutenant Governor" for Quebec would be negated by the declaration of sovereignty. The abolition of the office of

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26 See Woehrling, "Les aspects juridiques," supra note 3 at 39, note 8. One of the questions that arose in Blaikie was whether the province could amend section 128 of the Constitution Act, 1867, supra note 4 pursuant to its authority in section 92(1) to amend "the Constitution of the Province, except as regards the Office of Lieutenant Governor." Although the Supreme Court of Canada did not decide this issue, it did note that section 128, referring to the taking of a prescribed oath of allegiance ... before the Lieutenant-Governor of a Province by elected or appointed members of the ... provincial Legislative Assembly or Council, as the case may be, raises a different issue, referable to the office of the ... Lieutenant-Governor and touching the Crown in respect of the members of the legislative chambers, so long as such chambers exist.

Professor Woehrling notes that, although the province may not have been able to amend the requirement of an oath of allegiance by members of the Legislative Council, it was able to abolish the Legislative Council entirely. He reasons that, although the province may not be able to modify the powers of the Lieutenant-Governor, it can abolish the office entirely.
Lieutenant Governor of Quebec must therefore amount to an amendment in relation to section 71.27

2. The use of the English and French language—section 41(c)

Section 41(c) provides that amendments in relation to "the use of the English and French language" require unanimous consent. However, section 41(c) is expressly made subject to section 43, which applies to amendments to constitutional provisions that apply to "one or more, but not all, provinces." This means that those constitutional provisions dealing with the use of the English or the French language in some but not all provinces may be amended by resolutions passed by the Senate and House of Commons and those provinces affected by the amendment. There are a significant number of constitutional provisions that fall within this class.28 However, other constitutional provisions dealing with the use of the English and French language in all provinces or in federal institutions29 are subject to section 41(c) and would require unanimous provincial consent.

The secession of Quebec would mean that these "section 41(c)" language guarantees would no longer be available to the Anglophone minority in Quebec. This is significant because, as we shall see, the Supreme Court of Canada has found that at least one of these section 41(c) language guarantees—section 23 of the Charter30—was enacted specifically to guarantee language rights to Quebec Anglophones. Therefore, because the secession of Quebec would negate the underlying purpose and effect of section 23 of the Charter, it would arguably amount to an amendment in relation to section 23 and fall under section 41(c) of Part V.

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27 Nor is this conclusion altered by the Supreme Court of Canada's comments in Blaikie, supra note 25 respecting the right of the province to abolish its Legislative Council. While the abolition of the Legislative Council merely "affected" the status and rights of the Crown, rather than being an amendment "in relation to" the Crown, the same could not be said of an amendment abolishing the office of Lieutenant Governor of a province.

28 See, for example, section 133 of the Constitution Act, 1867, supra note 4; and sections 16(2), 17(2), 18(2), 19(2), and 20(2) of the Constitution Act, 1982, supra note 2.

29 See sections 133 of the Constitution Act, 1867, ibid., as regards federal institutions; and sections 16(1), 17(1), 18(1), 19(1), 20(1), 21, 22, and 23 of the Constitution Act, 1982, ibid.

The leading case on the interpretation of section 23 of the Charter is Quebec (A.G.) v. Quebec Protestant School Boards.\textsuperscript{31} In Protestant School Boards, the Supreme Court of Canada described section 23 of the Charter as a “unique set of constitutional provisions, quite peculiar to Canada.”\textsuperscript{32} In drafting section 23, the Court opined, “the framers knew, and clearly had in mind the regimes governing the Anglophone and Francophone linguistic minorities in various provinces of Canada as far as the language of instruction was concerned.”\textsuperscript{33} The Court found that the drafters of the Charter were particularly concerned with the limitations on the rights of the Anglophone minority in Quebec as a result of Quebec’s Bill 101,\textsuperscript{34} and drafted section 23 as a specific response to that legislation:

The framers of the Constitution unquestionably intended by s. 23 to establish a general regime for the language of instruction, not a special regime for Quebec; but in view of the period when the Charter was enacted, and especially in light of the wording of s. 23 of the Charter as compared with that of ss. 72 and 73 of Bill 101, it is apparent that the combined effect of the latter two sections seemed to the framers like an archetype of the regimes needing reform, or which at least had to be affected, and the remedy prescribed for all of Canada by s. 23 of the Charter was in large part a response to those sections.\textsuperscript{35}

The Court went on to examine the similarities in the structure of section 23 of the Charter and the relevant provisions in Bill 101, noting that the similarities were such that “it may be wondered whether the framers of the Constitution would have drafted s. 23 of the Charter as they did if they had not had in view the model which s. 23 was indeed in large measure meant to override.”\textsuperscript{36} The Court concluded as follows:

By incorporating into the structure of s. 23 of the Charter the unique set of criteria in s. 73 of Bill 101, the framers of the Constitution identified the type of regime they wished to correct and on which they would base the remedy prescribed. The framers’ objective appears simple, and may readily be inferred from the concrete method used by them: to adopt a general rule guaranteeing the Francophone and Anglophone minorities in Canada an important part of the rights which the Anglophone minority in Quebec had enjoyed with respect to the language of instruction before Bill 101 was adopted.\textsuperscript{37}

\textsuperscript{31} [1984] 2 S.C.R. 66 [hereinafter Protestant School Boards].
\textsuperscript{32} Ibid. at 79.
\textsuperscript{33} Ibid.
\textsuperscript{34} Charte de la Langue française, 31st Leg., 2d Sess., Quebec, 1977 [hereinafter Bill 101].
\textsuperscript{35} Ibid. at 79-80.
\textsuperscript{36} Ibid. at 84.
\textsuperscript{37} Ibid.
Thus, while section 23 contains a language regime applicable across Canada, the “prototype” for the section was Quebec’s Bill 101. Therefore, the Court held that those provisions in Bill 101 that were inconsistent with section 23 could not be regarded as legitimate “limits” on rights, within the meaning of section 1 of the Charter.

The Protestant School Boards case makes it clear that the Quebec government cannot repeal or amend section 23 of the Charter. Yet that is precisely the effect of a declaration of sovereignty by Quebec. Since a declaration of sovereignty amounts to a repeal of section 23 of the Charter in Quebec, it would appear to be subject to section 41(c) of Part V and so can only be enacted with unanimous provincial consent, as well as the approval of the Senate and House of Commons.

It might be observed that the draft Act respecting the sovereignty of Quebec makes no specific reference to limits on the rights of the Anglophone minority in Quebec. In fact, the draft bill states that the constitution of an independent Quebec shall “guarantee the English-speaking community that its identity and institutions will be preserved.” It might therefore be argued that the Anglophone minority's rights will be unaffected by Quebec's secession, except for the fact that these rights would henceforth be exercised within the new state of Quebec rather than Canada. But this ignores the fact that the rights of the Anglophone minority would have been significantly diminished, since they would no longer enjoy the protection of the Canadian Constitution or have recourse to Canadian Courts. Whereas under the Canadian Constitution their section 23 rights could only be diminished through a constitutional amendment passed by the Senate, the House of Commons, and the legislatures of all ten provinces, these rights would now be dependent upon the terms of the Quebec constitution and Quebec statute. Thus, even if the constitution of the new Quebec state incorporated the exact wording of section 23 of the Charter, the rights of the Anglophone minority would still have been negatively affected.

I conclude that the better view is that the secession of Quebec would constitute an amendment to section 23 of the Charter, a provision dealing with the use of the English and the French language, and that the amendment therefore falls under section 41(c) of Part V.

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38 Supra note 17.
39 Ibid., Art. 3.
3. Composition of the Supreme Court of Canada—section 41(d)

The *Supreme Court Act* currently guarantees Quebec three members on the Supreme Court of Canada. Although the Quebec government has suggested that a sovereign Quebec might establish joint political institutions with Canada (including judicial institutions), presumably Quebec would not have representation on the Supreme Court of Canada. Therefore the composition of the Supreme Court of Canada would necessarily be altered as a result of the secession of Quebec, and the amendment would be subject to section 41(d) of Part V.

There is a counterargument to this line of reasoning, based on the fact that the *Supreme Court Act* is not explicitly included in the definition of the "Constitution of Canada" in section 52(2) of the *Constitution Act, 1982*. Therefore, according to this counterargument, amendments to the *Supreme Court Act*, including changes to the composition of the Supreme Court of Canada, are not "amendments to the Constitution of Canada" and fall completely outside of Part V.

This interpretation of section 41(d) leads to a number of anomalous results. First, it means that Quebec's representation on the Supreme Court of Canada could be eliminated without its consent, through an ordinary statute passed by the Parliament of Canada. Second, the only way that Quebec could obtain constitutional protection against this kind of change in its Supreme Court representation would be to obtain the agreement of all the other provinces. This is because any amendment entrenching the current composition of the Supreme Court of Canada in the Constitution would clearly be an amendment "in relation to the composition of the Supreme Court of Canada," and therefore be subject to section 41(d). Thus, even if the Senate, the House of Commons, and the eight other provinces agreed that Quebec's right to have three judges on the Supreme Court should be constitutionally entrenched, the amendment could be blocked by the objection of a single province.

These results are doubly anomalous when placed in the context of Part V as a whole. The general amending formula protects the "legislative powers, the proprietary rights or any other rights or privileges of the legislature or government of a province" from change,

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41 This is the conclusion of Professor Hogg: *supra* note 7 at 82.

42 *Supra* note 2, s. 38(2).
either by requiring provincial consent or by granting a right to "opt out" of an amendment. The overall purpose of the amending procedure, in other words, is to protect the provinces from having their rights or privileges negatively affected without their agreement. Yet, according to this interpretation of section 41(d), the provinces have absolutely no protection when it comes to the Supreme Court of Canada. Apparently (at least according to this interpretation of section 41(d)), this key institution of the federation can be changed by the Parliament of Canada alone. It is submitted that this interpretation of section 41(d) is inconsistent with the overall purpose of Part V, as well as with the jurisprudence of the Supreme Court of Canada on constitutional amendment.

I conclude that the better view is that changes in the composition of the Supreme Court of Canada are subject to the requirements of section 41(d). Since the secession of Quebec would alter the composition of the Supreme Court of Canada, it must satisfy those requirements.

4. Requirement of Aboriginal consent

Section 35.1 of the Constitution Act, 1982 requires the federal government and the provincial governments to convene a constitutional conference, to which representatives of the Aboriginal peoples of Canada must be invited, prior to amending section 35. But section 35.1 does not specify whether the consent of the Aboriginal peoples must be obtained in order for the amendment to proceed.

In my view, it is arguable that the government of Canada, which is under a fiduciary obligation towards Aboriginal peoples in Quebec, would be in breach of that fiduciary obligation if it were to agree to the secession of Quebec without the consent of the Aboriginal peoples who

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43 See s. 38(1)-(3) of Part V, supra note 2.

44 See, in particular, Re Upper House, supra note 9, which held that the Parliament of Canada could not unilaterally alter representation in the Senate, partly on the grounds that the Senate implicated important provincial interests. It is submitted that Quebec's interest in representation on the Supreme Court of Canada is at least as important as its representation in the Senate.

45 Aside from the general fiduciary obligation towards Aboriginal peoples recognized by the Supreme Court in Guerin v. R., [1984] 2 S.C.R. 335, the federal government has specifically acknowledged a fiduciary obligation in relation to Aboriginal peoples in Northern Quebec. The preamble to the federal legislation implementing the James Bay and Northern Quebec Native Claims Settlement Act, S.C. 1976-77, c. 32, provides that the "Parliament and Government of Canada recognize and affirm a special responsibility for the said Crees and Inuit."
would be directly affected. This conclusion follows from the fact that the secession of the province of Quebec would have the effect of terminating the fiduciary relationship between the federal Crown and the Aboriginal peoples living in Quebec.

It is arguable that the fiduciary obligation of the federal Crown requires it to obtain the consent of Aboriginal peoples for any amendment affecting rights under section 35.\textsuperscript{46} The point for purposes of the present discussion, however, is that the secession of a province involves a very particular and exceptional derogation from section 35 rights. Since the seceding province would no longer be a part of Canada, the effect of provincial secession is to permanently terminate the fiduciary relationship between the Crown and the Aboriginal peoples concerned.\textsuperscript{47} To permit the termination of a fiduciary relationship without the consent of the beneficiary is inconsistent with the very existence of a fiduciary relationship. It is well established that trust-like or fiduciary obligations which arise from the operation of law cannot be unilaterally terminated by the fiduciary.\textsuperscript{48}

Thus, regardless of whether there is a requirement of Aboriginal consent for a constitutional amendment affecting section 35 rights generally,\textsuperscript{49} it would appear that there is such a requirement for an amendment which would terminate altogether the fiduciary relationship between the Crown and Aboriginal peoples. This is precisely the effect

\textsuperscript{46} See N. Finkelstein & G. Vegh, The Separation of Quebec and the Constitution of Canada (North York: York University Centre for Public Law and Public Policy, 1992) at 25-31, who argue that there may be a constitutional convention requiring Aboriginal consent to amendments affecting rights under section 35. Finkelstein and Vegh were writing prior to the Multilateral Meetings on the Constitution (MMC), held between March and August of 1992. The 1992 MMC reinforce the conclusion that there is an emerging constitutional convention requiring the consent of Aboriginal peoples for any amendment directly affecting section 35 rights. Representatives of the Aboriginal peoples participated fully in the negotiations, and the Charlottetown Accord (Consensus Report on the Constitution: Final Text (Charlottetown: 28 August 1992)) contained a provision requiring the consent of Aboriginal peoples for any constitutional amendments affecting their rights: see Draft Legal Text (Ottawa: 9 October 1992), art. 33, which would have added section 45.1 to the Constitution Act, 1982. While the Accord was defeated in a referendum, there has never been any suggestion that the principle underlying proposed section 45.1 is questioned in any way by any Canadian government. Thus, even though there may not be any legal requirement of Aboriginal consent for amendments affecting section 35 rights (given the defeat of the Charlottetown Accord), there seems to be a constitutional convention requiring such consent.

\textsuperscript{47} I exclude from consideration the possibility that Aboriginal peoples could maintain their connection with the federal Crown by migrating from the seceding province into another part of Canada, since this forced migration would itself be a denial of section 35 rights.

\textsuperscript{48} See the discussion of a trustee's duties and powers in D.W.M. Waters, Law of Trusts in Canada, 2d ed. (Toronto: Carswell, 1984) at 689-93.

\textsuperscript{49} See note 46 above, arguing that there is a constitutional convention requiring such consent.
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of the secession of a province from Canada. The Aboriginal peoples in the seceding province would find themselves in a foreign country, their links with the Crown in right of Canada irrevocably severed. Before the federal government can agree to a constitutional amendment terminating this fiduciary relationship, it must obtain the consent of the Aboriginal peoples who would be affected.

It is apparent that this Aboriginal consent requirement is indirect in the sense that it must be expressed through and by the government of Canada. But this does not make the Aboriginal consent requirement any less meaningful or legally enforceable. The fiduciary obligation of the government of Canada requires it to obtain the consent of Aboriginal peoples directly affected before the government endorses any amendment permitting a province to secede. In the absence of such consent, the members of the government would be required to oppose any amendment when such an amendment was presented for Parliamentary approval. While injunctive relief is generally not available against the Crown, an exception applies where the injunction is sought to prevent a violation of the Constitution. The Crown cannot use its remedial immunity to shield or further an unconstitutional act. Therefore, Aboriginal peoples may be able to obtain injunctive relief to prevent the government from approving an amendment that had not obtained the necessary Aboriginal consent.

C. Achieving the Necessary Agreement is Unlikely

I have argued elsewhere that it is highly unlikely that Quebec would secure the necessary consent for an amendment permitting it to secede from Canada. Amongst the difficulties are the fact that the Prime Minister of Canada is from Quebec (making the Canadian government an inappropriate “Canadian” representative in any secession negotiations); the complex and divisive nature of the issues.

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51 See Société Asbestos v. Société Nationale de l’amiante, [1979] C.A. 342 (Que.), in which an interlocutory injunction was granted to prevent the implementation of legislation that was unconstitutional by reason of its enactment in the French language only.
52 The issue would arise as to how a court could ascertain the existence of such consent. It would appear that the best way to demonstrate consent would be through a referendum conducted amongst the persons whose rights would be directly affected; that is, those living in the seceding province.
53 See Cooler Heads, supra note 3.
(including debt division, currency, territory, and citizenship); the absence of the necessary time to bring the negotiations to a successful conclusion; and the fact that any agreement would have to be ratified through a referendum.\textsuperscript{54}

Some commentators have challenged my prediction of failed negotiations, positing a swift and consensual resolution of all the issues.\textsuperscript{55} I would offer two brief observations in response. First, even those commentators who believe that there would be a quick agreement between Quebec and Canada concede that the international experience with secession points in the opposite direction. Professor Young notes that "contested secessions are far more numerous than peaceful ones."\textsuperscript{56} Another survey of the politics of secession concludes that "[i]f there is one constant in history apart from the universality of death and taxes, it is the reluctance of states to part with territory. ... [T]he key fact about secession is that it is among the rarest of major political outcomes."\textsuperscript{57}

The second observation is that recent experience has shown that there is a world of difference between elite agreement and popular agreement on constitutional issues. In both the Meech Lake and Charlottetown constitutional negotiations, there was unanimity between the various governmental representatives. But this elite agreement was insufficient to persuade a majority of the population to support the proposed amendments. Thus, even if representatives of the Canadian and Quebec governments were able to tentatively agree on the terms of Quebec secession, this would not guarantee popular support for such an agreement. And what do we know about popular attitudes about the terms of Quebec's secession from Canada? Opinion polls have consistently revealed quite contradictory expectations on the part of Quebecers as opposed to Canadians in other parts of Canada. Thus, while most Quebecers expect that if Quebec were to become sovereign they would keep their Canadian citizenship and passports, that they would be able to work within the rest of Canada as freely as they do now, and that they would retain the Canadian dollar, in the Rest of Canada (ROC) there is a strong majority with precisely the opposite

\textsuperscript{54} Ibid. at 18-25.


\textsuperscript{56} Young, ibid. at 129. Professor Young surveys comparative studies of secession.

\textsuperscript{57} M. Hechter, "The Dynamics of Secession" (1992) 35 Acta Sociologica 267 at 277.
expectations. In short, it is inevitable that the terms of any separation will directly contradict one or the other of these popular expectations. This suggests that even if political elites were somehow able to cobble together an agreement, the bargain would founder on the rocks of public opinion.

This leads me to a consideration of the alternative scenario—Quebec sovereignty being achieved unilaterally, based on a Quebec UDI, in defiance of the requirements of the existing Canadian Constitution.

III. LEGAL DISCONTINUITY: A QUEBEC UDI

In the event that Quebec were to attempt to jump outside of the rules of the existing Canadian Constitution and secede unilaterally, principles of public international law would come into play. Even though Quebec has no right to secede unilaterally under Canadian domestic law, it may be able to invoke the right to "self-determination of peoples" in order to justify unilateral secession. Also relevant are the principles of public international law respecting the territorial integrity of newly independent states. Some commentators have claimed that the principle uti possidetis would entitle Quebec to secede with its current borders left intact. This section considers the relevance and application of principles of public international law in the event of unilateral Quebec secession.

A. Self-Determination and Secession in International Law

The right of "self-determination of peoples," while notoriously vague and difficult to apply, has gradually come to be recognized as a legal right in public international law. Articles 1(2) and 55 of the United Nations Charter both list "self-determination of peoples" as goals of the United Nations. Similar statements can be found in other

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58 See "CBC Prime Time News—SRC Le Point Poll," 16 February 1995, Questions 25B, 25E, 32C, and 32D (results based on 2,406 telephone interviews conducted between February 2 and 8, 1995). Other polls have consistently revealed a wide divergence of expectations between residents in Quebec and those elsewhere in Canada as to the terms of separation.

59 See S.A. Williams, International Legal Effects of Secession by Quebec (North York: York University Centre for Public Law and Public Policy, 1992).

United Nations instruments, including General Assembly Resolution 1514\textsuperscript{61} and the \textit{International Covenant on Civil and Political Rights}.\textsuperscript{62}

While self-determination has come to be generally recognized as a principle of customary international law, the important point for purposes of the present discussion is that this has not been accompanied by a recognition of a right of groups within existing states to secede.\textsuperscript{63} The right to self-determination has been used primarily to justify decolonialization rather than secession. Moreover, states that have relied upon the principle of self-determination to achieve independence from colonial powers frequently oppose any secession efforts.\textsuperscript{64} The territorial integrity of existing states is generally regarded as taking priority over any right of secessionist self-determination.

The priority given to the principle of territorial integrity is reflected in the various United Nations' declarations recognizing self-determination. For example, General Assembly Resolution 1514, in addition to recognizing the principle of self-determination, also states that “[a]ny attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.”

The 1970 \textit{Declaration on Friendly Relations},\textsuperscript{65} after affirming the right of self-determination, makes plain that this principle does not compromise the territorial integrity of existing states:

> Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above.

\textsuperscript{61} Section 2 provides as follows: “All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.” See \textit{Declaration on the Granting of Independence to Colonial Territories and Peoples}, G.A. Res. 1514 (XV), UN GAOR, 15th Sess., Supp. No. 16, UN Doc. A/4684 (1961) 66.


\textsuperscript{64} See Buchheit, \textit{ibid.} at 102.

and thus possessed of a government representing the whole people belonging to the
territory without distinction as to race, creed or colour.66

One recent commentator summarized international attitudes
and practice on this issue as follows:

[The general practice of states opposes an extension of the right [to self-determination]
to people in self-governing territories. States understandably fear the threat to their sovereignty, and the global community as a whole fears the instability and potential violence inherent in the right. Hence, the inviolability of boundaries has become virtually an axiom of international relations, especially among governments of former non-self-governing territories.67

Some jurists have suggested that the wording quoted above from the Declaration on Friendly Relations may have opened the door to a limited right of secession in cases where an existing state is not representative of the entire population.68 But it is clear that even if any such exception has come to be recognized, Quebec would not fall within it. International law commentators and publicists who have examined Quebec’s right to self-determination are virtually unanimous in concluding that Quebec is not subject to any systematic discrimination that would permit it to claim the right to secede from Canada. The following conclusion is representative of the opinions that have been expressed on the application of the principle of self-determination to Quebec:

Permitting groups such as the Quebecois in Canada to invoke the right of secession based upon cultural or group identity alone would threaten to open the floodgates of secession, and could exacerbate group conflicts. It is difficult to imagine any clear limits upon a secession right that permits groups to secede from pluralistic, nonoppressive states such as Canada.69

66 Ibid., “The principle of equal rights and self-determination of peoples.”
68 See Buchheit, supra note 63 at 94.
There have been some suggestions that state practice with respect to the recent breakup of the Soviet Union and Yugoslavia indicate that customary international law may be in the nascent stages of a transition toward the recognition of a secession right. In particular, the willingness of the international community to recognize the independence of the Baltic Republics as well as the Republics of Slovenia, Croatia, and Bosnia-Hercegovina could be seen as the beginning of a pattern of conduct evincing the existence of a right of secession under customary international law.

However, upon closer examination, these precedents do not support the recognition of any new principle of customary international law. In the case of the Baltics, there was no international recognition of the sovereignty of the Baltic states until Russian President Boris Yeltsin endorsed Latvian and Estonian independence in August 1991. In effect, the international community did not recognize the new states until they had already achieved de facto sovereignty. Moreover, the Baltics had formerly been sovereign states that had been illegally annexed by the Soviet Union in 1941. Thus, "even if the response of the international community suggests some acceptance of secession, such support may mark only the beginning of international recognition of a limited secession right applicable to illegally annexed territories rather than a general right of secession." As for the independence of the Republics of the former Socialist Federal Republic of Yugoslavia (sFRY), this was not a case of secession but of the dissolution of an existing state. This matter was addressed by the Arbitration Commission appointed by the European Community (EC) in late 1991 to render advisory opinions on legal issues arising in the context of the dissolution of the sFRY. The first question submitted to the Arbitration Commission by Lord Carrington, the President of the Conference on Yugoslavia, was as follows:

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\text{re\`{e}vision du statut politique et constitutionnel du Qu\^{e}bec, (Document de travail no. 1) (Quebec: Commission sur l'avenir politique et constitutionnel du Qu\^{e}bec, 1991) (Annexe B-4) at 540-42; Marchildon \& Maxwell, supra note 67 at 618; and Williams, supra note 59 at 20-22.}
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70 See Eastwood, ibid. at 300.

71 See ibid. at 316-21 for a review of the relevant events.

72 Ibid. at 321.

We find ourselves with a major legal question.

Serbia considers that those Republics which have declared or would declare themselves independent or sovereign have seceded or would secede from the SFRY which would otherwise continue to exist.

Other Republics on the contrary consider that there is no question of secession, but that the question is one of a disintegration or breaking-up of the SFRY as the result of the concurring will of a number of Republics... I should like the Arbitration Commission to consider the matter in order to formulate any opinion or recommendation which it might deem useful.\textsuperscript{74} [emphasis added]

The Arbitration Commission found in favour of the second view put forward in Lord Carrington's question—namely, that the SFRY was "in the process of dissolution." In reaching this conclusion, the Commission noted that the SFRY Republics had clearly expressed their desire for independence, that the composition and workings of the essential organs of the Federation no longer met the criteria of participation and representativeness inherent in a federal state, and that the authorities of the Federation and the Republics had shown themselves to be powerless to enforce respect for succeeding cease-fire agreements.\textsuperscript{75}

The dissolution of a state means that it no longer has legal personality. Therefore, the member states of the EC could recognize the independence of the former Yugoslav Republics without thereby calling into question the principle of the territorial integrity of existing states.\textsuperscript{76} No question of secession arose and no precedent that might be invoked to undermine the territorial integrity of other existing states would be created by recognition. Less than two months after the rendering of this initial advisory opinion, the EC and its member states recognized Slovenia and Croatia as independent states.\textsuperscript{77}

Unlike the former Soviet Union in relation to the Baltics, Canada has not illegally annexed the territory of Quebec. I also assume, for purposes of this opinion, that the Canadian state would continue to

\textsuperscript{74} "Conference on Yugoslavia—Arbitration Committee: Opinion No. 1," 20 November 1991, 31 I.L.M. 1494 [hereinafter "Opinion No. 1"].

\textsuperscript{75} Ibid. at 1496-97.

\textsuperscript{76} The Arbitration Commission later found that the process of dissolution had concluded by July 1992. See "Conference for Peace in Yugoslavia—Arbitration Commission: Opinion No. 8," 4 July 1992, 31 I.L.M. 1521 [hereinafter "Opinion No. 8"].

\textsuperscript{77} The EC recognized Croatia even though the Arbitration Commission, in an opinion rendered in early January 1992, had found that Croatia did not yet meet the EC's guidelines for recognition: see "Conference on Yugoslavia—Arbitration Commission: Opinion No. 5," 11 January 1992, 31 I.L.M. 1503 at 1505.
exist following the secession of Quebec. Therefore, in my view, the recent state practice in respect of the former Soviet Union or Yugoslavia does not establish precedents that would be helpful or relevant to Quebec in any secession from Canada.

B. Quebec's Territorial Integrity

The conclusion reached in the previous section is that Quebec has no "right" under international law to declare independence unilaterally. This means that, in the event that Canada disputes the validity of a Quebec UDI, Quebec will attain statehood only in the event that it is able to oust the jurisdiction of Canada over Quebec territory. The criterion for Quebec statehood will be "the maintenance of a stable and effective government over a reasonably well defined territory, to the exclusion of the metropolitan State, in such circumstances that independence is in fact undisputed, or manifestly indisputable." This will be the test that other states will generally apply in determining whether to recognize the new state of Quebec.

This leads to the following obvious question: what happens if Quebec is able to exercise effective control over only a portion of the territory that comprised the province of Quebec, with Canada remaining in partial or complete control over the remainder? Such a possibility seems realistic. The population of the northern portion of the province of Quebec is made up of Aboriginal peoples, many of whom have signified their desire to remain a part of Canada should Quebec choose to secede. Other regions in the province have large concentrations of anglophones or allophones who might similarly be expected to choose to remain in Canada if this option were available to them. Since Quebec lacks any organized military, it is not at all clear that it would be able to enforce compliance on such dissident groups.

The analysis thus far would suggest that, in such a scenario, the Quebec UDI would be effective only with respect to that territory over which the new state had established effective control. This follows from the basic proposition that Quebec has no right, either under Canadian domestic law or international law principles, to unilaterally declare independence with respect to the entire Quebec territory. Its claim for statehood is ultimately based on political reality—on its ability to oust the jurisdiction of the Canadian authorities over its territory.

Accordingly, where any such ouster of Canada is only partial or incomplete, Quebec's claim to political independence must be correspondingly impaired or reduced.

However, certain commentators have suggested that the principle *uti possidetis, ita possideatis* would guarantee Quebec its existing borders in the event that it were to attain sovereignty. The *uti possidetis* principle was first evoked and applied in respect of former Spanish colonies in Central and South America, "the continent which first witnessed the phenomenon of decolonization involving the formation of a number of sovereign states on territory formerly belonging to a single metropolitan state." The essence of the principle is that the territorial boundaries of former colonies should be respected when those colonies achieve independence: "no question of international boundaries could ever have occurred to the minds of those servants of the Spanish Crown who established administrative boundaries; *uti possidetis juris* is essentially a retrospective principle, investing as international boundaries administrative limits intended originally for quite other purposes." The purpose of the principle *uti possidetis* has been described by the International Court of Justice as "to prevent the independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power." The principle has also been applied in the decolonization process in Africa, notwithstanding the fact that it appears to conflict with the right of peoples in these newly emerging states to self-determination.

Given the origins and application of the principle *uti possidetis*, it is difficult to see how it could be relevant to the attempted secession of Quebec from Canada. This is because the principle has never been invoked by a seceding state against a predecessor state. Rather, the principle has been applied between former colonies in order to prevent border disputes from arising upon the withdrawal of the authority of the predecessor state. The fact that the predecessor state is no longer asserting a territorial claim is of critical importance; the application of

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79 "As you possess, so may you possess."


82 Supra note 80 at 565.

83 Ibid. at 567.
uti possidetis will therefore not compromise the territorial integrity of the predecessor state. But it would be quite another matter entirely to apply this principle in order to justify territorial claims of an administrative unit which wishes to secede from the predecessor state. Thus, while Spain had no particular interest or right to determine the post-independence boundaries of its former colonies in Central America, this did not mean that it thereby lost its right to prevent regions within its own borders from seceding.

Notwithstanding the fact that uti possidetis would appear to have no application to a case of secession, a recent opinion rendered by five international experts came to an opposite conclusion.84 The “Five Experts’ Opinion” concedes that uti possidetis has generally been applied in colonial situations, but they argue that the principle has come to have “universal application” in the resolution of border disputes involving newly independent states.85 In coming to this quite extraordinary conclusion, the Five Experts rely upon “Opinion No. 3” of the Arbitration Commission established to offer advisory opinions on legal issues arising in the context of the dissolution of Yugoslavia. One of the matters submitted to the Arbitration Commission was whether the “internal boundaries between Croatia and Serbia and between Bosnia-Hercegovina and Serbia [could] be regarded as frontiers in terms of public international law.”86 The Arbitration Commission found that, in the absence of an agreement between the parties to the contrary, the principles of public international law would indicate that the former administrative boundaries should constitute the new international frontiers. This conclusion is expressed in the following passage in the Commission’s Opinion, a paragraph upon which the Five Experts rely very heavily in order to support their own conclusions on this point:

Except where otherwise agreed, the former boundaries become frontiers protected by international law. This conclusion follows from the principle of respect for the territorial status quo and, in particular, from the principle of uti possidetis. Uti possidetis, though initially applied in settling decolonization issues in America and Africa, is today recognized as a general principle, as stated by the International Court of Justice in its Judgment of 22 December 1986 in the case between Burkina Faso and Mali (Frontier Dispute, [1986] ICJ Reports 554 at 565): “Nevertheless the principle is not a special rule which pertains solely to one specific system of international law. It is a general principle, which is logically connected with the phenomenon of the obtaining of independence,

84 “Five Experts’ Opinion,” supra note 69.
85 Ibid. at 413-15, para. 2.46.
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wherever it occurs. Its obvious purpose is to prevent the independence and stability of new States being endangered by fratricidal struggles.  

The Five Experts suggest that, in light of this reasoning, Quebec would be able to rely on the principle uti possidetis in order to defeat secessionist claims of Aboriginal peoples or minorities seeking to secede from an independent Quebec. Whether or not this is the case, it says nothing about the resolution of territorial disputes between Quebec and Canada. Indeed, as between Canada and Quebec, the principle uti possidetis would seem to favour Canada; as the Arbitration Commission notes, the principle favours the “territorial status quo.” The “territorial status quo” is one in which the entire territory of Quebec is contained within the Canadian state. Accordingly, if we wished to maintain the territorial status quo, we would simply affirm our earlier conclusion, namely, that the territorial integrity of Canada takes precedence over any right of self-determination possessed by Quebec.

In fact, if one carefully reads the entire Opinion No. 3 (rather than the portions quoted by the Five Experts) it becomes clear that territorial disputes in the former Yugoslavia were entirely different from any that would arise upon the attempted secession of Quebec from Canada. The Arbitration Commission began its Opinion No. 3 by referring to an earlier Opinion in which it had found that “the Socialist Federal Republic of Yugoslavia is in the process of dissolution.” The Commission observed that the principles it was about to announce would apply “once the process in the SFRY [i.e., its dissolution] leads to the creation of one or more independent States.” This reference to the dissolution of SFRY explains how the Commission was able to state that the application of the principle uti possidetis would favour the territorial status quo. Upon dissolution a state no longer has legal personality. The SFRY no longer having a territorial claim, the only remaining issue would be how to resolve border disputes between the newly independent Republics of the former SFRY. In effect, the situation resembled the decolonization process in Central and South America following the withdrawal of Spanish authority.

One could see how this analysis might become relevant or applicable in the event that the Canadian state were to fragment into a number of successor states and border disputes were to arise between the new successor states. Suppose, for example, that both Ontario and Quebec were to emerge as independent, sovereign states, following the

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87 Ibid. at 1500.
88 Supra note 74 at 1497.
dissolution of Canada, and that a border dispute were to develop between Ontario and Quebec. In this situation, we would not be dealing with a dispute between a seceding state and a predecessor state, i.e., Canada, that could assert a prior or superior claim over disputed territory. Rather, the border dispute would involve the two successor states of Ontario and Quebec, neither of whom would have a claim to any of the provincial territory of the other. In this context, it is at least plausible to imagine the border dispute being resolved in accordance with the *uti possidetis* principle referred to above, so that pre-existing provincial borders would continue to govern, absent an agreement by both parties to the contrary.

But a border dispute between Canada and a province attempting to secede is quite a different matter entirely. Here the predecessor state—Canada—has not fragmented or dissolved. The principle of *uti possidetis* cannot be applied in a manner so as to undermine the territorial integrity of Canada.

Accordingly, I conclude that the principle *uti possidetis* has no application to a border or any other territorial dispute between Canada and Quebec. In my view, Quebec's territorial integrity is not guaranteed under any principle of public international law in the event that it attempts to secede unilaterally from Canada.

C. *A Quebec UDI: Legally Possible But Politically Impossible*

I have argued elsewhere that a Quebec UDI would be challenged by Canada, leading to a disastrous contest for supremacy between the Canadian and Quebec governments.\(^8^9\) Some commentators have questioned my claim that Canada would resist a Quebec UDI, arguing that the financial markets would force Canada to accept "UDI with a wink."\(^9^0\) Professor Woehrling, on the other hand, has recently argued that Canada would initially oppose a Quebec UDI, but suggests that eventually Canada would give in to pressure from the United States and France to normalize relations with Quebec.\(^9^1\)

In my view, a Quebec UDI is simply not feasible if it is opposed by Canada. Simply put, Quebec does not have the resources needed to withstand the political and economic whirlwind that would be unleashed.

\(^8^9\) See *Cooler Heads*, *supra* note 3 at 25-30.


\(^9^1\) "Les aspects juridiques," *supra* note 3 at 35.
by a contest for legal supremacy between Quebec and Canada. If a UDI were even a possibility, Quebec's ability to borrow on international markets would be severely constrained, if not eliminated. International capital markets would be unwilling to lend money to a regime whose very existence was uncertain. The Quebec government would also face widespread resistance to a UDI from its own population, and this resistance would increase once it became apparent that the UDI would involve real economic hardship for the Quebec population. There are simply no international precedents for a state even attempting to secede unilaterally with the support of only 50 to 55 per cent of its population, much less succeeding in the attempt.

Of course, the government of Canada would also face a financial crisis if Quebec were to attempt to secede unilaterally, particularly since Quebec would not be liable for any of the existing Canadian debt if the UDI were successful. On the other hand, Canada controls the airports, seaports, key federal buildings, and all the entry points into Quebec. In other words, there would appear to be no way for Quebec to achieve effective control over its territory absent Canadian agreement. Moreover, given the implications of a successful UDI for the future Canadian debt load, Canada could be expected to contest the UDI vigorously even in the face of a short-term fiscal and liquidity crisis.

Some commentators have labelled a discussion of such scenarios as undemocratic and contributing to a "propaganda war." If Quebecers vote "yes" in a referendum, it is claimed, the ROC will quickly agree to reasonable terms of separation. The ROC will act rationally and pursue a cooperative strategy because the costs associated with any other response are unacceptably high.

But this criticism misses the point of the arguments that I and others have been raising in respect of the consequences of a Quebec UDI. My claim is precisely that ROC will react rationally in the face of a Quebec UDI—but that "rationality" in this context means acting in the ROC's own self-interest, rather than in the interests of Quebec. In particular, the ROC will insist that Quebec can secede only on terms and conditions that are acceptable to both parties. Far from being "irrational," this insistence on joint terms and conditions is simply a natural response to any aggressive attempt by Quebec to jump outside of the existing Constitution.

As for the suggestion that raising such concerns is somehow "undemocratic," surely democracy requires that all Canadians (including those in Quebec) have a right to know what is really at stake in the

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forthcoming referendum. Otherwise, citizens are left to make a
fundamental choice about their future without a clear understanding of
the likely consequences. In fact, it is those who seek to suppress a full
and open debate through charges of "economic terrorism" who are the
real elitists, since they assume that ordinary citizens will be incapable of
making an informed judgment if they are exposed to arguments on both
sides of the issue.

IV. CONCLUSION: WOULD POLITICAL ASSOCIATION
RESOLVE THE IMPASSE?

The Quebec government has indicated that the referendum
question will make some reference to continued political and economic
association between an independent Quebec and Canada. Apparently,
the existence of these linkages will not be a precondition to a declaration
of sovereignty, but are thought to be a virtual certainty once sovereignty
has been achieved.

The Agreement signed on June 12, 1995 (the "June 12
Agreement") between Messrs. Jacques Parizeau, Lucien Bouchard and
Mario Dumont suggests that the joint political institutions contemplated
by the Quebec government would be based on the European
Community institutions. The June 12 Agreement proposes the
establishment of a Council of Ministers, with equal representation from
Canada and Quebec. The decisions of the Council would require
unanimity, giving each side a veto. A permanent Secretariat would be
established to assist the Council of Ministers. A joint Parliamentary
Assembly would also be established, with representation based on the
relative population of Canada and Quebec. But the Assembly would not
possess any legislative powers, its only authority being to make
recommendations or pass non-binding resolutions regarding the
decisions of the Council. The Assembly could also hold public hearings.
Finally, the June 12 Agreement proposes the establishment of a Tribunal
to make binding interpretations of the treaty.

European Community institutions have been criticized on
grounds that they are almost entirely executive-driven.93 The European
Council of Ministers provides for governmental interaction but its
decisions are not subject to ratification by the home parliaments of the

93 For a detailed discussion, see P.J. Monahan, Political and Economic Integration: The
European Experience and Lessons for Canada (North York: York University Centre for Public Law
and Public Policy, 1992).
Member States, and Council deliberations often occur behind closed doors. The only elected Community institution is the Parliament, but its role is largely advisory and it lacks the scope of initiative associated with a domestic parliament. Recent reforms have increased the powers of the parliament, and there are calls for granting the parliament an equal role with the Council of Ministers in the legislative process.\textsuperscript{94}

The June 12 Agreement proposes institutions that are even more executive-driven than those in Europe. At least in Europe, the parliament is sometimes required to approve decisions of the Council of Ministers; failure to obtain parliamentary approval forces the Council to take decisions by unanimous vote, rather than through a qualified majority. The June 12 Agreement does not contemplate any approval powers for the joint Canada-Quebec parliament.

Even more problematic is the proposal for equal Quebec-Canada representation on the Council of Ministers, and for granting a veto to each party. In the early years of the European Community, the most important decisions of the Council of Ministers required unanimous consent. This requirement of unanimous consent produced incredible delay and deadlock within the Council such that, by the mid-1980s, it was widely recognized that the requirement of unanimity had to be abandoned. Important reforms introduced in 1986 provided for the most important decisions to be taken by a qualified majority.

The European experience suggests that the Council of Ministers proposed in the June 12 Agreement would be a recipe for deadlock and division. It is evident that the proposal for equal Quebec-Canadian representation on the Council of Ministers with vetoes for each side would clearly be a non-starter in ROC. The ROC would simply not be interested in giving a veto over important ROC policy decisions—such as the size of the budget deficit—to a foreign country one-third its size. So the only possible structure (assuming for the sake of argument that a Council of Ministers were to be created) would be some form of weighted representation, with most decisions taken by majority vote rather than through unanimity.

It is immediately apparent that Quebec would be worse off under this arrangement than it is under the status quo. The Quebec government is not currently required to submit its budget for approval by Ottawa. But if a Council of Ministers were created with majority representation from ROC and with no general Quebec veto, a “sovereign”

\textsuperscript{94} See “Conference of the European Community Parliaments: Final Declaration” (1990) Agence Europe No. 1668.
Quebec would be required to obtain budget approval from a joint political body in which it was in a permanent minority position.

In fact, Quebec would be outvoted on every issue in which it formed the minority before a Ministerial Council. Under such a model, the Prime Minister of Canada would necessarily be a non-Quebecer, and the Canadian government, with no Quebec representation, would effectively control joint decisions. Quebec could expect to be outvoted on any issue in which its interests were at odds with the interests of any significant part of ROC. This is in stark contrast to the role of Quebec MPs in the Canadian Parliament, where a Quebec MP has been Prime Minister of Canada for 26 of the past 27 years and Quebec MPs always occupy key cabinet posts.

Given this analysis, it might be thought that ROC would have an interest in establishing joint political institutions with Quebec, on the assumption that it would have a majority position and thus be able to effectively control joint decision-making. In fact, however, ROC would likely have no interest in establishing such joint institutions, even if it were in a majority along the lines described above, albeit for different reasons.

From ROC's point of view, a political association with an independent Quebec would involve the establishment of an additional level of government. The ROC would have the governments of the remaining nine provinces, the new "national" government of ROC, plus the government and bureaucracy associated with any joint political institutions with Quebec. There would also be a complete overlap between the responsibilities of any joint ROC-Quebec political institutions and the "domestic" governments in ROC. There is little public support, and certainly no demonstrable public need, for additional layers of government and for increasing overlap and duplication. In short, I believe that it is highly unlikely that ROC would be willing to agree to joint political institutions following secession, even assuming that the terms of secession were otherwise agreed to in advance.

The point for purposes of the present discussion is that ROC would not even be willing to contemplate any discussions on the point if Quebec were to proceed with a UDI. A UDI would involve a unilateral repudiation of Canadian federalism, without any agreement on contentious issues such as debt division, currency, territory, and the rights of aboriginal peoples and minorities in Quebec. Such unilateral action would poison the well between ROC and Quebec for many years to come, regardless of whether the UDI proved successful. In the face of a UDI, ROC would flatly refuse to talk about creating joint political...
institutions for a considerable period of time, that is, years following secession.

Some have argued that this kind of negative response would be "irrational" and that ROC would eventually come to recognize its common interest in rebuilding joint political institutions with a sovereign Quebec. But the only truly "irrational" decision in this scenario would be Quebec's resort to a UDI—a declaration which is certain to significantly reduce the living standards of all Canadians, particularly those living in Quebec. Political leaders who pursue a deliberately uncooperative strategy should not be surprised when they are met with an identical response from those whose interests they have chosen to disregard.

To conclude where I began, the legal issues that I have explored in this paper will certainly not prove decisive in Quebeckers' choice of whether to remain within Canada. But neither are they irrelevant to that decision. I have suggested that there are significant legal obstacles faced by the Quebec government in its attempt to attain sovereignty. The existence of those impediments suggests, at the very least, that the road to sovereignty is likely to be rather more bumpy, circuitous, and dangerous than the Quebec government has thus far predicted.