

CONSTITUTIONAL LAW AND SECESSION: THE CASE OF QUEBEC

by Peter Radan*

On 20 August 1998 the Supreme Court of Canada, in *Reference re: Secession of Quebec*¹ (*Secession Reference*), handed down its decision on the Canadian government's reference to the Court concerning the legality of a future unilateral secession by the province of Quebec from Canada.

The reference sought the Court's opinion on the following three specific questions:

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

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¹ *Reference re: Secession of Quebec* (1998) 161 DLR (4th) 385.

The Court answered the first two questions in the negative, which meant that the third question did not arise.

Although the “No” answers to the first two questions came as no surprise to most observers, the decision was not a clear-cut legal triumph for the Canadian government as would first appear. This is because the Court, recognised that even though a unilateral secession would be illegal under Canadian constitutional law, it may nevertheless be successful if recognised by the international community. This article will critically evaluate the Court’s reasoning on the first question in the Canadian government’s reference.

The Court’s Reasoning

In assessing the legality of any unilateral secession by Quebec in terms of Canadian constitutional law, the Court stressed the relevance of “four fundamental and organizing principles of the Constitution.” These are federalism, democracy, constitutionalism and the rule of law, and respect for minorities.² In the words of the Court:

These defining principles function in symbiosis. No single principle can be defined in isolation from the others, nor does any one principle trump or exclude the operation of any other.³

These principles dictate that, under Canadian constitutional law, secession requires a negotiated amendment to the Canadian Constitution.⁴ The Court ruled that:

[T]he secession of Quebec from Canada cannot be accomplished by the National Assembly, the legislature or government of Quebec unilaterally, that is to say without principled negotiations, and be considered a lawful act. Any attempt to effect the secession of a province from Canada must be undertaken pursuant to the Constitution of Canada, or else violate the Canadian legal order.⁵

² n1 at 403 (para. 32).

³ n1 at 410 (para. 49).

⁴ n1 at 422-423, 428 (paras. 84, 97).

⁵ n1 at 430-431 (para. 104).

Although Canada's Constitution is silent on the issue of secession, in that it neither expressly authorises nor prohibits it, a negotiated constitutional amendment to facilitate secession is necessary because "an act of secession would purport to alter the governance of Canadian territory in a manner which undoubtedly is inconsistent with [Canada's] current constitutional arrangements."⁶ Given that Canada's Constitution is an expression of the sovereignty of Canada's people, any amendment could be made to the Constitution, including the secession of Quebec, provided that such an amendment was achieved by procedures set out in the Constitution.⁷

The Court proceeded to broadly delineate the procedure by which the secession of Quebec could be constitutionally achieved. The first step would be "a clear expression of the people of Quebec of their will to secede from Canada."⁸ This could be determined by a referendum on secession, even though the referendum of itself would have no legal effect and could not bring about unilateral secession. However, a clear referendum vote in favour of secession is important because it "would confer legitimacy on the effort's of the Quebec government to initiate the Constitution's amendment process in order to secede by constitutional means."⁹ The political legitimacy that would flow from a referendum that showed a clear desire on the part of the population of Quebec to secede would place an obligation on the other provinces and the federal government to enter into negotiations "to negotiate constitutional changes to respond to that desire."¹⁰ These negotiations would need to be conducted in a manner consistent with the principles of federalism, democracy, constitutionalism and the rule of law, and respect for minorities. A refusal by any party to so act would undermine the legitimacy of that party's position and could jeopardise the negotiations as a whole.¹¹ The negotiations could reach an impasse, in which case, provided they had been conducted properly by all parties, it would mean, from the perspective of Canada's constitutional law, that the secession of Quebec would not be permitted because of the absence of a constitutional amendment.¹²

⁶ n1 at 423 (para. 84).

⁷ n1 at 423 (para. 85).

⁸ n1 at 424 (para. 87).

⁹ n1 at 424 (para. 87).

¹⁰ n1 at 424 (para. 88).

¹¹ n1 at 425, 427 (paras. 90, 94-95).

¹² n1 at 428 (para. 97).

As to the referendum that could trigger this procedure, the Court, on a number of occasions, referred to the need that the referendum amount to a “clear expression” of the population of Quebec in favour of secession.¹³ The Court ruled that:

The referendum result, if it is to be taken as an expression of the democratic will, must be free of ambiguity both in terms of the question asked and in terms of the support it achieves.¹⁴

A number of comments can be made on the Court’s decision on secession in the context of Canada’s constitutional law. These include the issues of the meaning of a “clear expression” of support for secession, the position of Quebec’s minorities on secession, the wording of any referendum question, the process of negotiations on secession, the content of secession negotiations, the appropriate amendment procedures, and the possibility of a successful, but unconstitutional, secession.

The Meaning of a “Clear Expression”

The Court expressly declined to define what was meant by a “clear expression” by the people in the context of a secession referendum in Quebec, on the ground that this was a matter to be determined by the political process.¹⁵ In the 1980 and 1995 referenda on Quebec’s secession the Quebec government claimed that a bare majority of votes cast would have been sufficient. In the wake of the Supreme Court’s decision this position is still maintained by the present Quebec government.¹⁶ However, a reading of the Court’s judgment suggests that it does not accept this position and that more than a simple majority is required. On behalf of the Canadian government, Stéphane Dion, the Minister for Intergovernmental Affairs, has rejected the Quebec government’s contention, although he has not specified what qualified majority would be necessary.¹⁷

¹³ n1 at 423, 424, 426, 427, 429, 431 (paras. 86, 87, 92, 93, 100, 104). The Court, at 425 (para. 88), also spoke in terms of a “clear repudiation” of exiting constitutional arrangements.

¹⁴ n1 at 424 (para. 87).

¹⁵ n1 at 447-448 (para. 153).

¹⁶ E Stewart, “Both Sides Buoyed by Decision”, *The Toronto Star*, 21 August 1998.

¹⁷ J Ruimy, “Dion Warns Separatists”, *The Toronto Star*, 12 September 1998. A public opinion poll conducted immediately after the Supreme Court decision indicated that over three-quarters of Canada’s population believed that a clear majority meant more than a 50% plus one. The same poll indicated that just over two-thirds of Quebec’s population thought that a higher threshold was required: *Angus Reid Poll on Reference*, 28 August 1998, available on website <http://www.uni.ca/ar_ref.htm> (visited on 2 January 1999).

In seeking guidance on what sort of majority vote would be needed to amount to a “clear expression” in favour of secession one could turn to constitutions of existing states that explicitly deal with secession of federal units. The Constitution of Saint Christopher and Nevis provides that the island of Nevis can secede from the federation and stipulates the procedures for such an act. One of the requirements is a referendum for secession supported by “not less than two-thirds of all the votes cast on that referendum” (Article 113(2)(b)). On 10 August 1998 a secession referendum in Nevis failed, attracting only 61.8% of votes cast.¹⁸ The Constitution of Ethiopia permits secession in accordance with procedures that require, inter alia, a referendum on secession supported by a majority vote (Article 39(4)(c)). However, both the above constitutions have a significant hurdle to overcome before a secession referendum can be held. In the case of Nevis, the Nevis Island legislature must vote in favour of secession with a majority of at least two-thirds of all the elected members of its Assembly (Article 113(2)). Similarly, in the case of Ethiopia a similar two-thirds vote is required by the legislative council of the relevant unit seeking secession (Article 39(4)(a)).

Furthermore, some guidance could be sought in the secessions of four republics from Yugoslavia in 1991-1992. In all four republics a referendum was held on the question of sovereignty and secession. The applications for recognition as international states by all four republics were considered by the so-called Badinter Arbitration Commission. Croatia, Slovenia and Macedonia all referred to the referendum votes in favour of secession as part of their cases for recognition. With Bosnia-Herzegovina such a referendum had not been held at the time the application for recognition was made. The Badinter Commission’s recommendation was against recognition of Bosnia-Herzegovina’s independence on the ground that “the will of the peoples of Bosnia-Herzegovina” on the question of secession and independence had not been established.¹⁹ It was only after a vote in

¹⁸ SF Kovaleski, “Secession Move Fails On Caribbean Island”, *The Washington Post*, 11 August 1998. The Canadian government took the unusual step of issuing a statement on the Saturday before the referendum opposing the secession of Nevis: E Stewart, “Nevis Vote Pleases Edgy Ottawans”, *The Toronto Star*, 12 August 1998. For background on the Nevis secession issue see SCR McIntosh, “The St Kitts-Nevis Question: Secession or Constitutional Reform?” (1997) 7 *Caribbean Law Review* 419.

¹⁹ *Opinion No 4 on the International Recognition of the Socialist Republic of Bosnia and Herzegovina by the European Community and its Member States*, 11 January 1992, (1992) 31 ILM 1501.

favour of independence from Yugoslavia was held that international recognition was extended to Bosnia-Herzegovina.²⁰ The Badinter Commission's recommendation in relation to Bosnia-Herzegovina has been interpreted as elevating the holding of a referendum to the status of a basic requirement for the legitimation of secession.²¹ Whilst this may be so, the Badinter Commission made only the slightest of comments on the majority that would be required to justify recognition. In its recommendation on Slovenia the Commission made reference to the fact that "an absolute majority of those voting" were in favour of Slovenia's independence.²² This could be interpreted as endorsing the view that a simple majority vote in favour of secession would be sufficient. However, this is at best an implication that could be drawn from the recommendation relating to Slovenia. It should be noted that in Slovenia 88.5% of votes cast were in favour of secession. This was the lowest "Yes" vote, in terms of percentages of those who voted, of all four referenda held in the republics that seceded from Yugoslavia.²³ Such high percentage votes would, it is suggested, be sufficient in terms of being a "clear expression" in favour of secession as required by the Canadian Supreme Court in *Secession Reference*.²⁴

The Position of Quebec's Minorities

The major problem with the referenda in the four Yugoslav republics was that, in the cases of Croatia, Bosnia-Herzegovina and Macedonia, a significant minority national group boycotted the voting process. An issue in any secession referendum in Quebec will be the position of that province's minority populations. To date the English speaking and indigenous

²⁰ P Radan, *Self-Determination, Uti Possidetis and Post-Secession International Borders: The Case of Yugoslavia*, unpublished Doctoral Dissertation, University of Sydney, 1998 at 419-421.

²¹ A Cassese, *Self-Determination of Peoples, A Legal Appraisal*, Cambridge University Press, Cambridge, 1995 at 272.

²² *Opinion No 7 on the International Recognition of the Republic of Slovenia by the European Community and its Member States*, 11 January 1992, (1992) 31 ILM 1512.

²³ For accounts of the secessions of and within Yugoslavia's republics see Radan, n20 at 390-444.

²⁴ Other examples that would indicate a "clear expression" are the votes for independence in Norway from Sweden (99%), Algeria from France (99%), Lithuania from the USSR (90%), Latvia from the USSR (77%), and Estonia from the USSR (78%): quoted in PW Hogg, "Principles Governing the Secession of Quebec" (1997) 8 *National Journal of Constitutional Law* 19 at 39-40.

populations of Quebec have opposed moves towards Quebec's secession from Canada.²⁵ The problem of these minorities can be illustrated by the following possible scenario. On the basis that a two-thirds majority vote in favour of secession is indicative of a "clear expression" in favour of secession, would such a result be viewed as legitimate if it were achieved in circumstances in which significant majorities of Quebec's minority populations voted against secession? In other words, what would be the status of a referendum vote in favour of secession achieved on the strength of significant support by the French speaking population of Quebec, but strongly opposed by the English speaking and indigenous populations?

It could be argued that, having achieved the required threshold in percentage terms of Quebec's entire population, there is a "clear expression" in favour of secession. The independence referendum held in Bosnia-Herzegovina in 1992 would support this view. In that case the international community interpreted the results of the referendum as legitimating secession and extended international recognition to the former Yugoslav republic following the referendum. In the referendum the Bosnian Muslim and Croat populations overwhelmingly voted in favour of independence. Of the 63.4% of the population that voted, 99.4% voted in favour of independence. The Serb population's boycott of the referendum was in effect a vote against independence. The referendum result meant that the vote of 62.7% of the total electorate of Bosnia-Herzegovina in favour of independence legitimated the secession of that republic notwithstanding opposition to secession from its significant Serb minority population.²⁶

On the other hand it could be argued that the Quebec referendum scenario suggested above would not be legitimate, because of the opposition of Quebec's minority populations, and in particular the indigenous populations.²⁷ The argument would be based upon issues concerned with the right of peoples to self-determination. According to the Declaration on Friendly Relations adopted by the General Assembly of the United Nations, the right to self-determination entitles "a people" to "the establishment of a

²⁵ K Henderson, *Staying Canadian, The Struggle Against UDI*, DC Books, Montreal, 1997 at 208-211; Grand Council of the Crees, *Sovereign Injustice[:] Forcible Inclusion of the James Bay Crees and Cree Territory into a Sovereign Quebec*, Nemaska, 1995 at 62.

²⁶ Radan, n20 at 420.

²⁷ AC Cairns, "Why Is It So Difficult to Talk to Each Other?" (1997) 42 *McGill Law Journal* 63 at 86.

sovereign or independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people.”²⁸ The critical question relating to self-determination is the definition of “a people”. The answer to this question has been a matter of significant dispute amongst international lawyers. The essential division of opinion is between those who subscribe to the view that “a people” is the population of a defined territorial unit, such as an independent state, colonial entity, and, more recently, a federal unit of an independent state. Others argue that “a people” includes groups defined according to ethno-national criteria.²⁹ On the first interpretation the population of Quebec would be “a people.” On the second interpretation, the French speaking population of Quebec would be a “people” as would be, for example, the James Bay Cree population of Quebec. In *Secession Reference* the Supreme Court rejected the territorial definition of a people. The Court said:

It is clear that “a people” may include only a portion of the population of an existing state.³⁰

The Court did not need to clearly define the meaning of “a people” for the purposes of its decision, but it clearly suggested that the French speaking and indigenous populations of Quebec were separate peoples. The Court stated:

While much of the Quebec population certainly shares many of the characteristics (such as a common language and culture) that would be considered in determining whether a specific group is “a people”, as do other groups within Quebec and/or Canada, it is not necessary to explore this legal characterization.³¹

²⁸ Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance With the Charter of the United Nations, Resolution of the United Nations General Assembly 2625(XXV), 24 October 1970.

²⁹ On the debate over the meaning of “A people” see TD Musgrave, *Self-Determination and National Minorities*, Clarendon Press, Oxford, 1997 at 148-179; Radan, n20 at 11-115.

³⁰ n1 at 437 (para. 124).

³¹ n1 at 437 (para. 125). In this context it can be noted that Canada’s *Constitution Act*, 1982, s. 35(2), refers to “aboriginal peoples of Canada” as including “the Indian, Inuit and Metis peoples of Canada”. Quebec’s indigenous populations emphatically assert that they are distinct “peoples”: P Joffe, “International Practice, Quebec Secession and Indigenous Peoples: The Imperative for Fairness, Non-Discrimination and Respect for Human Rights” (1997) 8 *National Journal of Constitutional Law* 97 at 111-112; Grand Council of the Crees, n25 at 33-36.

If the Supreme Court is, as appears from the above, of the view that the French speaking and indigenous populations of Quebec are peoples, then, according to the Declaration on Friendly Relations, secession from Canada by the French speaking population would be a legitimate exercise of the right to self-determination. The Court recognised that this right of secession would only arise in international law if a people were subject to oppression by the state within which they were located and took the view that this did not apply to the case of Quebec's peoples.³² However, if the French speaking population were subject to oppression from Canada's central government their secession would require the partition of Quebec, so as to give effect to the self-determination rights of Quebec's other peoples to stay within Canada.³³ Indeed, the Court contemplated that partition could be a result of secession negotiations when it indicated that the question of borders, discussed later in this article, could be one of the issues in the process of negotiating a constitutional amendment on secession.

It would follow from the above that the Quebec referendum scenario suggested above would be a "clear expression" of the will of the French speaking population of Quebec to secede and would thus legitimate the holding of constitutional negotiations with a view to achieving that goal by means of an amendment to the Canadian Constitution. It would not legitimate discussions on the secession of Quebec within its present territorial borders.

The Wording of the Referendum Question

The Supreme Court indicated that the referendum question would need to be "free of ambiguity" in terms of the question asked.³⁴ The Court also ruled that the determination of what was a clear question to be put to a referendum was to be established by the political process.³⁵ On the other hand the Court's requirement that the question be "free of ambiguity" suggests that it did not believe that the questions posed in the two previous Quebec referenda met that standard.

³² n1 at 437-442 (paras. 126-137).

³³ Public opinion polls in Canada and Quebec indicate strong majorities in favour of the territories occupied by indigenous peoples remaining within Canada in the event of secession by the French speaking population of Quebec: Joffe, n31 at 120.

³⁴ n1 at 424 (para. 87).

³⁵ n1 at at 447-448 (para. 153).

The October 1995 referendum in Quebec asked voters the following: “Do you agree that Quebec should become sovereign, after having made a formal offer to Canada for a new Economic and Political Partnership, within the scope of the Bill respecting the Future of Quebec and of the agreement signed on 12 June 1995?”³⁶ It has been shown that a “Yes” vote in response to this question was not always understood as a vote for independent statehood. This flowed from the confusion of what was meant by the word “sovereignty” in the referendum question. Between one-quarter and one-third of Quebec voters favouring sovereignty for Quebec believed that it meant that Quebec would remain a province of Canada.³⁷ The October 1995 question put to Quebec voters is in stark contrast to the question put to the voters of Nevis in August 1998 who were asked: “Do you approve of the Nevis secession bill and Nevis becoming an independent state separate from St Kitts?”³⁸

The Process of Negotiations

In relation to the course of negotiations that must follow a successful referendum on secession in Quebec, the Court rejected the idea that the other provinces and federal government had to accede to the secession of Quebec.³⁹ Similarly, the Court rejected the view that a successful secession referendum in Quebec would impose no obligations upon the remaining provinces and central government.⁴⁰ These absolutist propositions were not sustainable because of the requirement that negotiations be governed by the principles of federalism, democracy, constitutionalism and the rule of law, and the protection of minorities.⁴¹

The Court observed that in relation to the course of negotiations:

³⁶ Hogg, n24 at 19.

³⁷ K McRoberts, *Misconceiving Canada, The Struggle for National Unity*, Oxford University Press, Toronto, 1997 at 230; R Whitaker, “Thinking About the Unthinkable: Planning for a Possible Secession” (1996) 7 (2-3) *Constitutional Forum* 58 at 61; S Contenta, “Sovereignists Scramble For A Game Plan, Federal Offensive Finds PQ In A State Of Disarray And Confusion”, *The Toronto Star*, 21 September 1997.

³⁸ Stewart, n18.

³⁹ n1 at 425 (para. 91).

⁴⁰ n1 at 426 (para. 92).

⁴¹ n1 at 425 (para. 90).

The rights of other provinces and the federal government cannot deny the right of the government of Quebec to pursue secession, should a clear majority of the people of Quebec choose that goal, so long as in doing so, Quebec respects the rights of others. Negotiations would be necessary to address the interests of the federal government, of Quebec and the other provinces, and other participants, as well as the rights of all Canadians both within and outside Quebec.⁴²

Later in the judgment the Court added that the negotiations would need to “specifically” address “the rights of minorities.”⁴³

The Court’s judgment is not clear on the issue of which parties would participate in the negotiations. In a number of places the Court refers to negotiations between the Canadian provinces and federal government.⁴⁴ On the other hand, the Court, as quoted above, refers to the provinces and federal government “and other participants” as being engaged in negotiations. This is a significant matter because any negotiated resolution of a Quebec initiative to secede would need to be the product of an agreement by the participants to the negotiations. It is thus necessary to determine who, apart from the provinces and central government are to be participants to the negotiations. If there are to be “other participants” the Court judgment does not indicate who they may be. As noted, the Court explicitly ruled that the rights of minority groups have to be addressed at the negotiations.⁴⁵ Yet the Court does not state that such groups are entitled to participation in the negotiations. This may well indicate that such groups are by implication excluded from participation in the negotiations. If they are to be participants it is odd that the Court did not state this, given that it did specifically state that their interests are to be addressed in the negotiations. On the other hand, if this reasoning is correct, it probably would not apply to Canada’s Aboriginal peoples who are required to be participants in certain proposed amendments to Canada’s Constitution.⁴⁶ Furthermore, the judgment does not indicate what majority of participants needs to support any agreement reached at the negotiations. This may well be part of the “content and process of negotiations” that the Court expressly stated were to be determined by the political process.⁴⁷

⁴² n1 at 426 (para. 92).

⁴³ n1 at 447 (para. 151).

⁴⁴ n1 at 425, 426, 446-447 (paras. 88, 90, 92, 150).

⁴⁵ n1 at 447 (para. 151).

⁴⁶ *Constitution Act*, 1982, s35(1).

⁴⁷ n1 at 447-448 (para. 153).

The Content of Negotiations

Although the Court ruled that the “content and process of the negotiations” would have to be determined by the political process, it did indicate some of the matters that could be the subject of negotiations relating to Quebec’s secession. One was the issue of Quebec’s borders.⁴⁸ This is of particular significance given that the issue of borders has been a matter of significant differences of opinion between the central government, Quebec’s Aboriginal peoples and Quebec’s government. The Canadian government⁴⁹ and the James Bay Crees⁵⁰ have argued that Quebec’s present provincial borders would not automatically become international borders following secession. The Quebec government has argued the opposite⁵¹ and has relied heavily on the break-up of Yugoslavia as a precedent. In Yugoslavia it was held by the Badinter Arbitration Commission that existing internal republic borders became international borders following recognition of independence pursuant to the international law principle of *uti possidetis juris*.⁵² However, the Canadian Supreme Court effectively rejects the proposition that existing federal borders are sacrosanct in the context of a negotiated constitutional amendment for the secession of Quebec. On the other hand, the Court appears to recognise that existing borders would become international borders if an unconstitutional secession of Quebec was nevertheless sanctioned by the obtaining of recognition of independent statehood by the international community.⁵³

⁴⁸ n1 at 427 (para. 96).

⁴⁹ Letter of Stephane Dion, Federal Minister for Intergovernmental Affairs to Lucien Bouchard, Premier of Quebec, *Canada NewsWire*, 11 August 1997.

⁵⁰ Grand Council of the Crees, n25 at 171-227; Grand Council of the Crees, *Never Without Consent, James Bay Crees’ Stand Against Forcible Inclusion into an Independent Quebec*, ECW Press, Toronto, 1998 at 84-111.

⁵¹ The Quebec government has relied heavily on a report it commissioned from five international law experts which stated that Quebec’s provincial borders automatically became international borders upon the secession of Quebec. An English translation of the report is available on the Internet at <<http://www.mri.gouv.qc.ca/etiqaeso.html>>.

⁵² For a critique of the views of the Badinter Commission and its relevance to Canada see P Radan, “The Borders of a Future Independent Quebec: Does the Principle of *Uti Possidetis Juris* Apply?” [1997] *Australian International Law Journal* 200. For a detailed critique of the report of the five experts commissioned by the Quebec government see Grand Council of the Crees, n25 at 229-247.

⁵³ This aspect of the Court decision is discussed in detail in P Radan, “The Supreme Court of Canada and the Borders of Quebec” [1998] *Australian International Law Journal* 171.

The Constitutional Amendment Procedures

The Supreme Court judgment makes it clear that any secession of Quebec, or indeed any agreement that may be negotiated as the result of a secession initiative by Quebec, would need to proceed by amendment to the Canadian Constitution. As the Court stated, a successful referendum in Quebec would “initiate the Constitution’s amendment process”.⁵⁴ The question of the procedure for amendment of the Constitution is one that has been the subject of wide debate within Canadian legal circles. Canada’s complex and varied constitutional amendment procedures are contained in Part V (ss. 38-49) of the *Constitution Act*, 1982.

The two major alternatives are the so-called general procedure which requires the assent of both houses of the federal parliament plus the consent of at least seven provincial assemblies which together represent at least fifty per cent of Canada’s population (ss. 38-40, 42), and the unanimity procedure which requires the assent of both houses of federal parliament and of all the provincial legislative assemblies (s. 41). In both procedures some provinces are required by their own constitutions to have a referendum vote in favour of the amendment before it is voted upon by the provincial legislature.⁵⁵

Prior to *Secession Reference* Canadian constitutional lawyers were divided over which of the two Part V procedures would apply in a case involving the secession of one of Canada’s provinces.⁵⁶ The Supreme Court declined to make any pronouncement on “the applicability of any particular constitutional procedure to effect secession unless and until sufficiently clear facts exist to squarely raise the issue for judicial determination.”⁵⁷

The Court in its references to constitutional amendment to effect secession made no specific reference to either of the stipulated procedures in Part V, merely noting that “various procedures to achieve lawful secession [were] raised in argument”.⁵⁸ It has been argued by Donna Greschner that the effect of the Court’s decision is to render both alternatives within Part

⁵⁴ n1 at 424 (para. 87).

⁵⁵ For example in Alberta: *Constitutional Referendum Act 1992*, and British Columbia: *Constitutional Amendment Approval Act 1996*.

⁵⁶ See J Webber, “The Legality of a Unilateral Declaration of Independence Under Canadian Law” (1997) 42 *McGill Law Journal* 281, where the author argues that the unanimity procedure applies to cases of secession. See also Hogg, n24 at 23-28.

⁵⁷ n1 at 431 (para. 105).

⁵⁸ n1 at 431 (para. 105).

V as in applicable to cases of secession.⁵⁹ Greschner refers to the Court's pronouncement on the four fundamental constitutional principles noted above as being:

... a necessary part of [Canada's] Constitution because problems or situations may arise which are not expressly dealt with by the text of the Constitution. In order to endure over time, a constitution must contain a comprehensive set of rules and principles which are capable of providing an exhaustive legal framework for our system of government.⁶⁰

This passage leads Greschner to conclude that, accepting that the Part V methods are unworkable in the context of secession, a constitutional amendment based upon the four fundamental principles is appropriate.⁶¹ She then argues that the Court, in ruling that the secession of Quebec could not be achieved lawfully without principled negotiations based upon the four fundamental principles, meant that:

Unilateral secession is not one that is attempted without compliance with the Part V amending formula, but one attempted without principled negotiations beforehand. Conversely, a non-unilateral secession is one preceded by negotiations and, to use the Court's phrase, will "be considered a lawful act."⁶²

Provided Quebec lives up to its obligation to engage in principled negotiations on secession, Greschner argues that, if such negotiations did not produce an amendment to permit secession, a declaration of independence by Quebec would be lawful.⁶³

Greschner further supports her argument by compelling claims that the Part V procedures do not fit comfortably with the issue of secession because they were not designed with the purpose of creating two independent states out of one.⁶⁴ However, whatever the merits of her arguments her proposition that Part V can be dispensed with in relation to secession fails

⁵⁹ D Greschner, "The Quebec Secession Reference: Goodbye to Part V?" (1998) 10(1) *Constitutional Forum* 19.

⁶⁰ n1 at 403 (para. 32).

⁶¹ Greschner, n59 at 20.

⁶² Greschner, n59 at 22.

⁶³ Greschner, n59 at 22.

⁶⁴ Greschner, n59 at 23.

to deal with the unequivocal statement by the Court that “[u]nder the Constitution, secession requires that an amendment be negotiated.”⁶⁵ This statement clearly means that Part V cannot be dispensed with for a lawful secession.

Successful, but Unconstitutional, Secession

A final comment on the Supreme Court’s decision relates to the possibility of a successful secession of Quebec even if a constitutional amendment to achieve that result was not agreed upon pursuant to negotiations between Quebec and the other provinces and federal government. The Court opined that in the event that Quebec’s attempt to secede was thwarted by a failure of any of the other parties to the negotiations to negotiate in good faith, Quebec may well find sympathy in the international community with the result that it would be more likely that its independence would be recognised internationally than if itself had failed to negotiate in good faith.⁶⁶ The Court also suggested that an unconstitutional and unilateral secession by Quebec could possibly succeed if recognised by the international community.⁶⁷ Although recognition is not necessary to achieve statehood, the Court recognised that, in the context of secession, “the viability of a would-be state in the international community depends, as a practical matter, upon recognition by other states.”⁶⁸

Historically, international recognition of statehood has been the major foreign policy goal of any secessionist movement.⁶⁹ The recognition of independence of the Spanish American states by the United States of America in 1822 has been described as “the greatest assistance rendered by any foreign power to the independence of Latin America.”⁷⁰ The recognition by India, a significant regional power, of Bangladesh in 1971 was a key to the success

⁶⁵ n1 at 428 (para. 97).

⁶⁶ n1 at 430 (para. 103). During the 1995 referendum, French President, Jacques Chirac, intimated that France would recognise a unilateral secession of Quebec: J F Boshier, *The Gaullist Attack on Canada 1967-1997*, McGill-Queen’s University Press, Montreal, 1999 at 71, 120.

⁶⁷ n1 at 431-432, 443, 449 (paras. 106-107, 142, 155).

⁶⁸ n1 at 443 (para. 142).

⁶⁹ J Crawford, *The Creation of States in International Law*, Clarendon Press, Oxford, 1979 at 248.

⁷⁰ S Flagg Bemis quoted in Piero Gleijeses, “The Limits of Sympathy: The United States and the Independence of Spanish America” (1992) 24 *Journal of Latin American Studies* 481 at 487.

of the latter's secession from Pakistan.⁷¹ Conversely, the failure to gain international recognition has been a major contributing factor to the failure of various secessions. This is confirmed by the failure of the southern Confederacy to gain British recognition of its secession from the US in the 1860s,⁷² and Katanga's failed secession from Congo in the 1960s.⁷³ The fact that only Turkey has recognised the 1983 secession of the Turkish Republic of Northern Cyprus means that the latter's secession has not, at least to date, been successful.⁷⁴

In relation to a unilateral secession by Quebec the recognition of the four former republics of Yugoslavia serves as an instructive precedent. International recognition was extended to the republics despite the unilateral acts of secession being declared unconstitutional by Yugoslavia's Constitutional Court.⁷⁵ Recognition was justified, in part, on allegations of intransigence on the part of Serbia and, to a lesser extent, Montenegro, who sought to retain parts of the territory of the seceding republics within what remained of Yugoslavia.

Conclusion

By way of conclusion it can be noted that the Supreme Court's decision is clear in stating that a unilateral declaration of independence by Quebec from Canada is illegal under Canadian constitutional law. On the other hand such an act could be effective if it was accepted by the international community. The Court also recognised that secession could be achieved by constitutional amendment. The Court stipulated some of principles that

⁷¹ Crawford, n69 at 115.

⁷² President Lincoln's major foreign policy goal was to prevent British recognition of the Confederacy. He was prepared to risk war with Great Britain over the issue. For a detailed analysis of Lincoln's foreign policy on the recognition issue see H Jones, *Union in Peril, The Crisis Over British Intervention in the Civil War*, University of Nebraska Press, Lincoln, 1992 and H Jones, "History and Mythology, The Crisis Over British Intervention in the Civil War" in RE May (ed), *The Union, the Confederacy, and the Atlantic Rim*, Purdue University Press, West Lafayette, 1995 at 29-67.

⁷³ Security Council Resolution 169 (1961), 24 November 1961.

⁷⁴ *Loizidou v. Turkey (Merits)* (1996) 108 ILR 445 at 471, per Judge Wildhaber; R Jennings & A Watts, *Oppenheim's International Law, Volume 1, Peace*, 9th Edition, Longman, London 1992 at 130.

⁷⁵ On the Yugoslav Constitutional Court decisions see Radan, n20 at 354-358.

would govern the process by which such an amendment could be achieved. Many of these principles were deliberately not precisely defined or fleshed out on the basis that the Court felt that this was properly to be left for determination by the political process. If a constitutional amendment could not be negotiated by the relevant parties Quebec's secession could, nevertheless, attract sympathy and recognition from the international community, especially if the reason for a failure to obtain the necessary constitutional amendment was not due to Quebec's failure to negotiate in good faith.

