Secession of Quebec, Re, Reference to Supreme Court, [1998] 2 SCR 217, (1998) 161 DLR (4th) 385, (1998), 55 CRR (2d) 1, ILDC 184 (CA 1998), 20th August 1998, Canada; Supreme Court [SCC]

Date: 20 August 1998
Citation(s): [1998] 2 SCR 217 (Official Citation)
(1998) 161 DLR (4th) 385 (Other Reference)
(1998), 55 CRR (2d) 1 (Other Reference)
ILDC 184 (CA 1998) (OUP reference)
Content type: Domestic court decisions
Product: Oxford Reports on International Law [ORIL]
Module: International Law in Domestic Courts [ILDC]
Jurisdiction: Canada [ca]; Supreme Court [SCC]

Parties: Reference by Governor in Council

Judges/Arbitrators: Lamer (Chief Justice); L'Heureux-Dubé; Gonthier; Cory; McLachlin; Iacobucci; Major; Bastarache; Binnie

Procedural Stage: Reference to Supreme Court

Subject(s):

Self-determination — Minorities — Democracy — Secession — Conflicts between — General principles of international law — Recognition of states

Core Issue(s):

Whether the international law of self-determination granted Quebec the unilateral right to secede from the Canadian Federation.

Whether the residents of Quebec were a ‘people’ as that term is used in international law.

Whether Canadian law or international law had precedence in the event of a conflict between the two.

Oxford Reports on International Law in Domestic Courts is edited by:

Professor André Nollkaemper, University of Amsterdam and August Reinisch, University of Vienna.

Facts

F1 The Federal Government of Canada initiated this reference to clarify whether the province of Quebec could secede unilaterally from Canada under the Constitution, Canada ('Constitution') or international law.

F2 The Government sent three questions to the Supreme Court of Canada:

1. Under the Constitution, can the National Assembly, legislature or Government of Quebec effect the secession of Quebec from Canada unilaterally?

2. Does international law give the National Assembly, legislature or Government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature or Government of Quebec the right to effect the secession of Quebec from Canada unilaterally?

3. In the event of a conflict between domestic and international law on the right of the National Assembly, legislature or Government of Quebec to effect the secession of Quebec from Canada unilaterally, which would take precedence in Canada? (paragraph 3)

F3 The court appointed an amicus curiae *to* present arguments in favour of Quebec's right of unilateral secession. The amicus argued that the Supreme Court of Canada lacked the jurisdiction to answer the second question, as the question was one of pure international law and, as such, out of bounds for a domestic court. (paragraphs 4, 19, 21)

F4 The amicus curiae conceded that the principle of self-determination of peoples was not applicable to the Quebec context (paragraph 111) but argued that, although international law did not ground a right to secession, international law did not prohibit secession either. The amicus argued also that international law would give effect to the unilateral secession of Quebec through the doctrine of effectivity. (paragraph 140)

Held

H1 The Court was competent to answer the second question posed by the Governor in Council. The Court was not acting as an international tribunal; its answer to the second question did not bind any other State or international tribunal. (paragraph 20) The Court has looked to international law in previous cases (paragraph 22) and, as the amicus curiae argued that international law would govern any attempt by Quebec to secede unilaterally from Canada, it was appropriate to consider international law in this case. (paragraph 23)

H2 International law contained no explicit right to the unilateral secession for parts of States; nor did it contain an explicit denial of that right. (paragraphs 111, 112) Because of the lack of express permission in international law, supporters of a doctrine of unilateral secession point to the principles of the self-determination of peoples and the proposition that what is not expressly prohibited is permitted. (paragraph 111)

H3 International law will generally leave the creation of a new State to the law of the existing State. Where unilateral secession is incompatible with a domestic Constitution, as in the case of Canada, it is probable that international law would accept that conclusion.

This acceptance remains subject to the right of peoples to self-determination. (paragraph 112)

H4 The existence of a right to the self-determination of peoples is so widely recognized that it is considered a general principle of international law. (paragraph 114)

H5 The right of self-determination belongs to peoples. (paragraph 123) A people may include only a part of the population of an existing State. If it belonged only to the entire population of an existing State, the right to self-determination would largely duplicate the right to territorial integrity of existing States and would frustrate the remedial purpose of the principle of self-determination of peoples. (paragraph 124) It was not necessary to determine whether the population of Quebec, or other groups in Quebec or Canada, is a 'people'. The characteristics of a people may include such things as a common language and culture. (paragraph 125)

H6 In general, self-determination is to be exercised internally. (paragraphs 122, 126) External self-determination, which may take the form of an assertion of a unilateral right of secession, will arise only in the most extreme circumstances. (paragraph 126) The limited circumstances in which the right to external self-determination arises implies a denial of a general unilateral right of secession in international law. (paragraph 112)

H7 The principle of self-determination of peoples operates within a framework of respect for the territorial integrity of States. (paragraphs 127, 131) Where the population of a State can exercise its self-determination internally, the State will be entitled to the protection of its territorial integrity. (paragraph 130)

H8 Colonial and oppressed peoples have the right of external self-determination (paragraph 131) as do a people subject to alien subjugation. (paragraph 133)

H9 It is possible that the principle of self-determination may also ground a right to unilateral secession in cases where a people is blocked from the meaningful exercise of its right to internal self-determination. (paragraphs 134, 135) Even if this situation grounds a right of self-determination, it was not applicable to the Quebec context. (paragraph 135)

H10 The principle of effectivity has no constitutional or legal status; accepting that principle is equivalent to accepting that the National Assembly, legislature or Government of Quebec may act contrary to law simply by asserting it has the power to do so. (paragraph 107) The notion that the law may be broken if it can be broken successfully is contrary to the rule of law and is rejected. (paragraph 108)

H11 Effectivity had no real application to Question 2. Effectivity relates to factual recognition; Question 2 addressed the right of Quebec to unilateral secession. (paragraph 141) International recognition is not alone constitutive of statehood and does not retroactively give rise to a right to secede. (paragraph 142)

H12 There was no conflict between international law and Canadian law on the questions at issue; there was no need to address which system would have precedence in case of conflict. (paragraph 147)

Date of Report: 18 April 2007

Reporter(s): Gillian MacNeil

Analysis

A1 In 1995, the Government of Quebec held a referendum in that province to determine whether a majority of the population supported the secession of Quebec from the Canadian Federation. A narrow majority favoured remaining in Canada.

A2 In the wake of the referendum, the Canadian Government sought to clarify whether Quebec had a unilateral right of secession under either Canadian law or international law. To that end, the Federal Government sent three questions (paragraph 2) to the Supreme Court of Canada under that Court's reference jurisdiction. (The Supreme Court Act, RSC 1985 c S-26 s 53 (Canada) permits the Governor in Council to refer questions directly to the Supreme Court in order to receive a legal opinion thereon.) No relief was sought, merely an opinion on the questions submitted.

A3 The decision of the Court can be summed up very simply: international law contains no general right to unilateral secession. (This Commentary does not discuss the first question submitted to the Court, which relates to Canada's domestic law.) As required by the wording of the second question submitted, the Court examined two related issues in order to reach that determination: the principle of self-determination of peoples, and the role of international law in regulating secession.

A4 The Court favoured an interpretation of the principle of self-determination that did not threaten the territorial integrity of States, and it took care to highlight the limitations on the principle of self-determination. A group must establish that it is a ‘people’, (paragraph 123) that it is under colonial rule or foreign occupation, or that it is incapable of exercising its self-determination within the existing state. (paragraphs 131–4) Because the right to self-determination is a human right, it is first to be exercised internally. (paragraphs 122, 126) The decision is clear that while the self-determination of peoples may be a general principle of international law, (paragraphs 114–21) it will only rarely give rise to a right of unilateral secession.

A5 The limited role played by the international law principle of external self-determination was paralleled by the narrow role the Court assigned to international law generally. Because there is no specific right to unilateral secession in international law, (paragraph 111) the international legal system must interact with the domestic systems of existing States; domestic law will regulate secession, subject to the self-determination of peoples, (paragraphs 112, 144) and international law will judge the legitimacy of the parties' actions based on domestic law. Because secession is to be governed by domestic law, it is apparent that, in the normal course of events, international law principles will not operate to trump domestic law. In particular, in the Canadian context, the terms of secession must be negotiated (paragraph 84) and within those negotiations, the seceding party cannot dictate the terms by asserting the principle of self-determination. (paragraph 91)

A6 Because the Court found that the right of external self-determination did not apply to the Quebec context, (paragraphs 111, 135) it did not address whether in the extreme circumstances conceived for the operation of that right, international law would override the usually applicable domestic law.

A7 The judgment of the Court reflects the general preference in international law for the territorial integrity and stability of States. This preference is so pronounced that international law will speak to the secession of part of a State only in the rarest of circumstances. Even in a case of direct application of international law, where a right of

external self-determination could be said to exist, it is unclear whether international law would operate to exclude domestic legal requirements.

Date of Analysis: 18 April 2007
Analysis by: Gillian MacNeil

Further analysis:

Suzanne Lalonde, 'Quebec's Boundaries in the Event of Secession' (2003) 3 Mq LJ 129
A Bayefsky (ed), 'Self-Determination in International Law: Quebec and Lessons Learned' (Kluwer Law International, Den Haag 2000)
DP Haljan, 'A Constitutional Duty to Negotiate Amendments: Reference re Secession of Quebec' (1999) 48 ICLQ 447

Instruments cited in the full text of this decision:

International

Charter of the United Nations (26 June 1945) 59 Stat 1031; TS 993; 3 Bevans 1153, entered into force 24 October 1945, Article 1(2)

Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) 213 UNTS 222; 312 ETS 5, entered into force 3 September 1953

Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol 2 1963

Resolution 2625 (XXV), Declaration on Principles of International law Concerning Friendly Relations and Cooperation Among States, UN General Assembly, 1970

Final Act of the Conference on Security and Cooperation in Europe (Helsinki Final Act) 1975

International Covenant on Civil and Political Rights (16 December 1966) 999 UNTS 171, entered into force 23 March 1976, Article 1

International Covenant on Economic, Social and Cultural Rights (16 December 1966) 993 UNTS 3, entered into force 3 January 1976, Article 1

Statute of the Inter-American Court on Human Rights OAS Res 448 (IX-0/79)

Treaty Establishing the European Community (25 March 1957) EU Consolidated Treaties, entered into force 1 January 1958

Vienna Declaration and Program of Action 1993

Resolution 50/6, UN General Assembly, 1995

Constitution

Constitution, (Canada)

Cases cited in the full text of this decision:

Canadian domestic courts

Reference re Objection by Quebec to a Resolution to amend the Constitution, (1982) 2 SCR 793

To access full citation information for this document, see the Oxford Law Citator record

Decision - full text

I. Introduction

1 This Reference requires us to consider momentous questions that go to the heart of our system of constitutional government. The observation we made more than a decade ago in *Reference re Manitoba Language Rights*, 1985 CanLII 33 (S.C.C.), [1985] 1 S.C.R. 721 (*Manitoba Language Rights Reference*), at p. 728, applies with equal force here: as in that case, the present one "combines legal and constitutional questions of the utmost subtlety and complexity with political questions of great sensitivity". In our view, it is not possible to answer the questions that have been put to us without a consideration of a number of underlying principles. An exploration of the meaning and nature of these underlying principles is not merely of academic interest. On the contrary, such an exploration is of immense practical utility. Only once those underlying principles have been examined and delineated may a considered response to the questions we are required to answer emerge.

2 The questions posed by the Governor in Council by way of Order in Council P.C. 1996–1497, dated September 30, 1996, read as follows:

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

3 Before turning to Question 1, as a preliminary matter, it is necessary to deal with the issues raised with regard to this Court's reference jurisdiction.

II. The Preliminary Objections to the Court's Reference Jurisdiction

4 The *amicus curiae* argued that s. 101 of the *Constitution Act, 1867* does not give Parliament the authority to grant this Court the jurisdiction provided for in s. 53 of the *Supreme Court Act*, R.S.C., 1985, c. S-26. Alternatively, it is submitted that even if Parliament were entitled to enact s. 53 of the *Supreme Court Act*, the scope of that section should be interpreted to exclude the kinds of questions the Governor in Council has submitted in this Reference. In particular, it is contended that this Court cannot answer Question 2, since it is a question of "pure" international law over which this Court has no jurisdiction. Finally, even if this Court's reference jurisdiction is constitutionally valid, and even if the questions are within the purview of s. 53 of the *Supreme Court Act*, it is argued that the three questions referred to the Court are speculative, of a political nature, and, in any event, are not ripe for judicial decision, and therefore are not justiciable.

5 Notwithstanding certain formal objections by the Attorney General of Canada, it is our view that the *amicus curiae* was within his rights to make the preliminary objections, and that we should deal with them.

A. The Constitutional Validity of Section 53 of the Supreme Court Act

6 In *Re References by Governor-General in Council* (1910), 43 S.C.R. 536, affirmed on appeal to the Privy Council, [1912] A.C. 571 (*sub nom. Attorney-General for Ontario v. Attorney-General for Canada*), the constitutionality of this Court's special jurisdiction was twice upheld. The Court is asked to revisit these decisions. In light of the significant changes in the role of this Court since 1912, and the very important issues raised in this Reference, it is appropriate to reconsider briefly the constitutional validity of the Court's reference jurisdiction.

7 Section 3 of the *Supreme Court Act* establishes this Court both as a "general court of appeal" for Canada and as an "additional court for the better administration of the laws of Canada". These two roles reflect the two heads of power enumerated in s. 101 of the *Constitution Act, 1867*. However, the "laws of Canada" referred to in s. 101 consist only of federal law and statute: see *Quebec North Shore Paper Co. v. Canadian Pacific Ltd.*, 1976 CanLII 10 (S.C.C.), [1977] 2 S.C.R. 1054, at pp. 1065–66. As a result, the phrase "additional courts" contained in s. 101 is an insufficient basis upon which to ground the special jurisdiction established in s. 53 of the *Supreme Court Act*, which clearly exceeds a consideration of federal law alone (see, e.g., s. 53(2)). Section 53 must therefore be taken as enacted pursuant to Parliament's power to create a "general court of appeal" for Canada.

8 Section 53 of the *Supreme Court Act* is *intra vires* Parliament's power under s. 101 if, in "pith and substance", it is legislation in relation to the constitution or organization of a "general court of appeal". Section 53 is defined by two leading characteristics –– it establishes an original jurisdiction in this Court and imposes a duty on the Court to render advisory opinions. Section 53 is therefore constitutionally valid only if (1) a "general court of appeal" may properly exercise an original jurisdiction; and (2) a "general court of appeal" may properly undertake other legal functions, such as the rendering of advisory opinions.

(1) May a Court of Appeal Exercise an Original Jurisdiction?

9 The words "general court of appeal" in s. 101 denote the status of the Court within the national court structure and should not be taken as a restrictive definition of the Court's functions. In most instances, this Court acts as the exclusive ultimate appellate court in the country, and, as such, is properly constituted as the "general court of appeal" for Canada. Moreover, it is clear that an appellate court can receive, on an exceptional basis, original jurisdiction not incompatible with its appellate jurisdiction.

10 The English Court of Appeal, the U.S. Supreme Court and certain courts of appeal in Canada exercise an original jurisdiction in addition to their appellate functions. See *De Demko v. Home Secretary*, [1959] A.C. 654 (H.L.), at p. 660; *Re Forest and Registrar of Court of Appeal of Manitoba* (1977), 77 D.L.R. (3d) 445 (Man. C.A.), at p. 453; United States Constitution, art. III, § 2. Although these courts are not constituted under a head of power similar to s. 101, they certainly provide examples which suggest that there is nothing inherently self-contradictory about an appellate court exercising original jurisdiction on an exceptional basis.

11 It is also argued that this Court's original jurisdiction is unconstitutional because it conflicts with the original jurisdiction of the provincial superior courts and usurps the normal appellate process. However, Parliament's power to establish a general court of appeal pursuant to s. 101 is plenary, and takes priority over the province's power to control the administration of justice in s. 92(14). See *Attorney-General for Ontario v. Attorney-General for Canada*, [1947] A.C. 127 (P.C.). Thus, even if it could be said that there is any conflict between this Court's reference jurisdiction and the original jurisdiction of the provincial superior courts, any such conflict must be resolved in favour of Parliament's exercise of its plenary power to establish a "general court of appeal" provided, as discussed

below, advisory functions are not to be considered inconsistent with the functions of a general court of appeal.

(2) May a Court of Appeal Undertake Advisory Functions?

12 The *amicus curiae* submits that

> [TRANSLATION] [e]ither this constitutional power [to give the highest court in the federation jurisdiction to give advisory opinions] is expressly provided for by the Constitution, as is the case in India (*Constitution of India*, art. 143), or it is not provided for therein and so it simply does not exist. This is what the Supreme Court of the United States has held. [Emphasis added.]

13 However, the U.S. Supreme Court did not conclude that it was unable to render advisory opinions because no such express power was included in the United States Constitution. Quite the contrary, it based this conclusion on the express limitation in art. III, § 2 restricting federal court jurisdiction to actual "cases" or "controversies". See, e.g., *Muskrat v. United States*, 219 U.S. 346 (1911), at p. 362. This section reflects the strict separation of powers in the American federal constitutional arrangement. Where the "case or controversy" limitation is missing from their respective state constitutions, some American state courts do undertake advisory functions (e.g., in at least two states –– Alabama and Delaware –– advisory opinions are authorized, in certain circumstances, by statute: see Ala. Code 1975 § 12-2-10; Del. Code Ann. tit. 10, § 141 (1996 Supp.)).

14 In addition, the judicial systems in several European countries (such as Germany, France, Italy, Spain, Portugal and Belgium) include courts dedicated to the review of constitutional claims; these tribunals do not require a concrete dispute involving individual rights to examine the constitutionality of a new law –– an "abstract or objective question" is sufficient. See L. Favoreu, "American and European Models of Constitutional Justice", in D. S. Clark, ed., *Comparative and Private International Law* (1990), 105, at p. 113. The European Court of Justice, the European Court of Human Rights, and the Inter-American Court of Human Rights also all enjoy explicit grants of jurisdiction to render advisory opinions. See *Treaty establishing the European Community*, Art. 228(6); Protocol No. 2 of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, Europ. T.S. No. 5, p. 36; *Statute of the Inter-American Court of Human Rights*, Art. 2. There is no plausible basis on which to conclude that a court is, by its nature, inherently precluded from undertaking another legal function in tandem with its judicial duties.

15 Moreover, the Canadian Constitution does not insist on a strict separation of powers. Parliament and the provincial legislatures may properly confer other legal functions on the courts, and may confer certain judicial functions on bodies that are not courts. The exception to this rule relates only to s. 96 courts. Thus, even though the rendering of advisory opinions is quite clearly done outside the framework of adversarial litigation, and such opinions are traditionally obtained by the executive from the law officers of the Crown, there is no constitutional bar to this Court's receipt of jurisdiction to undertake such an advisory role. The legislative grant of reference jurisdiction found in s. 53 of the *Supreme Court Act* is therefore constitutionally valid.

B. The Court's Jurisdiction Under Section 53

16 Section 53 provides in its relevant parts as follows:

> **53.**

> **(1)** The Governor in Council may refer to the Court for hearing and consideration important questions of law or fact concerning
>
> **(a)** the interpretation of the *Constitution Acts*;
>
> …
>
> **(d)** the powers of the Parliament of Canada, or of the legislatures of the provinces, or of the respective governments thereof, whether or not the particular power in question has been or is proposed to be exercised.
>
> **(2)** The Governor in Council may refer to the Court for hearing and consideration important questions of law or fact concerning any matter, whether or not in the opinion of the Court *ejusdem generis* with the enumerations contained in subsection (1), with reference to which the Governor in Council sees fit to submit any such question.
>
> **(3)** Any question concerning any of the matters mentioned in subsections (1) and (2), and referred to the Court by the Governor in Council, shall be conclusively deemed to be an important question.

17 It is argued that even if Parliament were entitled to enact s. 53 of the *Supreme Court Act*, the questions submitted by the Governor in Council fall outside the scope of that section.

18 This submission cannot be accepted. Question 1 is directed, at least in part, to the interpretation of the *Constitution Acts*, which are referred to in s. 53(1)(*a*). Both Question 1 and Question 2 fall within s. 53(1)(*d*), since they relate to the powers of the legislature or government of a Canadian province. Finally, all three questions are clearly “important questions of law or fact concerning any matter” so that they must come within s. 53(2).

19 However, the *amicus curiae* has also raised some specific concerns regarding this Court's jurisdiction to answer Question 2. The question, on its face, falls within the scope of s. 53, but the concern is a more general one with respect to the jurisdiction of this Court, as a domestic tribunal, to answer what is described as a question of “pure“ international law.

20 The first contention is that in answering Question 2, the Court would be exceeding its jurisdiction by purporting to act as an international tribunal. The simple answer to this submission is that this Court would not, in providing an advisory opinion in the context of a reference, be purporting to “act as” or substitute itself for an international tribunal. In accordance with well accepted principles of international law, this Court's answer to Question 2 would not purport to bind any other state or international tribunal that might subsequently consider a similar question. The Court nevertheless has jurisdiction to provide an advisory opinion to the Governor in Council in its capacity as a national court on legal questions touching and concerning the future of the Canadian federation.

21 Second, there is a concern that Question 2 is beyond the competence of this Court, as a domestic court, because it requires the Court to look at international law rather than domestic law.

22 This concern is groundless. In a number of previous cases, it has been necessary for this Court to look to international law to determine the rights or obligations of some actor within the Canadian legal system. For example, in *Reference re Powers to Levy Rates on Foreign Legations and High Commissioners' Residences*, [1943] S.C.R. 208, the Court was required to determine whether, taking into account the principles of international law with

respect to diplomatic immunity, a municipal council had the power to levy rates on certain properties owned by foreign governments. In two subsequent references, this Court used international law to determine whether the federal government or a province possessed proprietary rights in certain portions of the territorial sea and continental shelf (*Reference re Ownership of Offshore Mineral Rights of British Columbia*, [1967] S.C.R. 792; *Reference re Newfoundland Continental Shelf*, [1984] 1 S.C.R. 86).

23 More importantly, Question 2 of this Reference does not ask an abstract question of "pure" international law but seeks to determine the legal rights and obligations of the National Assembly, legislature or government of Quebec, institutions that clearly exist as part of the Canadian legal order. As will be seen, the *amicus curiae* himself submitted that the success of any initiative on the part of Quebec to secede from the Canadian federation would be governed by international law. In these circumstances, a consideration of international law in the context of this Reference about the legal aspects of the unilateral secession of Quebec is not only permissible but unavoidable.

C. Justiciability

24 It is submitted that even if the Court has jurisdiction over the questions referred, the questions themselves are not justiciable. Three main arguments are raised in this regard:

(1) the questions are not justiciable because they are too "theoretical" or speculative;

(2) the questions are not justiciable because they are political in nature;

(3) the questions are not yet ripe for judicial consideration.

25 In the context of a reference, the Court, rather than acting in its traditional adjudicative function, is acting in an advisory capacity. The very fact that the Court may be asked hypothetical questions in a reference, such as the constitutionality of proposed legislation, engages the Court in an exercise it would never entertain in the context of litigation. No matter how closely the procedure on a reference may mirror the litigation process, a reference does not engage the Court in a disposition of rights. For the same reason, the Court may deal on a reference with issues that might otherwise be considered not yet "ripe" for decision.

26 Though a reference differs from the Court's usual adjudicative function, the Court should not, even in the context of a reference, entertain questions that would be inappropriate to answer. However, given the very different nature of a reference, the question of the appropriateness of answering a question should not focus on whether the dispute is formally adversarial or whether it disposes of cognizable rights. Rather, it should consider whether the dispute is appropriately addressed by a court of law. As we stated in *Reference re Canada Assistance Plan (B.C.)*, 1991 CanLII 74 (S.C.C.), [1991] 2 S.C.R. 525, at p. 545:

> While there may be many reasons why a question is non-justiciable, in this appeal the Attorney General of Canada submitted that to answer the questions would draw the Court into a political controversy and involve it in the legislative process. In exercising its discretion whether to determine a matter that is alleged to be non-justiciable, the Court's primary concern is to retain its proper role within the constitutional framework of our democratic form of government. … In considering its appropriate role the Court must determine whether the question is purely political in nature and should, therefore, be determined in another forum or

whether it has a sufficient legal component to warrant the intervention of the judicial branch. [Emphasis added.]

Thus the circumstances in which the Court may decline to answer a reference question on the basis of "non-justiciability" include:

(i) if to do so would take the Court beyond its own assessment of its proper role in the constitutional framework of our democratic form of government or

(ii) if the Court could not give an answer that lies within its area of expertise: the interpretation of law.

27 As to the "proper role" of the Court, it is important to underline, contrary to the submission of the *amicus curiae*, that the questions posed in this Reference do not ask the Court to usurp any democratic decision that the people of Quebec may be called upon to make. The questions posed by the Governor in Council, as we interpret them, are strictly limited to aspects of the legal framework in which that democratic decision is to be taken. The attempted analogy to the U.S. "political questions" doctrine therefore has no application. The legal framework having been clarified, it will be for the population of Quebec, acting through the political process, to decide whether or not to pursue secession. As will be seen, the legal framework involves the rights and obligations of Canadians who live outside the province of Quebec, as well as those who live within Quebec.

28 As to the "legal" nature of the questions posed, if the Court is of the opinion that it is being asked a question with a significant extralegal component, it may interpret the question so as to answer only its legal aspects; if this is not possible, the Court may decline to answer the question. In the present Reference the questions may clearly be interpreted as directed to legal issues, and, so interpreted, the Court is in a position to answer them.

29 Finally, we turn to the proposition that even though the questions referred to us are justiciable in the "reference" sense, the Court must still determine whether it should exercise its discretion to refuse to answer the questions on a pragmatic basis.

30 Generally, the instances in which the Court has exercised its discretion to refuse to answer a reference question that is otherwise justiciable can be broadly divided into two categories. First, where the question is too imprecise or ambiguous to permit a complete or accurate answer: see, e.g., *McEvoy v. Attorney General for New Brunswick*, [1983] 1 S.C.R. 704; *Reference re Waters and Water-Powers*, [1929] S.C.R. 200; *Reference re Goods and Services Tax*, 1992 CanLII 69 (S.C.C.), [1992] 2 S.C.R. 445; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, 1997 CanLII 317 (S.C.C.), [1997] 3 S.C.R. 3 (*Provincial Judges Reference*), at para. 256. Second, where the parties have not provided sufficient information to allow the Court to provide a complete or accurate answer: see, e.g., *Reference re Education System in Island of Montreal*, [1926] S.C.R. 246; *Reference re Authority of Parliament in relation to the Upper House*, [1980] 1 S.C.R. 54 (*Senate Reference*); *Provincial Judges Reference*, at para. 257.

31 There is no doubt that the questions posed in this Reference raise difficult issues and are susceptible to varying interpretations. However, rather than refusing to answer at all, the Court is guided by the approach advocated by the majority on the "conventions" issue in

Reference re Resolution to Amend the Constitution, 1981 CanLII 25 (S.C.C.), [1981] 1 S.C.R. 753 (*Patriation Reference*), at pp. 875–76:

> If the questions are thought to be ambiguous, this Court should not, in a constitutional reference, be in a worse position than that of a witness in a trial and feel compelled simply to answer yes or no. Should it find that a question might be misleading, or should it simply avoid the risk of misunderstanding, the Court is free either to interpret the question … or it may qualify both the question and the answer. …

The Reference questions raise issues of fundamental public importance. It cannot be said that the questions are too imprecise or ambiguous to permit a proper legal answer. Nor can it be said that the Court has been provided with insufficient information regarding the present context in which the questions arise. Thus, the Court is duty bound in the circumstances to provide its answers.

III. Reference Questions

A. Question 1

> Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally?

(1) Introduction

32 As we confirmed in *Reference re Objection by Quebec to a Resolution to amend the Constitution*, [1982] 2 S.C.R. 793, at p. 806, "The *Constitution Act, 1982* is now in force. Its legality is neither challenged nor assailable." The "Constitution of Canada" certainly includes the constitutional texts enumerated in s. 52(2) of the *Constitution Act, 1982*. Although these texts have a primary place in determining constitutional rules, they are not exhaustive. The Constitution also "embraces unwritten, as well as written rules", as we recently observed in the *Provincial Judges Reference, supra*, at para. 92. Finally, as was said in the *Patriation Reference, supra*, at p. 874, the Constitution of Canada includes

> the global system of rules and principles which govern the exercise of constitutional authority in the whole and in every part of the Canadian state.

These supporting principles and rules, which include constitutional conventions and the workings of Parliament, are a necessary part of our 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. Such principles and rules emerge from an understanding of the constitutional text itself, the historical context, and previous judicial interpretations of constitutional meaning. In our view, there are four fundamental and organizing principles of the Constitution which are relevant to addressing the question before us (although this enumeration is by no means exhaustive): federalism; democracy; constitutionalism and the rule of law; and respect for minorities. The foundation and substance of these principles are addressed in the following paragraphs. We will then turn to their specific application to the first reference question before us.

(2) Historical Context: The Significance of Confederation

33 In our constitutional tradition, legality and legitimacy are linked. The precise nature of this link will be discussed below. However, at this stage, we wish to emphasize only that our constitutional history demonstrates that our governing institutions have adapted and changed to reflect changing social and political values. This has generally been accomplished by methods that have ensured continuity, stability and legal order.

34 Because this Reference deals with questions fundamental to the nature of Canada, it should not be surprising that it is necessary to review the context in which the Canadian union has evolved. To this end, we will briefly describe the legal evolution of the Constitution and the foundational principles governing constitutional amendments. Our purpose is not to be exhaustive, but to highlight the features most relevant in the context of this Reference.

35 Confederation was an initiative of elected representatives of the people then living in the colonies scattered across part of what is now Canada. It was not initiated by Imperial *fiat*. In March 1864, a select committee of the Legislative Assembly of the Province of Canada, chaired by George Brown, began to explore prospects for constitutional reform. The committee's report, released in June 1864, recommended that a federal union encompassing Canada East and Canada West, and perhaps the other British North American colonies, be pursued. A group of Reformers from Canada West, led by Brown, joined with Étienne P. Taché and John A. Macdonald in a coalition government for the purpose of engaging in constitutional reform along the lines of the federal model proposed by the committee's report.

36 An opening to pursue federal union soon arose. The leaders of the maritime colonies had planned to meet at Charlottetown in the fall to discuss the perennial topic of maritime union. The Province of Canada secured invitations to send a Canadian delegation. On September 1, 1864, 23 delegates (five from New Brunswick, five from Nova Scotia, five from Prince Edward Island, and eight from the Province of Canada) met in Charlottetown. After five days of discussion, the delegates reached agreement on a plan for federal union.

37 The salient aspects of the agreement may be briefly outlined. There was to be a federal union featuring a bicameral central legislature. Representation in the Lower House was to be based on population, whereas in the Upper House it was to be based on regional equality, the regions comprising Canada East, Canada West and the Maritimes. The significance of the adoption of a federal form of government cannot be exaggerated. Without it, neither the agreement of the delegates from Canada East nor that of the delegates from the maritime colonies could have been obtained.

38 Several matters remained to be resolved, and so the Charlottetown delegates agreed to meet again at Quebec in October, and to invite Newfoundland to send a delegation to join them. The Quebec Conference began on October 10, 1864. Thirty-three delegates (two from Newfoundland, seven from New Brunswick, five from Nova Scotia, seven from Prince Edward Island, and twelve from the Province of Canada) met over a two and a half week period. Precise consideration of each aspect of the federal structure preoccupied the political agenda. The delegates approved 72 resolutions, addressing almost all of what subsequently made its way into the final text of the *Constitution Act, 1867*. These included guarantees to protect French language and culture, both directly (by making French an official language in Quebec and Canada as a whole) and indirectly (by allocating jurisdiction over education and “Property and Civil Rights in the Province” to the provinces). The protection of minorities was thus reaffirmed.

39 Legally, there remained only the requirement to have the Quebec Resolutions put into proper form and passed by the Imperial Parliament in London. However, politically, it was thought that more was required. Indeed, Resolution 70 provided that "The Sanction of the Imperial and Local Parliaments shall be sought for the Union of the Provinces, on the principles adopted by the Conference." (Cited in J. Pope, ed., *Confederation: Being a Series of Hitherto Unpublished Documents Bearing on the British North America Act* (1895), at p. 52 (emphasis added).)

40 Confirmation of the Quebec Resolutions was achieved more smoothly in central Canada than in the Maritimes. In February and March 1865, the Quebec Resolutions were the subject of almost six weeks of sustained debate in both houses of the Canadian legislature. The Canadian Legislative Assembly approved the Quebec Resolutions in March 1865 with the support of a majority of members from both Canada East and Canada West. The governments of both Prince Edward Island and Newfoundland chose, in accordance with popular sentiment in both colonies, not to accede to the Quebec Resolutions. In New Brunswick, a general election was required before Premier Tilley's pro-Confederation party prevailed. In Nova Scotia, Premier Tupper ultimately obtained a resolution from the House of Assembly favouring Confederation.

41 Sixteen delegates (five from New Brunswick, five from Nova Scotia, and six from the Province of Canada) met in London in December 1866 to finalize the plan for Confederation. To this end, they agreed to some slight modifications and additions to the Quebec Resolutions. Minor changes were made to the distribution of powers, provision was made for the appointment of extra senators in the event of a deadlock between the House of Commons and the Senate, and certain religious minorities were given the right to appeal to the federal government where their denominational school rights were adversely affected by provincial legislation. The British North America Bill was drafted after the London Conference with the assistance of the Colonial Office, and was introduced into the House of Lords in February 1867. The Act passed third reading in the House of Commons on March 8, received royal assent on March 29, and was proclaimed on July 1, 1867. The Dominion of Canada thus became a reality.

42 There was an early attempt at secession. In the first Dominion election in September 1867, Premier Tupper's forces were decimated: members opposed to Confederation won 18 of Nova Scotia's 19 federal seats, and in the simultaneous provincial election, 36 of the 38 seats in the provincial legislature. Newly-elected Premier Joseph Howe led a delegation to the Imperial Parliament in London in an effort to undo the new constitutional arrangements, but it was too late. The Colonial Office rejected Premier Howe's plea to permit Nova Scotia to withdraw from Confederation. As the Colonial Secretary wrote in 1868:

> The neighbouring province of New Brunswick has entered into the union in reliance on having with it the sister province of Nova Scotia; and vast obligations, political and commercial, have already been contracted on the faith of a measure so long discussed and so solemnly adopted. … I trust that the Assembly and the people of Nova Scotia will not be surprised that the Queen's government feel that they would not be warranted in advising the reversal of a great measure of state, attended by so many extensive consequences already in operation. …
>
> (Quoted in H. Wade MacLauchlan, "Accounting for Democracy and the Rule of Law in the Quebec Secession Reference" (1997), 76 *Can. Bar Rev.* 155, at p. 168.)

The interdependence characterized by “vast obligations, political and commercial”, referred to by the Colonial Secretary in 1868, has, of course, multiplied immeasurably in the last 130 years.

43 Federalism was a legal response to the underlying political and cultural realities that existed at Confederation and continue to exist today. At Confederation, political leaders told their respective communities that the Canadian union would be able to reconcile diversity with unity. It is pertinent, in the context of the present Reference, to mention the words of George-Étienne Cartier (cited in the *Parliamentary Debates on the subject of the Confederation* (1865), at p. 60):

> Now, when we [are] united together, if union [is] attained, we [shall] form a political nationality with which neither the national origin, nor the religion of any individual, [will] interfere. It was lamented by some that we had this diversity of races, and hopes were expressed that this distinctive feature would cease. The idea of unity of races [is] utopian –– it [is] impossible. Distinctions of this kind [will] always exist. Dissimilarity, in fact, appear[s] to be the order of the physical world and of the moral world, as well as in the political world. But with regard to the objection based on this fact, to the effect that a great nation [can]not be formed because Lower Canada [is] in great part French and Catholic, and Upper Canada [is] British and Protestant, and the Lower Provinces [are] mixed, it [is] futile and worthless in the extreme. … In our own Federation we [will] have Catholic and Protestant, English, French, Irish and Scotch, and each by his efforts and his success [will] increase the prosperity and glory of the new Confederacy. … [W]e [are] of different races, not for the purpose of warring against each other, but in order to compete and emulate for the general welfare.

The federal-provincial division of powers was a legal recognition of the diversity that existed among the initial members of Confederation, and manifested a concern to accommodate that diversity within a single nation by granting significant powers to provincial governments. The *Constitution Act, 1867* was an act of nation-building. It was the first step in the transition from colonies separately dependent on the Imperial Parliament for their governance to a unified and independent political state in which different peoples could resolve their disagreements and work together toward common goals and a common interest. Federalism was the political mechanism by which diversity could be reconciled with unity.

44 A federal-provincial division of powers necessitated a written constitution which circumscribed the powers of the new Dominion and Provinces of Canada. Despite its federal structure, the new Dominion was to have “a Constitution similar in Principle to that of the United Kingdom” (*Constitution Act, 1867*, preamble). Allowing for the obvious differences between the governance of Canada and the United Kingdom, it was nevertheless thought important to thus emphasize the continuity of constitutional principles, including democratic institutions and the rule of law; and the continuity of the exercise of sovereign power transferred from Westminster to the federal and provincial capitals of Canada.

45 After 1867, the Canadian federation continued to evolve both territorially and politically. New territories were admitted to the union and new provinces were formed. In 1870, Rupert's Land and the Northwest Territories were admitted and Manitoba was formed as a province. British Columbia was admitted in 1871, Prince Edward Island in 1873, and the Arctic Islands were added in 1880. In 1898, the Yukon Territory and in 1905, the provinces of Alberta and Saskatchewan were formed from the Northwest Territories. Newfoundland was admitted in 1949 by an amendment to the *Constitution Act, 1867*. The

new territory of Nunavut was carved out of the Northwest Territories in 1993 with the partition to become effective in April 1999.

46 Canada's evolution from colony to fully independent state was gradual. The Imperial Parliament's passage of the *Statute of Westminster, 1931* (U.K.), 22 & 23 Geo. 5, c. 4, confirmed in law what had earlier been confirmed in fact by the Balfour Declaration of 1926, namely, that Canada was an independent country. Thereafter, Canadian law alone governed in Canada, except where Canada expressly consented to the continued application of Imperial legislation. Canada's independence from Britain was achieved through legal and political evolution with an adherence to the rule of law and stability. The proclamation of the *Constitution Act, 1982* removed the last vestige of British authority over the Canadian Constitution and re-affirmed Canada's commitment to the protection of its minority, aboriginal, equality, legal and language rights, and fundamental freedoms as set out in the *Canadian Charter of Rights and Freedoms*.

47 Legal continuity, which requires an orderly transfer of authority, necessitated that the 1982 amendments be made by the Westminster Parliament, but the legitimacy as distinguished from the formal legality of the amendments derived from political decisions taken in Canada within a legal framework which this Court, in the *Patriation Reference*, had ruled was in accordance with our Constitution. It should be noted, parenthetically, that the 1982 amendments did not alter the basic division of powers in ss. 91 and 92 of the *Constitution Act, 1867*, which is the primary textual expression of the principle of federalism in our Constitution, agreed upon at Confederation. It did, however, have the important effect that, despite the refusal of the government of Quebec to join in its adoption, Quebec has become bound to the terms of a Constitution that is different from that which prevailed previously, particularly as regards provisions governing its amendment, and the *Canadian Charter of Rights and Freedoms*. As to the latter, to the extent that the scope of legislative powers was thereafter to be constrained by the *Charter*, the constraint operated as much against federal legislative powers as against provincial legislative powers. Moreover, it is to be remembered that s. 33, the “notwithstanding clause”, gives Parliament and the provincial legislatures authority to legislate on matters within their jurisdiction in derogation of the fundamental freedoms (s. 2), legal rights (ss. 7 to 14) and equality rights (s. 15) provisions of the *Charter*.

48 We think it apparent from even this brief historical review that the evolution of our constitutional arrangements has been characterized by adherence to the rule of law, respect for democratic institutions, the accommodation of minorities, insistence that governments adhere to constitutional conduct and a desire for continuity and stability. We now turn to a discussion of the general constitutional principles that bear on the present Reference.

(3) Analysis of the Constitutional Principles

(a) Nature of the Principles

49 What are those underlying principles? Our Constitution is primarily a written one, the product of 131 years of evolution. Behind the written word is an historical lineage stretching back through the ages, which aids in the consideration of the underlying constitutional principles. These principles inform and sustain the constitutional text: they are the vital unstated assumptions upon which the text is based. The following discussion addresses the four foundational constitutional principles that are most germane for resolution of this Reference: federalism, democracy, constitutionalism and the rule of law, and respect for minority rights. 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.

50 Our Constitution has an internal architecture, or what the majority of this Court in *OPSEU v. Ontario (Attorney General)*, 1987 CanLII 71 (S.C.C.), [1987] 2 S.C.R. 2, at p. 57, called a "basic constitutional structure". The individual elements of the Constitution are linked to the others, and must be interpreted by reference to the structure of the Constitution as a whole. As we recently emphasized in the *Provincial Judges Reference*, certain underlying principles infuse our Constitution and breathe life into it. Speaking of the rule of law principle in the *Manitoba Language Rights Reference, supra*, at p. 750, we held that "the principle is clearly implicit in the very nature of a Constitution". The same may be said of the other three constitutional principles we underscore today.

51 Although these underlying principles are not explicitly made part of the Constitution by any written provision, other than in some respects by the oblique reference in the preamble to the *Constitution Act, 1867*, it would be impossible to conceive of our constitutional structure without them. The principles dictate major elements of the architecture of the Constitution itself and are as such its lifeblood.

52 The principles assist in the interpretation of the text and the delineation of spheres of jurisdiction, the scope of rights and obligations, and the role of our political institutions. Equally important, observance of and respect for these principles is essential to the ongoing process of constitutional development and evolution of our Constitution as a "living tree", to invoke the famous description in *Edwards v. Attorney-General for Canada*, [1930] A.C. 124 (P.C.), at p. 136. As this Court indicated in *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, 1993 CanLII 153 (S.C.C.), [1993] 1 S.C.R. 319, Canadians have long recognized the existence and importance of unwritten constitutional principles in our system of government.

53 Given the existence of these underlying constitutional principles, what use may the Court make of them? In the *Provincial Judges Reference, supra*, at paras. 93 and 104, we cautioned that the recognition of these constitutional principles (the majority opinion referred to them as "organizing principles" and described one of them, judicial independence, as an "unwritten norm") could not be taken as an invitation to dispense with the written text of the Constitution. On the contrary, we confirmed that there are compelling reasons to insist upon the primacy of our written constitution. A written constitution promotes legal certainty and predictability, and it provides a foundation and a touchstone for the exercise of constitutional judicial review. However, we also observed in the *Provincial Judges Reference* that the effect of the preamble to the *Constitution Act, 1867* was to incorporate certain constitutional principles by reference, a point made earlier in *Fraser v. Public Service Staff Relations Board*, 1985 CanLII 14 (S.C.C.), [1985] 2 S.C.R. 455, at pp. 462–63. In the *Provincial Judges Reference*, at para. 104, we determined that the preamble "invites the courts to turn those principles into the premises of a constitutional argument that culminates in the filling of gaps in the express terms of the constitutional text".

54 Underlying constitutional principles may in certain circumstances give rise to substantive legal obligations (have "full legal force", as we described it in the *Patriation Reference, supra*, at p. 845), which constitute substantive limitations upon government action. These principles may give rise to very abstract and general obligations, or they may be more specific and precise in nature. The principles are not merely descriptive, but are also invested with a powerful normative force, and are binding upon both courts and governments. "In other words", as this Court confirmed in the *Manitoba Language Rights Reference, supra*, at p. 752, "in the process of Constitutional adjudication, the Court may

have regard to unwritten postulates which form the very foundation of the Constitution of Canada". It is to a discussion of those underlying constitutional principles that we now turn.

(b) Federalism

55 It is undisputed that Canada is a federal state. Yet many commentators have observed that, according to the precise terms of the *Constitution Act, 1867*, the federal system was only partial. See, e.g., K. C. Wheare, *Federal Government* (4th ed. 1963), at pp. 18–20. This was so because, on paper, the federal government retained sweeping powers which threatened to undermine the autonomy of the provinces. Here again, however, a review of the written provisions of the Constitution does not provide the entire picture. Our political and constitutional practice has adhered to an underlying principle of federalism, and has interpreted the written provisions of the Constitution in this light. For example, although the federal power of disallowance was included in the *Constitution Act, 1867*, the underlying principle of federalism triumphed early. Many constitutional scholars contend that the federal power of disallowance has been abandoned (e.g., P. W. Hogg, *Constitutional Law of Canada* (4th ed. 1997), at p. 120).

56 In a federal system of government such as ours, political power is shared by two orders of government: the federal government on the one hand, and the provinces on the other. Each is assigned respective spheres of jurisdiction by the *Constitution Act, 1867*. See, e.g., *Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick*, [1892] A.C. 437 (P.C.), at pp. 441–42. It is up to the courts "to control the limits of the respective sovereignties": *Northern Telecom Canada Ltd. v. Communication Workers of Canada*, 1983 CanLII 25 (S.C.C.), [1983] 1 S.C.R. 733, at p. 741. In interpreting our Constitution, the courts have always been concerned with the federalism principle, inherent in the structure of our constitutional arrangements, which has from the beginning been the lodestar by which the courts have been guided.

57 This underlying principle of federalism, then, has exercised a role of considerable importance in the interpretation of the written provisions of our Constitution. In the *Patriation Reference, supra*, at pp. 905–9, we confirmed that the principle of federalism runs through the political and legal systems of Canada. Indeed, Martland and Ritchie JJ., dissenting in the *Patriation Reference*, at p. 821, considered federalism to be "the dominant principle of Canadian constitutional law". With the enactment of the *Charter*, that proposition may have less force than it once did, but there can be little doubt that the principle of federalism remains a central organizational theme of our Constitution. Less obviously, perhaps, but certainly of equal importance, federalism is a political and legal response to underlying social and political realities.

58 The principle of federalism recognizes the diversity of the component parts of Confederation, and the autonomy of provincial governments to develop their societies within their respective spheres of jurisdiction. The federal structure of our country also facilitates democratic participation by distributing power to the government thought to be most suited to achieving the particular societal objective having regard to this diversity. The scheme of the *Constitution Act, 1867*, it was said in *Re the Initiative and Referendum Act*, [1919] A.C. 935 (P.C.), at p. 942, was

> not to weld the Provinces into one, nor to subordinate Provincial Governments to a central authority, but to establish a central government in which these Provinces should be represented, entrusted with exclusive authority only in affairs in which

> they had a common interest. Subject to this each Province was to retain its independence and autonomy and to be directly under the Crown as its head.

More recently, in *Haig v. Canada*, 1993 CanLII 58 (S.C.C.), [1993] 2 S.C.R. 995, at p. 1047, the majority of this Court held that differences between provinces "are a rational part of the political reality in the federal process". It was referring to the differential application of federal law in individual provinces, but the point applies more generally. A unanimous Court expressed similar views in *R. v. S. (S.)*, 1990 CanLII 65 (S.C.C.), [1990] 2 S.C.R. 254, at pp. 287–88.

59 The principle of federalism facilitates the pursuit of collective goals by cultural and linguistic minorities which form the majority within a particular province. This is the case in Quebec, where the majority of the population is French-speaking, and which possesses a distinct culture. This is not merely the result of chance. The social and demographic reality of Quebec explains the existence of the province of Quebec as a political unit and indeed, was one of the essential reasons for establishing a federal structure for the Canadian union in 1867. The experience of both Canada East and Canada West under the *Union Act, 1840* (U.K.), 3–4 Vict., c. 35, had not been satisfactory. The federal structure adopted at Confederation enabled French-speaking Canadians to form a numerical majority in the province of Quebec, and so exercise the considerable provincial powers conferred by the *Constitution Act, 1867* in such a way as to promote their language and culture. It also made provision for certain guaranteed representation within the federal Parliament itself.

60 Federalism was also welcomed by Nova Scotia and New Brunswick, both of which also affirmed their will to protect their individual cultures and their autonomy over local matters. All new provinces joining the federation sought to achieve similar objectives, which are no less vigorously pursued by the provinces and territories as we approach the new millennium.

(c) Democracy

61 Democracy is a fundamental value in our constitutional law and political culture. While it has both an institutional and an individual aspect, the democratic principle was also argued before us in the sense of the supremacy of the sovereign will of a people, in this case potentially to be expressed by Quebecers in support of unilateral secession. It is useful to explore in a summary way these different aspects of the democratic principle.

62 The principle of democracy has always informed the design of our constitutional structure, and continues to act as an essential interpretive consideration to this day. A majority of this Court in *OPSEU v. Ontario, supra*, at p. 57, confirmed that "the basic structure of our Constitution, as established by the *Constitution Act, 1867*, contemplates the existence of certain political institutions, including freely elected legislative bodies at the federal and provincial levels". As is apparent from an earlier line of decisions emanating from this Court, including *Switzman v. Elbling*, 1957 CanLII 2 (S.C.C.), [1957] S.C.R. 285, *Saumur v. City of Quebec*, 1953 CanLII 3 (S.C.C.), [1953] 2 S.C.R. 299, *Boucher v. The King*, 1950 CanLII 2 (S.C.C.), [1951] S.C.R. 265, and *Reference re Alberta Statutes*, 1938 CanLII 1 (S.C.C.), [1938] S.C.R. 100, the democracy principle can best be understood as a sort of baseline against which the framers of our Constitution, and subsequently, our elected representatives under it, have always operated. It is perhaps for this reason that the principle was not explicitly identified in the text of the *Constitution Act, 1867* itself. To have done so might have appeared redundant, even silly, to the framers. As explained in the *Provincial Judges Reference, supra*, at para. 100, it is evident that our Constitution contemplates that Canada shall be a constitutional democracy. Yet this merely demonstrates the importance of underlying constitutional principles that are nowhere explicitly described

in our constitutional texts. The representative and democratic nature of our political institutions was simply assumed.

63 Democracy is commonly understood as being a political system of majority rule. It is essential to be clear what this means. The evolution of our democratic tradition can be traced back to the *Magna Carta* (1215) and before, through the long struggle for Parliamentary supremacy which culminated in the English *Bill of Rights* of 1689, the emergence of representative political institutions in the colonial era, the development of responsible government in the 19th century, and eventually, the achievement of Confederation itself in 1867. “[T]he Canadian tradition”, the majority of this Court held in *Reference re Provincial Electoral Boundaries (Sask.)*, 1991 CanLII 61 (S.C.C.), [1991] 2 S.C.R. 158, at p. 186, is “one of evolutionary democracy moving in uneven steps toward the goal of universal suffrage and more effective representation”. Since Confederation, efforts to extend the franchise to those unjustly excluded from participation in our political system — such as women, minorities, and aboriginal peoples — have continued, with some success, to the present day.

64 Democracy is not simply concerned with the process of government. On the contrary, as suggested in *Switzman v. Elbling, supra*, at p. 306, democracy is fundamentally connected to substantive goals, most importantly, the promotion of self-government. Democracy accommodates cultural and group identities: *Reference re Provincial Electoral Boundaries*, at p. 188. Put another way, a sovereign people exercises its right to self-government through the democratic process. In considering the scope and purpose of the *Charter*, the Court in *R. v. Oakes*, 1986 CanLII 46 (S.C.C.), [1986] 1 S.C.R. 103, articulated some of the values inherent in the notion of democracy (at p. 136):

> The Court must be guided by the values and principles essential to a free and democratic society which I believe to embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.

65 In institutional terms, democracy means that each of the provincial legislatures and the federal Parliament is elected by popular franchise. These legislatures, we have said, are “at the core of the system of representative government”: *New Brunswick Broadcasting, supra*, at p. 387. In individual terms, the right to vote in elections to the House of Commons and the provincial legislatures, and to be candidates in those elections, is guaranteed to “Every citizen of Canada” by virtue of s. 3 of the *Charter*. Historically, this Court has interpreted democracy to mean the process of representative and responsible government and the right of citizens to participate in the political process as voters (*Reference re Provincial Electoral Boundaries, supra*) and as candidates (*Harvey v. New Brunswick (Attorney General)*, 1996 CanLII 163 (S.C.C.), [1996] 2 S.C.R. 876). In addition, the effect of s. 4 of the *Charter* is to oblige the House of Commons and the provincial legislatures to hold regular elections and to permit citizens to elect representatives to their political institutions. The democratic principle is affirmed with particular clarity in that s. 4 is not subject to the notwithstanding power contained in s. 33.

66 It is, of course, true that democracy expresses the sovereign will of the people. Yet this expression, too, must be taken in the context of the other institutional values we have identified as pertinent to this Reference. The relationship between democracy and federalism means, for example, that in Canada there may be different and equally legitimate majorities in different provinces and territories and at the federal level. No one majority is more or less “legitimate” than the others as an expression of democratic opinion,

although, of course, the consequences will vary with the subject matter. A federal system of government enables different provinces to pursue policies responsive to the particular concerns and interests of people in that province. At the same time, Canada as a whole is also a democratic community in which citizens construct and achieve goals on a national scale through a federal government acting within the limits of its jurisdiction. The function of federalism is to enable citizens to participate concurrently in different collectivities and to pursue goals at both a provincial and a federal level.

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

68 Finally, we highlight that a functioning democracy requires a continuous process of discussion. The Constitution mandates government by democratic legislatures, and an executive accountable to them, “resting ultimately on public opinion reached by discussion and the interplay of ideas” (*Saumur v. City of Quebec, supra*, at p. 330). At both the federal and provincial level, by its very nature, the need to build majorities necessitates compromise, negotiation, and deliberation. No one has a monopoly on truth, and our system is predicated on the faith that in the marketplace of ideas, the best solutions to public problems will rise to the top. Inevitably, there will be dissenting voices. A democratic system of government is committed to considering those dissenting voices, and seeking to acknowledge and address those voices in the laws by which all in the community must live.

69 The *Constitution Act, 1982* gives expression to this principle, by conferring a right to initiate constitutional change on each participant in Confederation. In our view, the existence of this right imposes a corresponding duty on the participants in Confederation to engage in constitutional discussions in order to acknowledge and address democratic expressions of a desire for change in other provinces. This duty is inherent in the democratic principle which is a fundamental predicate of our system of governance.

(d) Constitutionalism and the Rule of Law

70 The principles of constitutionalism and the rule of law lie at the root of our system of government. The rule of law, as observed in *Roncarelli v. Duplessis*, 1959 CanLII 1 (S.C.C.), [1959] S.C.R. 121, at p. 142, is “a fundamental postulate of our constitutional structure”. As we noted in the *Patriation Reference, supra*, at pp. 805–6, “[t]he ‘rule of law’ is a highly textured expression, importing many things which are beyond the need of these reasons to explore but conveying, for example, a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority”. At its most basic level, the rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs. It provides a shield for individuals from arbitrary state action.

71 In the *Manitoba Language Rights Reference, supra*, at pp. 747–52, this Court outlined the elements of the rule of law. We emphasized, first, that the rule of law provides that the law is supreme over the acts of both government and private persons. There is, in short, one law for all. Second, we explained, at p. 749, that "the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order". It was this second aspect of the rule of law that was primarily at issue in the *Manitoba Language Rights Reference* itself. A third aspect of the rule of law is, as recently confirmed in the *Provincial Judges Reference, supra*, at para. 10, that "the exercise of all public power must find its ultimate source in a legal rule". Put another way, the relationship between the state and the individual must be regulated by law. Taken together, these three considerations make up a principle of profound constitutional and political significance.

72 The constitutionalism principle bears considerable similarity to the rule of law, although they are not identical. The essence of constitutionalism in Canada is embodied in s. 52(1) of the *Constitution Act, 1982*, which provides that "[t]he Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." Simply put, the constitutionalism principle requires that all government action comply with the Constitution. The rule of law principle requires that all government action must comply with the law, including the Constitution. This Court has noted on several occasions that with the adoption of the *Charter*, the Canadian system of government was transformed to a significant extent from a system of Parliamentary supremacy to one of constitutional supremacy. The Constitution binds all governments, both federal and provincial, including the executive branch (*Operation Dismantle Inc. v. The Queen*, 1985 CanLII 74 (S.C.C.), [1985] 1 S.C.R. 441, at p. 455). They may not transgress its provisions: indeed, their sole claim to exercise lawful authority rests in the powers allocated to them under the Constitution, and can come from no other source.

73 An understanding of the scope and importance of the principles of the rule of law and constitutionalism is aided by acknowledging explicitly why a constitution is entrenched beyond the reach of simple majority rule. There are three overlapping reasons.

74 First, a constitution may provide an added safeguard for fundamental human rights and individual freedoms which might otherwise be susceptible to government interference. Although democratic government is generally solicitous of those rights, there are occasions when the majority will be tempted to ignore fundamental rights in order to accomplish collective goals more easily or effectively. Constitutional entrenchment ensures that those rights will be given due regard and protection. Second, a constitution may seek to ensure that vulnerable minority groups are endowed with the institutions and rights necessary to maintain and promote their identities against the assimilative pressures of the majority. And third, a constitution may provide for a division of political power that allocates political power amongst different levels of government. That purpose would be defeated if one of those democratically elected levels of government could usurp the powers of the other simply by exercising its legislative power to allocate additional political power to itself unilaterally.

75 The argument that the Constitution may be legitimately circumvented by resort to a majority vote in a province-wide referendum is superficially persuasive, in large measure because it seems to appeal to some of the same principles that underlie the legitimacy of the Constitution itself, namely, democracy and self-government. In short, it is suggested that as the notion of popular sovereignty underlies the legitimacy of our existing constitutional arrangements, so the same popular sovereignty that originally led to the present Constitution must (it is argued) also permit "the people" in their exercise of popular

sovereignty to secede by majority vote alone. However, closer analysis reveals that this argument is unsound, because it misunderstands the meaning of popular sovereignty and the essence of a constitutional democracy.

76 Canadians have never accepted that ours is a system of simple majority rule. Our principle of democracy, taken in conjunction with the other constitutional principles discussed here, is richer. Constitutional government is necessarily predicated on the idea that the political representatives of the people of a province have the capacity and the power to commit the province to be bound into the future by the constitutional rules being adopted. These rules are "binding" not in the sense of frustrating the will of a majority of a province, but as defining the majority which must be consulted in order to alter the fundamental balances of political power (including the spheres of autonomy guaranteed by the principle of federalism), individual rights, and minority rights in our society. Of course, those constitutional rules are themselves amenable to amendment, but only through a process of negotiation which ensures that there is an opportunity for the constitutionally defined rights of all the parties to be respected and reconciled.

77 In this way, our belief in democracy may be harmonized with our belief in constitutionalism. Constitutional amendment often requires some form of substantial consensus precisely because the content of the underlying principles of our Constitution demand it. By requiring broad support in the form of an "enhanced majority" to achieve constitutional change, the Constitution ensures that minority interests must be addressed before proposed changes which would affect them may be enacted.

78 It might be objected, then, that constitutionalism is therefore incompatible with democratic government. This would be an erroneous view. Constitutionalism facilitates — indeed, makes possible — a democratic political system by creating an orderly framework within which people may make political decisions. Viewed correctly, constitutionalism and the rule of law are not in conflict with democracy; rather, they are essential to it. Without that relationship, the political will upon which democratic decisions are taken would itself be undermined.

(e) Protection of Minorities

79 The fourth underlying constitutional principle we address here concerns the protection of minorities. There are a number of specific constitutional provisions protecting minority language, religion and education rights. Some of those provisions are, as we have recognized on a number of occasions, the product of historical compromises. As this Court observed in *Reference re Bill 30, An Act to amend the Education Act (Ont.)*, 1987 CanLII 65 (S.C.C.), [1987] 1 S.C.R. 1148, at p. 1173, and in *Reference re Education Act (Que.)*, 1993 CanLII 100 (S.C.C.), [1993] 2 S.C.R. 511, at pp. 529–30, the protection of minority religious education rights was a central consideration in the negotiations leading to Confederation. In the absence of such protection, it was felt that the minorities in what was then Canada East and Canada West would be submerged and assimilated. See also *Greater Montreal Protestant School Board v. Quebec (Attorney General)*, 1989 CanLII 125 (S.C.C.), [1989] 1 S.C.R. 377, at pp. 401–2, and *Adler v. Ontario*, 1996 CanLII 148 (S.C.C.), [1996] 3 S.C.R. 609. Similar concerns animated the provisions protecting minority language rights, as noted in *Société des Acadiens du Nouveau-Brunswick Inc. v. Association of Parents for Fairness in Education*, 1986 CanLII 66 (S.C.C.), [1986] 1 S.C.R. 549, at p. 564.

80 However, we highlight that even though those provisions were the product of negotiation and political compromise, that does not render them unprincipled. Rather, such a concern reflects a broader principle related to the protection of minority rights. Undoubtedly, the three other constitutional principles inform the scope and operation of the specific provisions that protect the rights of minorities. We emphasize that the protection of

minority rights is itself an independent principle underlying our constitutional order. The principle is clearly reflected in the *Charter*'s provisions for the protection of minority rights. See, e.g., *Reference re Public Schools Act (Man.), s. 79(3), (4) and (7)*, 1993 CanLII 119 (S.C.C.), [1993] 1 S.C.R. 839, and *Mahe v. Alberta*, 1990 CanLII 133 (S.C.C.), [1990] 1 S.C.R. 342.

81 The concern of our courts and governments to protect minorities has been prominent in recent years, particularly following the enactment of the *Charter*. Undoubtedly, one of the key considerations motivating the enactment of the *Charter*, and the process of constitutional judicial review that it entails, is the protection of minorities. However, it should not be forgotten that the protection of minority rights had a long history before the enactment of the *Charter*. Indeed, the protection of minority rights was clearly an essential consideration in the design of our constitutional structure even at the time of Confederation: *Senate Reference, supra*, at p. 71. Although Canada's record of upholding the rights of minorities is not a spotless one, that goal is one towards which Canadians have been striving since Confederation, and the process has not been without successes. The principle of protecting minority rights continues to exercise influence in the operation and interpretation of our Constitution.

82 Consistent with this long tradition of respect for minorities, which is at least as old as Canada itself, the framers of the *Constitution Act, 1982* included in s. 35 explicit protection for existing aboriginal and treaty rights, and in s. 25, a non-derogation clause in favour of the rights of aboriginal peoples. The “promise” of s. 35, as it was termed in *R. v. Sparrow*, 1990 CanLII 104 (S.C.C.), [1990] 1 S.C.R. 1075, at p. 1083, recognized not only the ancient occupation of land by aboriginal peoples, but their contribution to the building of Canada, and the special commitments made to them by successive governments. The protection of these rights, so recently and arduously achieved, whether looked at in their own right or as part of the larger concern with minorities, reflects an important underlying constitutional value.

(4) The Operation of the Constitutional Principles in the Secession Context

83 Secession is the effort of a group or section of a state to withdraw itself from the political and constitutional authority of that state, with a view to achieving statehood for a new territorial unit on the international plane. In a federal state, secession typically takes the form of a territorial unit seeking to withdraw from the federation. Secession is a legal act as much as a political one. By the terms of Question 1 of this Reference, we are asked to rule on the legality of unilateral secession “[u]nder the Constitution of Canada”. This is an appropriate question, as the legality of unilateral secession must be evaluated, at least in the first instance, from the perspective of the domestic legal order of the state from which the unit seeks to withdraw. As we shall see below, it is also argued that international law is a relevant standard by which the legality of a purported act of secession may be measured.

84 The secession of a province from Canada must be considered, in legal terms, to require an amendment to the Constitution, which perforce requires negotiation. The amendments necessary to achieve a secession could be radical and extensive. Some commentators have suggested that secession could be a change of such a magnitude that it could not be considered to be merely an amendment to the Constitution. We are not persuaded by this contention. It is of course true that the Constitution is silent as to the ability of a province to secede from Confederation but, although the Constitution neither expressly authorizes nor prohibits secession, an act of secession would purport to alter the governance of Canadian territory in a manner which undoubtedly is inconsistent with our current constitutional arrangements. The fact that those changes would be profound, or that they would purport

to have a significance with respect to international law, does not negate their nature as amendments to the Constitution of Canada.

85 The Constitution is the expression of the sovereignty of the people of Canada. It lies within the power of the people of Canada, acting through their various governments duly elected and recognized under the Constitution, to effect whatever constitutional arrangements are desired within Canadian territory, including, should it be so desired, the secession of Quebec from Canada. As this Court held in the *Manitoba Language Rights Reference, supra*, at p. 745, "[t]he Constitution of a country is a statement of the will of the people to be governed in accordance with certain principles held as fundamental and certain prescriptions restrictive of the powers of the legislature and government". The manner in which such a political will could be formed and mobilized is a somewhat speculative exercise, though we are asked to assume the existence of such a political will for the purpose of answering the question before us. By the terms of this Reference, we have been asked to consider whether it would be constitutional in such a circumstance for the National Assembly, legislature or government of Quebec to effect the secession of Quebec from Canada unilaterally.

86 The "unilateral" nature of the act is of cardinal importance and we must be clear as to what is understood by this term. In one sense, any step towards a constitutional amendment initiated by a single actor on the constitutional stage is "unilateral". We do not believe that this is the meaning contemplated by Question 1, nor is this the sense in which the term has been used in argument before us. Rather, what is claimed by a right to secede "unilaterally" is the right to effectuate secession without prior negotiations with the other provinces and the federal government. At issue is not the legality of the first step but the legality of the final act of purported unilateral secession. The supposed juridical basis for such an act is said to be a clear expression of democratic will in a referendum in the province of Quebec. This claim requires us to examine the possible juridical impact, if any, of such a referendum on the functioning of our Constitution, and on the claimed legality of a unilateral act of secession.

87 Although the Constitution does not itself address the use of a referendum procedure, and the results of a referendum have no direct role or legal effect in our constitutional scheme, a referendum undoubtedly may provide a democratic method of ascertaining the views of the electorate on important political questions on a particular occasion. The democratic principle identified above would demand that considerable weight be given to a clear expression by the people of Quebec of their will to secede from Canada, even though a referendum, in itself and without more, has no direct legal effect, and could not in itself bring about unilateral secession. Our political institutions are premised on the democratic principle, and so an expression of the democratic will of the people of a province carries weight, in that it would confer legitimacy on the efforts of the government of Quebec to initiate the Constitution's amendment process in order to secede by constitutional means. In this context, we refer to a "clear" majority as a qualitative evaluation. 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.

88 The federalism principle, in conjunction with the democratic principle, dictates that the clear repudiation of the existing constitutional order and the clear expression of the desire to pursue secession by the population of a province would give rise to a reciprocal obligation on all parties to Confederation to negotiate constitutional changes to respond to that desire. The amendment of the Constitution begins with a political process undertaken pursuant to the Constitution itself. In Canada, the initiative for constitutional amendment is the responsibility of democratically elected representatives of the participants in Confederation. Those representatives may, of course, take their cue from a referendum, but

in legal terms, constitution-making in Canada, as in many countries, is undertaken by the democratically elected representatives of the people. The corollary of a legitimate attempt by one participant in Confederation to seek an amendment to the Constitution is an obligation on all parties to come to the negotiating table. The clear repudiation by the people of Quebec of the existing constitutional order would confer legitimacy on demands for secession, and place an obligation on the other provinces and the federal government to acknowledge and respect that expression of democratic will by entering into negotiations and conducting them in accordance with the underlying constitutional principles already discussed.

89 What is the content of this obligation to negotiate? At this juncture, we confront the difficult inter-relationship between substantive obligations flowing from the Constitution and questions of judicial competence and restraint in supervising or enforcing those obligations. This is mirrored by the distinction between the legality and the legitimacy of actions taken under the Constitution. We propose to focus first on the substantive obligations flowing from this obligation to negotiate; once the nature of those obligations has been described, it is easier to assess the appropriate means of enforcement of those obligations, and to comment on the distinction between legality and legitimacy.

90 The conduct of the parties in such negotiations would be governed by the same constitutional principles which give rise to the duty to negotiate: federalism, democracy, constitutionalism and the rule of law, and the protection of minorities. Those principles lead us to reject two absolutist propositions. One of those propositions is that there would be a legal obligation on the other provinces and federal government to accede to the secession of a province, subject only to negotiation of the logistical details of secession. This proposition is attributed either to the supposed implications of the democratic principle of the Constitution, or to the international law principle of self-determination of peoples.

91 For both theoretical and practical reasons, we cannot accept this view. We hold that Quebec could not purport to invoke a right of self-determination such as to dictate the terms of a proposed secession to the other parties: that would not be a negotiation at all. As well, it would be naive to expect that the substantive goal of secession could readily be distinguished from the practical details of secession. The devil would be in the details. The democracy principle, as we have emphasized, cannot be invoked to trump the principles of federalism and rule of law, the rights of individuals and minorities, or the operation of democracy in the other provinces or in Canada as a whole. No negotiations could be effective if their ultimate outcome, secession, is cast as an absolute legal entitlement based upon an obligation to give effect to that act of secession in the Constitution. Such a foregone conclusion would actually undermine the obligation to negotiate and render it hollow.

92 However, we are equally unable to accept the reverse proposition, that a clear expression of self-determination by the people of Quebec would impose no obligations upon the other provinces or the federal government. The continued existence and operation of the Canadian constitutional order cannot remain indifferent to the clear expression of a clear majority of Quebecers that they no longer wish to remain in Canada. This would amount to the assertion that other constitutionally recognized principles necessarily trump the clearly expressed democratic will of the people of Quebec. Such a proposition fails to give sufficient weight to the underlying constitutional principles that must inform the amendment process, including the principles of democracy and federalism. 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.

93 Is the rejection of both of these propositions reconcilable? Yes, once it is realized that none of the rights or principles under discussion is absolute to the exclusion of the others. This observation suggests that other parties cannot exercise their rights in such a way as to amount to an absolute denial of Quebec's rights, and similarly, that so long as Quebec exercises its rights while respecting the rights of others, it may propose secession and seek to achieve it through negotiation. The negotiation process precipitated by a decision of a clear majority of the population of Quebec on a clear question to pursue secession would require the reconciliation of various rights and obligations by the representatives of two legitimate majorities, namely, the clear majority of the population of Quebec, and the clear majority of Canada as a whole, whatever that may be. There can be no suggestion that either of these majorities “trumps” the other. A political majority that does not act in accordance with the underlying constitutional principles we have identified puts at risk the legitimacy of the exercise of its rights.

94 In such circumstances, the conduct of the parties assumes primary constitutional significance. The negotiation process must be conducted with an eye to the constitutional principles we have outlined, which must inform the actions of all the participants in the negotiation process.

95 Refusal of a party to conduct negotiations in a manner consistent with constitutional principles and values would seriously put at risk the legitimacy of that party's assertion of its rights, and perhaps the negotiation process as a whole. Those who quite legitimately insist upon the importance of upholding the rule of law cannot at the same time be oblivious to the need to act in conformity with constitutional principles and values, and so do their part to contribute to the maintenance and promotion of an environment in which the rule of law may flourish.

96 No one can predict the course that such negotiations might take. The possibility that they might not lead to an agreement amongst the parties must be recognized. Negotiations following a referendum vote in favour of seeking secession would inevitably address a wide range of issues, many of great import. After 131 years of Confederation, there exists, inevitably, a high level of integration in economic, political and social institutions across Canada. The vision of those who brought about Confederation was to create a unified country, not a loose alliance of autonomous provinces. Accordingly, while there are regional economic interests, which sometimes coincide with provincial boundaries, there are also national interests and enterprises (both public and private) that would face potential dismemberment. There is a national economy and a national debt. Arguments were raised before us regarding boundary issues. There are linguistic and cultural minorities, including aboriginal peoples, unevenly distributed across the country who look to the Constitution of Canada for the protection of their rights. Of course, secession would give rise to many issues of great complexity and difficulty. These would have to be resolved within the overall framework of the rule of law, thereby assuring Canadians resident in Quebec and elsewhere a measure of stability in what would likely be a period of considerable upheaval and uncertainty. Nobody seriously suggests that our national existence, seamless in so many aspects, could be effortlessly separated along what are now the provincial boundaries of Quebec. As the Attorney General of Saskatchewan put it in his oral submission:

> A nation is built when the communities that comprise it make commitments to it, when they forego choices and opportunities on behalf of a nation, … when the communities that comprise it make compromises, when they offer each other guarantees, when they make transfers and perhaps most pointedly, when they receive from others the benefits of national solidarity. The threads of a thousand acts of accommodation are the fabric of a nation. …

97 In the circumstances, negotiations following such a referendum would undoubtedly be difficult. While the negotiators would have to contemplate the possibility of secession, there would be no absolute legal entitlement to it and no assumption that an agreement reconciling all relevant rights and obligations would actually be reached. It is foreseeable that even negotiations carried out in conformity with the underlying constitutional principles could reach an impasse. We need not speculate here as to what would then transpire. Under the Constitution, secession requires that an amendment be negotiated.

98 The respective roles of the courts and political actors in discharging the constitutional obligations we have identified follows ineluctably from the foregoing observations. In the *Patriation Reference*, a distinction was drawn between the law of the Constitution, which, generally speaking, will be enforced by the courts, and other constitutional rules, such as the conventions of the Constitution, which carry only political sanctions. It is also the case, however, that judicial intervention, even in relation to the law of the Constitution, is subject to the Court's appreciation of its proper role in the constitutional scheme.

99 The notion of justiciability is, as we earlier pointed out in dealing with the preliminary objection, linked to the notion of appropriate judicial restraint. We earlier made reference to the discussion of justiciability in *Reference re Canada Assistance Plan, supra*, at p. 545:

> In exercising its discretion whether to determine a matter that is alleged to be non-justiciable, the Court's primary concern is to retain its proper role within the constitutional framework of our democratic form of government.

In *Operation Dismantle, supra*, at p. 459, it was pointed out that justiciability is a “doctrine … founded upon a concern with the appropriate role of the courts as the forum for the resolution of different types of disputes”. An analogous doctrine of judicial restraint operates here. Also, as observed in *Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*, 1989 CanLII 73 (S.C.C.), [1989] 2 S.C.R. 49 (the *Auditor General*'s case), at p. 91:

> There is an array of issues which calls for the exercise of judicial judgment on whether the questions are properly cognizable by the courts. Ultimately, such judgment depends on the appreciation by the judiciary of its own position in the constitutional scheme.

100 The role of the Court in this Reference is limited to the identification of the relevant aspects of the Constitution in their broadest sense. We have interpreted the questions as relating to the constitutional framework within which political decisions may ultimately be made. Within that framework, the workings of the political process are complex and can only be resolved by means of political judgments and evaluations. The Court has no supervisory role over the political aspects of constitutional negotiations. Equally, the initial impetus for negotiation, namely a clear majority on a clear question in favour of secession, is subject only to political evaluation, and properly so. A right and a corresponding duty to negotiate secession cannot be built on an alleged expression of democratic will if the expression of democratic will is itself fraught with ambiguities. Only the political actors

would have the information and expertise to make the appropriate judgment as to the point at which, and the circumstances in which, those ambiguities are resolved one way or the other.

101 If the circumstances giving rise to the duty to negotiate were to arise, the distinction between the strong defence of legitimate interests and the taking of positions which, in fact, ignore the legitimate interests of others is one that also defies legal analysis. The Court would not have access to all of the information available to the political actors, and the methods appropriate for the search for truth in a court of law are ill-suited to getting to the bottom of constitutional negotiations. To the extent that the questions are political in nature, it is not the role of the judiciary to interpose its own views on the different negotiating positions of the parties, even were it invited to do so. Rather, it is the obligation of the elected representatives to give concrete form to the discharge of their constitutional obligations which only they and their electors can ultimately assess. The reconciliation of the various legitimate constitutional interests outlined above is necessarily committed to the political rather than the judicial realm, precisely because that reconciliation can only be achieved through the give and take of the negotiation process. Having established the legal framework, it would be for the democratically elected leadership of the various participants to resolve their differences.

102 The non-justiciability of political issues that lack a legal component does not deprive the surrounding constitutional framework of its binding status, nor does this mean that constitutional obligations could be breached without incurring serious legal repercussions. Where there are legal rights there are remedies, but as we explained in the *Auditor General*'s case, *supra*, at p. 90, and *New Brunswick Broadcasting, supra*, the appropriate recourse in some circumstances lies through the workings of the political process rather than the courts.

103 To the extent that a breach of the constitutional duty to negotiate in accordance with the principles described above undermines the legitimacy of a party's actions, it may have important ramifications at the international level. Thus, a failure of the duty to undertake negotiations and pursue them according to constitutional principles may undermine that government's claim to legitimacy which is generally a precondition for recognition by the international community. Conversely, violations of those principles by the federal or other provincial governments responding to the request for secession may undermine their legitimacy. Thus, a Quebec that had negotiated in conformity with constitutional principles and values in the face of unreasonable intransigence on the part of other participants at the federal or provincial level would be more likely to be recognized than a Quebec which did not itself act according to constitutional principles in the negotiation process. Both the legality of the acts of the parties to the negotiation process under Canadian law, and the perceived legitimacy of such action, would be important considerations in the recognition process. In this way, the adherence of the parties to the obligation to negotiate would be evaluated in an indirect manner on the international plane.

104 Accordingly, the 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. However, the continued existence and operation of the Canadian constitutional order cannot remain unaffected by the unambiguous expression of a clear majority of Quebecers that they no longer wish to remain in Canada. The primary means by which that expression is given effect is the constitutional duty to negotiate in accordance with the constitutional principles that we have described herein. In the event secession negotiations are initiated, our Constitution,

no less than our history, would call on the participants to work to reconcile the rights, obligations and legitimate aspirations of all Canadians within a framework that emphasizes constitutional responsibilities as much as it does constitutional rights.

105 It will be noted that Question 1 does not ask how secession could be achieved in a constitutional manner, but addresses one form of secession only, namely unilateral secession. Although the applicability of various procedures to achieve lawful secession was raised in argument, each option would require us to assume the existence of facts that at this stage are unknown. In accordance with the usual rule of prudence in constitutional cases, we refrain from pronouncing on the applicability of any particular constitutional procedure to effect secession unless and until sufficiently clear facts exist to squarely raise an issue for judicial determination.

(5) Suggested Principle of Effectivity

106 In the foregoing discussion we have not overlooked the principle of effectivity, which was placed at the forefront in argument before us. For the reasons that follow, we do not think that the principle of effectivity has any application to the issues raised by Question 1. A distinction must be drawn between the right of a people to act, and their power to do so. They are not identical. A right is recognized in law: mere physical ability is not necessarily given status as a right. The fact that an individual or group can act in a certain way says nothing at all about the legal status or consequences of the act. A power may be exercised even in the absence of a right to do so, but if it is, then it is exercised without legal foundation. Our Constitution does not address powers in this sense. On the contrary, the Constitution is concerned only with the rights and obligations of individuals, groups and governments, and the structure of our institutions. It was suggested before us that the National Assembly, legislature or government of Quebec could unilaterally effect the secession of that province from Canada, but it was not suggested that they might do so as a matter of law: rather, it was contended that they simply could do so as a matter of fact. Although under the Constitution there is no right to pursue secession unilaterally, that is secession without principled negotiation, this does not rule out the possibility of an unconstitutional declaration of secession leading to a *de facto* secession. The ultimate success of such a secession would be dependent on effective control of a territory and recognition by the international community. The principles governing secession at international law are discussed in our answer to Question 2.

107 In our view, the alleged principle of effectivity has no constitutional or legal status in the sense that it does not provide an *ex ante* explanation or justification for an act. In essence, acceptance of a principle of effectivity would be tantamount to accepting that the National Assembly, legislature or government of Quebec may act without regard to the law, simply because it asserts the power to do so. So viewed, the suggestion is that the National Assembly, legislature or government of Quebec could purport to secede the province unilaterally from Canada in disregard of Canadian and international law. It is further suggested that if the secession bid was successful, a new legal order would be created in that province, which would then be considered an independent state.

108 Such a proposition is an assertion of fact, not a statement of law. It may or may not be true; in any event it is irrelevant to the questions of law before us. If, on the other hand, it is put forward as an assertion of law, then it simply amounts to the contention that the law may be broken as long as it can be broken successfully. Such a notion is contrary to the rule of law, and must be rejected.

B. Question 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?

109 For reasons already discussed, the Court does not accept the contention that Question 2 raises a question of "pure" international law which this Court has no jurisdiction to address. Question 2 is posed in the context of a Reference to address the existence or non-existence of a right of unilateral secession by a province of Canada. The *amicus curiae* argues that this question ultimately falls to be determined under international law. In addressing this issue, the Court does not purport to act as an arbiter between sovereign states or more generally within the international community. The Court is engaged in rendering an advisory opinion on certain legal aspects of the continued existence of the Canadian federation. International law has been invoked as a consideration and it must therefore be addressed.

110 The argument before the Court on Question 2 has focused largely on determining whether, under international law, a positive legal right to unilateral secession exists in the factual circumstances assumed for the purpose of our response to Question 1. Arguments were also advanced to the effect that, regardless of the existence or non-existence of a positive right to unilateral secession, international law will in the end recognize effective political realities –– including the emergence of a new state –– as facts. While our response to Question 2 will address considerations raised by this alternative argument of "effectivity", it should first be noted that the existence of a positive legal entitlement is quite different from a prediction that the law will respond after the fact to a then existing political reality. These two concepts examine different points in time. The questions posed to the Court address legal rights in advance of a unilateral act of purported secession. While we touch below on the practice governing the international recognition of emerging states, the Court is as wary of entertaining speculation about the possible future conduct of sovereign states on the international level as it was under Question 1 to speculate about the possible future course of political negotiations among the participants in the Canadian federation. In both cases, the Reference questions are directed only to the legal framework within which the political actors discharge their various mandates.

(1) Secession at International Law

111 It is clear that international law does not specifically grant component parts of sovereign states the legal right to secede unilaterally from their "parent" state. This is acknowledged by the experts who provided their opinions on behalf of both the *amicus curiae* and the Attorney General of Canada. Given the lack of specific authorization for unilateral secession, proponents of the existence of such a right at international law are therefore left to attempt to found their argument (i) on the proposition that unilateral secession is not specifically prohibited and that what is not specifically prohibited is inferentially permitted; or (ii) on the implied duty of states to recognize the legitimacy of secession brought about by the exercise of the well-established international law right of "a people" to self-determination. The *amicus curiae* addressed the right of self-determination, but submitted that it was not applicable to the circumstances of Quebec within the Canadian federation, irrespective of the existence or non-existence of a referendum result

in favour of secession. We agree on this point with the *amicus curiae*, for reasons that we will briefly develop.

(a) Absence of a Specific Prohibition

112 International law contains neither a right of unilateral secession nor the explicit denial of such a right, although such a denial is, to some extent, implicit in the exceptional circumstances required for secession to be permitted under the right of a people to self-determination, e.g., the right of secession that arises in the exceptional situation of an oppressed or colonial people, discussed below. As will be seen, international law places great importance on the territorial integrity of nation states and, by and large, leaves the creation of a new state to be determined by the domestic law of the existing state of which the seceding entity presently forms a part (R. Y. Jennings, *The Acquisition of Territory in International Law* (1963), at pp. 8–9). Where, as here, unilateral secession would be incompatible with the domestic Constitution, international law is likely to accept that conclusion subject to the right of peoples to self-determination, a topic to which we now turn.

(b) The Right of a People to Self-determination

113 While international law generally regulates the conduct of nation states, it does, in some specific circumstances, also recognize the "rights" of entities other than nation states –– such as the right of a people to self-determination.

114 The existence of the right of a people to self-determination is now so widely recognized in international conventions that the principle has acquired a status beyond "convention" and is considered a general principle of international law. (A. Cassese, *Self-determination of peoples: A legal reappraisal* (1995), at pp. 171–72; K. Doehring, "Self-Determination", in B. Simma, ed., *The Charter of the United Nations: A Commentary* (1994), at p. 70.)

115 Article 1 of the *Charter of the United Nations*, Can. T.S. 1945 No. 7, states in part that one of the purposes of the United Nations (U.N.) is:

> ## Article 1
>
> …
>
> **2** To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;

116 Article 55 of the U.N. Charter further states that the U.N. shall promote goals such as higher standards of living, full employment and human rights "[w]ith a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples".

117 This basic principle of self-determination has been carried forward and addressed in so many U.N. conventions and resolutions that, as noted by Doehring, *supra*, at p. 60:

> The sheer number of resolutions concerning the right of self-determination makes their enumeration impossible.

118 For our purposes, reference to the following conventions and resolutions is sufficient. Article 1 of both the U.N.'s *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171, and its *International Covenant on Economic, Social and Cultural Rights*, 993 U.N.T.S. 3, states:

> **1** All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

119 Similarly, the U.N. General Assembly's *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, GA Res. 2625 (XXV), 24 October 1970 (*Declaration on Friendly Relations*), states:

> By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.

120 In 1993, the U.N. World Conference on Human Rights adopted the *Vienna Declaration and Programme of Action*, A/CONF.157/24, 25 June 1993, that reaffirmed Article 1 of the two above-mentioned covenants. The U.N. General Assembly's *Declaration on the Occasion of the Fiftieth Anniversary of the United Nations*, GA Res. 50/6, 9 November 1995, also emphasizes the right to self-determination by providing that the U.N.'s member states will:

> 1 ...
>
> > Continue to reaffirm the right of self-determination of all peoples, taking into account the particular situation of peoples under colonial or other forms of alien domination or foreign occupation, and recognize the right of peoples to take legitimate action in accordance with the Charter of the United Nations to realize their inalienable right of self-determination. This shall not be construed as authorizing or encouraging any action that 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 and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind. ... [Emphasis added.]

121 The right to self-determination is also recognized in other international legal documents. For example, the *Final Act of the Conference on Security and Co-operation in Europe*, 14 I.L.M. 1292 (1975) (*Helsinki Final Act*), states (in Part VIII):

> The participating States will respect the equal rights of peoples and their right to self-determination, acting at all times in conformity with the purposes and

> principles of the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of States.
>
> By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development. [Emphasis added.]

122 As will be seen, international law expects that the right to self-determination will be exercised by peoples within the framework of existing sovereign states and consistently with the maintenance of the territorial integrity of those states. Where this is not possible, in the exceptional circumstances discussed below, a right of secession may arise.

(i) Defining "Peoples"

123 International law grants the right to self-determination to "peoples". Accordingly, access to the right requires the threshold step of characterizing as a people the group seeking self-determination. However, as the right to self-determination has developed by virtue of a combination of international agreements and conventions, coupled with state practice, with little formal elaboration of the definition of "peoples", the result has been that the precise meaning of the term "people" remains somewhat uncertain.

124 It is clear that "a people" may include only a portion of the population of an existing state. The right to self-determination has developed largely as a human right, and is generally used in documents that simultaneously contain references to "nation" and "state". The juxtaposition of these terms is indicative that the reference to "people" does not necessarily mean the entirety of a state's population. To restrict the definition of the term to the population of existing states would render the granting of a right to self-determination largely duplicative, given the parallel emphasis within the majority of the source documents on the need to protect the territorial integrity of existing states, and would frustrate its remedial purpose.

125 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 to resolve Question 2 appropriately. Similarly, it is not necessary for the Court to determine whether, should a Quebec people exist within the definition of public international law, such a people encompasses the entirety of the provincial population or just a portion thereof. Nor is it necessary to examine the position of the aboriginal population within Quebec. As the following discussion of the scope of the right to self-determination will make clear, whatever be the correct application of the definition of people(s) in this context, their right of self-determination cannot in the present circumstances be said to ground a right to unilateral secession.

(ii) Scope of the Right to Self-determination

126 The recognized sources of international law establish that the right to self-determination of a people is normally fulfilled through internal self-determination –– a people's pursuit of its political, economic, social and cultural development within the framework of an existing state. A right to external self-determination (which in this case potentially takes the form of the assertion of a right to unilateral secession) arises in only the most extreme of cases and, even then, under carefully defined circumstances. External

self-determination can be defined as in the following statement from the *Declaration on Friendly Relations* as

> [t]he establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people. [Emphasis added.]

127 The international law principle of self-determination has evolved within a framework of respect for the territorial integrity of existing states. The various international documents that support the existence of a people's right to self-determination also contain parallel statements supportive of the conclusion that the exercise of such a right must be sufficiently limited to prevent threats to an existing state's territorial integrity or the stability of relations between sovereign states.

128 The *Declaration on Friendly Relations*, the *Vienna Declaration* and the *Declaration on the Occasion of the Fiftieth Anniversary of the United Nations* are specific. They state, immediately after affirming a people's right to determine political, economic, social and cultural issues, that such rights are not to

> be construed as authorizing or encouraging any action that 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 and thus possessed of a Government representing the whole people belonging to the territory without distinction. … [Emphasis added.]

129 Similarly, while the concluding document of the Vienna Meeting in 1989 of the Conference on Security and Co-operation in Europe on the follow-up to the *Helsinki Final Act* again refers to peoples having the right to determine "their internal and external political status" (emphasis added), that statement is immediately followed by express recognition that the participating states will at all times act, as stated in the *Helsinki Final Act*, "in conformity with the purposes and principles of the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of States" (emphasis added). Principle 5 of the concluding document states that the participating states (including Canada):

> … confirm their commitment strictly and effectively to observe the principle of the territorial integrity of States. They will refrain from any violation of this principle and thus from any action aimed by direct or indirect means, in contravention of the purposes and principles of the Charter of the United Nations, other obligations under international law or the provisions of the [Helsinki] Final Act, at violating the territorial integrity, political independence or the unity of a State. No actions or situations in contravention of this principle will be recognized as legal by the participating States. [Emphasis added.]

Accordingly, the reference in the *Helsinki Final Act* to a people determining its external political status is interpreted to mean the expression of a people's external political status through the government of the existing state, save in the exceptional circumstances discussed below. As noted by Cassese, *supra*, at p. 287, given the history and textual structure of this document, its reference to external self-determination simply means that

“no territorial or other change can be brought about by the central authorities of a State that is contrary to the will of the whole people of that State”.

130 While the *International Covenant on Economic, Social and Cultural Rights* and the *International Covenant on Civil and Political Rights* do not specifically refer to the protection of territorial integrity, they both define the ambit of the right to self-determination in terms that are normally attainable within the framework of an existing state. There is no necessary incompatibility between the maintenance of the territorial integrity of existing states, including Canada, and the right of a “people” to achieve a full measure of self-determination. A state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its own internal arrangements, is entitled to the protection under international law of its territorial integrity.

(iii) Colonial and Oppressed Peoples

131 Accordingly, the general state of international law with respect to the right to self-determination is that the right operates within the overriding protection granted to the territorial integrity of “parent” states. However, as noted by Cassese, *supra*, at p. 334, there are certain defined contexts within which the right to the self-determination of peoples does allow that right to be exercised “externally”, which, in the context of this Reference, would potentially mean secession:

> … the right to external self-determination, which entails the possibility of choosing (or restoring) independence, has only been bestowed upon two classes of peoples (those under colonial rule or foreign occupation), based upon the assumption that both classes make up entities that are inherently distinct from the colonialist Power and the occupant Power and that their ‘territorial integrity’, all but destroyed by the colonialist or occupying Power, should be fully restored. …

132 The right of colonial peoples to exercise their right to self-determination by breaking away from the “imperial” power is now undisputed, but is irrelevant to this Reference.

133 The other clear case where a right to external self-determination accrues is where a people is subject to alien subjugation, domination or exploitation outside a colonial context. This recognition finds its roots in the *Declaration on Friendly Relations*:

> Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle, in order:
>
> **(a)** To promote friendly relations and co-operation among States; and
>
> **(b)** To bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned;
>
> and bearing in mind that subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle, as well as a denial of fundamental human rights, and is contrary to the Charter.

134 A number of commentators have further asserted that the right to self-determination may ground a right to unilateral secession in a third circumstance. Although this third circumstance has been described in several ways, the underlying proposition is that, when a people is blocked from the meaningful exercise of its right to self-determination internally, it is entitled, as a last resort, to exercise it by secession. The *Vienna Declaration* requirement that governments represent "the whole people belonging to the territory without distinction of any kind" adds credence to the assertion that such a complete blockage may potentially give rise to a right of secession.

135 Clearly, such a circumstance parallels the other two recognized situations in that the ability of a people to exercise its right to self-determination internally is somehow being totally frustrated. While it remains unclear whether this third proposition actually reflects an established international law standard, it is unnecessary for present purposes to make that determination. Even assuming that the third circumstance is sufficient to create a right to unilateral secession under international law, the current Quebec context cannot be said to approach such a threshold. As stated by the *amicus curiae*, Addendum to the factum of the *amicus curiae*, at paras. 15–16:

> [TRANSLATION]
>
> > 15 The Quebec people is not the victim of attacks on its physical existence or integrity, or of a massive violation of its fundamental rights. The Quebec people is manifestly not, in the opinion of the *amicus curiae*, an oppressed people.
> >
> > 16 For close to 40 of the last 50 years, the Prime Minister of Canada has been a Quebecer. During this period, Quebecers have held from time to time all the most important positions in the federal Cabinet. During the 8 years prior to June 1997, the Prime Minister and the Leader of the Official Opposition in the House of Commons were both Quebecers. At present, the Prime Minister of Canada, the Right Honourable Chief Justice and two other members of the Court, the Chief of Staff of the Canadian Armed Forces and the Canadian ambassador to the United States, not to mention the Deputy Secretary-General of the United Nations, are all Quebecers. The international achievements of Quebecers in most fields of human endeavour are too numerous to list. Since the dynamism of the Quebec people has been directed toward the business sector, it has been clearly successful in Quebec, the rest of Canada and abroad.

136 The population of Quebec cannot plausibly be said to be denied access to government. Quebecers occupy prominent positions within the government of Canada. Residents of the province freely make political choices and pursue economic, social and cultural development within Quebec, across Canada, and throughout the world. The population of Quebec is equitably represented in legislative, executive and judicial institutions. In short, to reflect the phraseology of the international documents that address the right to self-determination of peoples, Canada is a "sovereign and independent state conducting itself in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a government representing the whole people belonging to the territory without distinction".

137 The continuing failure to reach agreement on amendments to the Constitution, while a matter of concern, does not amount to a denial of self-determination. In the absence of amendments to the Canadian Constitution, we must look at the constitutional arrangements presently in effect, and we cannot conclude under current circumstances that those arrangements place Quebecers in a disadvantaged position within the scope of the international law rule.

138

> In summary, the international law right to self-determination only generates, at best, a right to external self-determination in situations of former colonies; where a people is oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development. In all three situations, the people in question are entitled to a right to external self-determination because they have been denied the ability to exert internally their right to self-determination. Such exceptional circumstances are manifestly inapplicable to Quebec under existing conditions. Accordingly, neither the population of the province of Quebec, even if characterized in terms of "people" or "peoples", nor its representative institutions, the National Assembly, the legislature or government of Quebec, possess a right, under international law, to secede unilaterally from Canada.

139 We would not wish to leave this aspect of our answer to Question 2 without acknowledging the importance of the submissions made to us respecting the rights and concerns of aboriginal peoples in the event of a unilateral secession, as well as the appropriate means of defining the boundaries of a seceding Quebec with particular regard to the northern lands occupied largely by aboriginal peoples. However, the concern of aboriginal peoples is precipitated by the asserted right of Quebec to unilateral secession. In light of our finding that there is no such right applicable to the population of Quebec, either under the Constitution of Canada or at international law, but that on the contrary a clear democratic expression of support for secession would lead under the Constitution to negotiations in which aboriginal interests would be taken into account, it becomes unnecessary to explore further the concerns of the aboriginal peoples in this Reference.

(2) Recognition of a Factual/Political Reality: the "Effectivity" Principle

140 As stated, an argument advanced by the *amicus curiae* on this branch of the Reference was that, while international law may not ground a positive right to unilateral secession in the context of Quebec, international law equally does not prohibit secession and, in fact, international recognition would be conferred on such a political reality if it emerged, for example, via effective control of the territory of what is now the province of Quebec.

141 It is true that international law may well, depending on the circumstances, adapt to recognize a political and/or factual reality, regardless of the legality of the steps leading to its creation. However, as mentioned at the outset, effectivity, as such, does not have any real applicability to Question 2, which asks whether a right to unilateral secession exists.

142 No one doubts that legal consequences may flow from political facts, and that "sovereignty is a political fact for which no purely legal authority can be constituted ...", H. W. R. Wade, "The Basis of Legal Sovereignty", [1955] *Camb. L.J.* 172, at p. 196. Secession of a province from Canada, if successful in the streets, might well lead to the creation of a new state. Although recognition by other states is not, at least as a matter of theory, necessary to achieve statehood, the viability of a would-be state in the international community depends, as a practical matter, upon recognition by other states. That process of recognition is guided by legal norms. However, international recognition is not alone

constitutive of statehood and, critically, does not relate back to the date of secession to serve retroactively as a source of a "legal" right to secede in the first place. Recognition occurs only after a territorial unit has been successful, as a political fact, in achieving secession.

143 As indicated in responding to Question 1, one of the legal norms which may be recognized by states in granting or withholding recognition of emergent states is the legitimacy of the process by which the *de facto* secession is, or was, being pursued. The process of recognition, once considered to be an exercise of pure sovereign discretion, has come to be associated with legal norms. See, e.g., European Community Declaration on the *Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union*, 31 I.L.M. 1486 (1992), at p. 1487. While national interest and perceived political advantage to the recognizing state obviously play an important role, foreign states may also take into account their view as to the existence of a right to self-determination on the part of the population of the putative state, and a counterpart domestic evaluation, namely, an examination of the legality of the secession according to the law of the state from which the territorial unit purports to have seceded. As we indicated in our answer to Question 1, an emergent state that has disregarded legitimate obligations arising out of its previous situation can potentially expect to be hindered by that disregard in achieving international recognition, at least with respect to the timing of that recognition. On the other hand, compliance by the seceding province with such legitimate obligations would weigh in favour of international recognition. The notion that what is not explicitly prohibited is implicitly permitted has little relevance where (as here) international law refers the legality of secession to the domestic law of the seceding state and the law of that state holds unilateral secession to be unconstitutional.

144 As a court of law, we are ultimately concerned only with legal claims. If the principle of "effectivity" is no more than that "successful revolution begets its own legality" (S. A. de Smith, "Constitutional Lawyers in Revolutionary Situations" (1968), 7 *West. Ont. L. Rev.* 93, at p. 96), it necessarily means that legality follows and does not precede the successful revolution. *Ex hypothesi*, the successful revolution took place outside the constitutional framework of the predecessor state, otherwise it would not be characterized as "a revolution". It may be that a unilateral secession by Quebec would eventually be accorded legal status by Canada and other states, and thus give rise to legal consequences; but this does not support the more radical contention that subsequent recognition of a state of affairs brought about by a unilateral declaration of independence could be taken to mean that secession was achieved under colour of a legal right.

145 An argument was made to analogize the principle of effectivity with the second aspect of the rule of law identified by this Court in the *Manitoba Language Rights Reference, supra*, at p. 753, namely, avoidance of a legal vacuum. In that Reference, it will be recalled, this Court declined to strike down all of Manitoba's legislation for its failure to comply with constitutional dictates, out of concern that this would leave the province in a state of chaos. In so doing, we recognized that the rule of law is a constitutional principle which permits the courts to address the practical consequences of their actions, particularly in constitutional cases. The similarity between that principle and the principle of effectivity, it was argued, is that both attempt to refashion the law to meet social reality. However, nothing of our concern in the *Manitoba Language Rights Reference* about the severe practical consequences of unconstitutionality affected our conclusion that, as a matter of law, all Manitoba legislation at issue in that case was unconstitutional. The Court's declaration of unconstitutionality was clear and unambiguous. The Court's concern with maintenance of the rule of law was directed in its relevant aspect to the appropriate

remedy, which in that case was to suspend the declaration of invalidity to permit appropriate rectification to take place.

146 The principle of effectivity operates very differently. It proclaims that an illegal act may eventually acquire legal status if, as a matter of empirical fact, it is recognized on the international plane. Our law has long recognized that through a combination of acquiescence and prescription, an illegal act may at some later point be accorded some form of legal status. In the law of property, for example, it is well known that a squatter on land may ultimately become the owner if the true owner sleeps on his or her right to repossess the land. In this way, a change in the factual circumstances may subsequently be reflected in a change in legal status. It is, however, quite another matter to suggest that a subsequent condonation of an initially illegal act retroactively creates a legal right to engage in the act in the first place. The broader contention is not supported by the international principle of effectivity or otherwise and must be rejected.

C. Question 3

> In the event of a conflict between domestic and international law on the right of the National Assembly, legislature or government of Quebec to effect the secession of Quebec from Canada unilaterally, which would take precedence in Canada?

147 In view of our answers to Questions 1 and 2, there is no conflict between domestic and international law to be addressed in the context of this Reference.

IV. Summary of Conclusions

148 As stated at the outset, this Reference has required us to consider momentous questions that go to the heart of our system of constitutional government. We have emphasized that the Constitution is more than a written text. It embraces the entire global system of rules and principles which govern the exercise of constitutional authority. A superficial reading of selected provisions of the written constitutional enactment, without more, may be misleading. It is necessary to make a more profound investigation of the underlying principles that animate the whole of our Constitution, including the principles of federalism, democracy, constitutionalism and the rule of law, and respect for minorities. Those principles must inform our overall appreciation of the constitutional rights and obligations that would come into play in the event a clear majority of Quebecers votes on a clear question in favour of secession.

149 The Reference requires us to consider whether Quebec has a right to unilateral secession. Those who support the existence of such a right found their case primarily on the principle of democracy. Democracy, however, means more than simple majority rule. As reflected in our constitutional jurisprudence, democracy exists in the larger context of other constitutional values such as those already mentioned. In the 131 years since Confederation, the people of the provinces and territories have created close ties of interdependence (economically, socially, politically and culturally) based on shared values that include federalism, democracy, constitutionalism and the rule of law, and respect for minorities. A democratic decision of Quebecers in favour of secession would put those relationships at risk. The Constitution vouchsafes order and stability, and accordingly secession of a province “under the Constitution” could not be achieved unilaterally, that is, without principled negotiation with other participants in Confederation within the existing constitutional framework.

150 The Constitution is not a straitjacket. Even a brief review of our constitutional history demonstrates periods of momentous and dramatic change. Our democratic institutions necessarily accommodate a continuous process of discussion and evolution, which is reflected in the constitutional right of each participant in the federation to initiate constitutional change. This right implies a reciprocal duty on the other participants to engage in discussions to address any legitimate initiative to change the constitutional order. While it is true that some attempts at constitutional amendment in recent years have faltered, a clear majority vote in Quebec on a clear question in favour of secession would confer democratic legitimacy on the secession initiative which all of the other participants in Confederation would have to recognize.

151 Quebec could not, despite a clear referendum result, purport to invoke a right of self-determination to dictate the terms of a proposed secession to the other parties to the federation. The democratic vote, by however strong a majority, would have no legal effect on its own and could not push aside the principles of federalism and the rule of law, the rights of individuals and minorities, or the operation of democracy in the other provinces or in Canada as a whole. Democratic rights under the Constitution cannot be divorced from constitutional obligations. Nor, however, can the reverse proposition be accepted. The continued existence and operation of the Canadian constitutional order could not be indifferent to a clear expression of a clear majority of Quebecers that they no longer wish to remain in Canada. The other provinces and the federal government would have no basis to 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. The negotiations that followed such a vote would address the potential act of secession as well as its possible terms should in fact secession proceed. There would be no conclusions predetermined by law on any issue. Negotiations would need to address the interests of the other provinces, the federal government, Quebec and indeed the rights of all Canadians both within and outside Quebec, and specifically the rights of minorities. No one suggests that it would be an easy set of negotiations.

152 The negotiation process would require the reconciliation of various rights and obligations by negotiation between two legitimate majorities, namely, the majority of the population of Quebec, and that of Canada as a whole. A political majority at either level that does not act in accordance with the underlying constitutional principles we have mentioned puts at risk the legitimacy of its exercise of its rights, and the ultimate acceptance of the result by the international community.

153 The task of the Court has been to clarify the legal framework within which political decisions are to be taken “under the Constitution”, not to usurp the prerogatives of the political forces that operate within that framework. The obligations we have identified are binding obligations under the Constitution of Canada. However, it will be for the political actors to determine what constitutes “a clear majority on a clear question” in the circumstances under which a future referendum vote may be taken. Equally, in the event of demonstrated majority support for Quebec secession, the content and process of the negotiations will be for the political actors to settle. The reconciliation of the various legitimate constitutional interests is necessarily committed to the political rather than the judicial realm precisely because that reconciliation can only be achieved through the give and take of political negotiations. To the extent issues addressed in the course of negotiation are political, the courts, appreciating their proper role in the constitutional scheme, would have no supervisory role.

154 We have also considered whether a positive legal entitlement to secession exists under international law in the factual circumstances contemplated by Question 1, i.e., a clear democratic expression of support on a clear question for Quebec secession. Some of those who supported an affirmative answer to this question did so on the basis of the recognized right to self-determination that belongs to all “peoples”. Although much of the Quebec population certainly shares many of the characteristics of a people, it is not necessary to decide the “people” issue because, whatever may be the correct determination of this issue in the context of Quebec, a right to secession only arises under the principle of self-determination of peoples at international law where “a people” is governed as part of a colonial empire; where “a people” is subject to alien subjugation, domination or exploitation; and possibly where “a people” is denied any meaningful exercise of its right to self-determination within the state of which it forms a part. In other circumstances, peoples are expected to achieve self-determination within the framework of their existing state. A state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its internal arrangements, is entitled to maintain its territorial integrity under international law and to have that territorial integrity recognized by other states. Quebec does not meet the threshold of a colonial people or an oppressed people, nor can it be suggested that Quebecers have been denied meaningful access to government to pursue their political, economic, cultural and social development. In the circumstances, the National Assembly, the legislature or the government of Quebec do not enjoy a right at international law to effect the secession of Quebec from Canada unilaterally.

155 Although there is no right, under the Constitution or at international law, to unilateral secession, that is secession without negotiation on the basis just discussed, this does not rule out the possibility of an unconstitutional declaration of secession leading to a *de facto* secession. The ultimate success of such a secession would be dependent on recognition by the international community, which is likely to consider the legality and legitimacy of secession having regard to, amongst other facts, the conduct of Quebec and Canada, in determining whether to grant or withhold recognition. Such recognition, even if granted, would not, however, provide any retroactive justification for the act of secession, either under the Constitution of Canada or at international law.

156 The reference questions are answered accordingly.

Judgment accordingly.

Solicitor for the Attorney General of Canada: George Thomson, Ottawa.

Solicitors appointed by the Court as amicus curiae: Joli-C{oe}ur Lacasse Lemieux Simard St-Pierre, Sainte-Foy.

Solicitor for the intervener the Attorney General of Manitoba: The Department of Justice, Winnipeg.

Solicitor for the intervener the Attorney General for Saskatchewan: W. Brent Cotter, Regina.

Solicitor for the intervener the Minister of Justice of the Northwest Territories: Bernard W. Funston, Gloucester.

Solicitor for the intervener the Minister of Justice for the Government of the Yukon Territory: Stuart J. Whitley, Whitehorse.

Solicitor for the intervener Kitigan Zibi Anishinabeg: Agnès Laporte, Hull.

Solicitors for the intervener the Grand Council of the Crees (Eeyou Estchee): Robinson, Sheppard, Shapiro, Montréal.

Solicitors for the intervener the Makivik Corporation: Hutchins, Soroka & Dionne, Montréal.

Solicitor for the intervener the Chiefs of Ontario: Michael Sherry, Toronto.

Solicitors for the intervener the Minority Advocacy and Rights Council: Scott & Aylen, Toronto.

Solicitors for the intervener the Ad Hoc Committee of Canadian Women on the Constitution: Eberts Symes Street & Corbett, Toronto; Centre for Refugee Studies, North York.

Solicitors for the intervener Guy Bertrand: Guy Bertrand & Associés, Québec; Patrick Monahan, North York.

Solicitors for the interveners Roopnarine Singh, Keith Owen Henderson, Claude Leclerc, Kenneth O'Donnell and Van Hoven Petteway: Stephen A. Scott, Montréal.

Solicitors for the intervener Vincent Pouliot: Paquette & Associés, Montréal.