LAW VS. LEGITIMACY: PATRIATION, SECESSION, AND THE ROLE OF THE SUPREME COURT OF CANADA

BY

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A Thesis submitted to
the Faculty of Graduate Studies
in Partial Fulfillment of the Requirements for the Degree of

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Abstract

In many constitutional cases, the Supreme Court of Canada must craft an opinion on matters not originally anticipated by drafters of the Constitution's text nor addressed by subsequent case law. The *Patriation Reference* and *Secession Reference* each placed the Court in this difficult position. Unique about these two cases was the Court's resort to unwritten constitutional principles to establish a distinction between law and legitimacy in constitutional matters.

This thesis reviews both decisions, and focuses on the Court's use of these unwritten principles to introduce the distinctions between constitutional law and constitutional legitimacy, between legal obligations, as defined by the Constitution's text, and constitutional, moral or political obligations, as defined by unwritten elements such as constitutional conventions and principles. It is concluded that the Court's prior jurisprudence fails to explain the particular use of unwritten constitutional principles in the *Patriation* and *Secession References*.

Ultimately, the thesis proposes that, while the *Patriation* and *Secession Reference* decisions depart from the Court's prior use of unwritten constitutional principles, these cases might indicate the emergence of a modified and useful role for the Court to fulfill in cases in which constitutional law and constitutional legitimacy diverge. The proposed role of 'constitutional advisor' is introduced and defined, as a means of examining the Court's decisions in the *Patriation* and *Secession References* and as a suggested model for future constitutional jurisprudence. In essence, the role of constitutional advisor recognises the important role of unwritten principles in Canadian constitutionalism, but refrains from

enunciating new legal obligations which might arise from these principles, thereby protecting the supremacy of the Constitution's written text. The *Patriation* and *Secession References* can be viewed as useful examples of how the role of constitutional advisor might be fulfilled in future constitutional cases.

Introduction

When powerful political protagonists clash in a major constitutional case, a nation's highest court has an extraordinarily difficult task. Its judgment must be an effective response to an exigent or potential crisis of government. At the same time, the judgment must meet the standards required of all judicial decisions by displaying a logical coherence and theoretical underpinning which will enable its use beyond its own facts.[1]

The role played by the Supreme Court of Canada in constitutional cases is challenging and crucial, more so than in cases arising from other areas of law. While 'difficult' cases suggest no simple resolution, for which prior decisions provide limited precedential help, constitutional cases are particularly prone to develop questions not susceptible to clear or easily discernible answers; "many landmark constitutional cases, if not most of them, are 'hard' cases. A very high proportion of constitutional disputes involve tensions between important communitarian values and the equally important rights of individuals or minority groups."[2]

Constitutional cases also provide distinct challenges because, while rules or guidelines have been developed by the courts regarding statutory interpretation, interpreting constitutional statutes involves courts in a slightly different function. As explained in the oft quoted passage from Lord Sankey's decision in the *Edwards* case, "the British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits"; and the role of the Court, when considering constitutional provisions, is to give them "a large and liberal interpretation."[3]

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[1] E. Colvin, "Constitutional Jurisprudence in the Supreme Court of Canada" (1982) 4 Supreme Court Law Review 3 at 3.
[2] D. Gibson, "The Real Laws of the Constitution" (1990) 28:2 Alberta Law Review 358 at 362.
[3] *Edwards* v. *A. G. Canada,* [1930] A.C. 124 at 136.

When determining matters of constitutional interpretation, then, the Supreme Court of Canada faces a uniquely difficult task. It must apply often vague provisions to complex matters in a manner that renders relevant its decision and applicability to novel situations in the future. In some instances, the matter before the Court has not been contemplated by provisions of the Constitution at all. A written document meant to endure for the life of a nation surely cannot contemplate every instance of constitutional turmoil in the future. As Peter Hogg has noted,

> [t]he language of the Constitution is for the most part broad and vague....The scope of potential governmental activity that the rules address is so enormous that many problems will inevitably be overlooked by the framers of the text. Moreover, the passage of time produces social and economic change which throws up new problems which could not possibly have been foreseen by the framers of the text. For these reasons, the court probably has to apply a larger discretionary judgment to its constitutional decisions than it does to its decisions in other fields of law.[4]

In these cases, the Court's challenge increases and it must craft an opinion on matters not originally anticipated by the drafters of the Constitution's text nor addressed by constitutional jurisprudence.

The *Patriation Reference*[5] and the *Quebec Secession Reference*[6] were two cases that placed the Court in this difficult position. The matters under consideration were novel and not expressly contemplated by the Constitution's written provisions. In fact, the issues in each case had the potential to alter fundamentally the very nature of the Constitution itself. In addition, each case involved matters of great political significance, highlighting the delicate line the Court must maintain between defining the limits of the Constitution and inappropriately interfering in the political

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[4] *Ibid.* at 128.
[5] *Reference Re Amendment of the Constitution of Canada (Nos. 1, 2 and 3)*, [1981] 1 S.C.R. 753 [hereinafter *Patriation Reference*].
[6] *Reference Re Secession of Quebec,* [1998] 2 S.C.R. 217 [hereinafter *Secession Reference*].

affairs of the nation. In each case, the Court dealt with unique matters by delivering equally unique opinions on how the Constitution could be interpreted to dictate a particular course of action. When the Constitution's written provisions proved inadequate, the Court considered the 'other' constitution: those customs, usages, conventions, and principles, said to supplement the written text, which make up unwritten, but essential, elements of the Canadian Constitution. Unique about these two cases was the Court's use of unwritten principles to establish a distinction between *law* and *legitimacy* in constitutional matters. Constitutional *law* might be described as the express written provisions of Canada's various constitutional documents, and judicial decisions regarding those documents.[7] The interpretation and application of these written provisions is what was ordinarily expected from the Court in constitutional cases. The distinct element of constitutional *legitimacy* was introduced by the Court in the *Patriation* and *Secession Reference* cases, and referred to a constitutional morality or propriety regarding the interpretation and application of the legal requirements of the Constitution. In short, constitutional *law* outlines *who* may exercise *which* legal powers, while constitutional *legitimacy* outlines *how* those legal powers have traditionally been, or should be, exercised. The Court found these dictates of *legitimacy* in the unwritten elements of the Constitution, namely political conventions and 'fundamental constitutional principles'. In essence, the Court in these two cases found that certain political behaviour might be constitutionally inappropriate, or *'illegitimate'*, as violating an unwritten convention or principle, yet all the while remain in perfect conformity with constitutional *law*. With this distinction between matters of constitutional

[7] The definition of the 'Constitution of Canada' is discussed in greater detail in Chapter Three.

legitimacy and constitutional *law*, the query becomes how the Court justified its consideration of such 'non-legal' matters and whether the consideration of matters of *legitimacy*, as opposed to *law*, is, and should be, beyond the Court's jurisdiction.

The Court's use of unwritten constitutional principles and its distinction between constitutional *law* and *legitimacy*, in both the *Patriation* and *Secession References*, has been criticized by some as unnecessary and unwarranted intrusions which crossed the line between the Court's authority to 'interpret' the Constitution and Parliament's responsibility for 'constitution-making'. To justify the Court's consideration of unwritten principles in these cases, one might review some of the prior jurisprudence in which unwritten constitutional principles were articulated and discussed in Supreme Court of Canada judgments. But upon closer examination, this proves to be an unsatisfactory justification, given the limited use to which unwritten principles have been put, and the ongoing debate about the propriety of the Court's consideration of non-legal matters.

However, there may be other means by which the Court's consideration of unwritten principles in these two cases might be explained, even though the judgments disclosed incongruity with the Court's own past practice. It is possible to accept the Court's decisions as useful, as fulfilling some broader purpose, even if one has trouble accepting the intellectual integrity of the decisions themselves. There may be a broader role for the Court to fulfill, a role that might justify resort to this new brand of 'principled' constitutional decision-making by the Supreme Court of Canada, limited to those cases not adequately resolved by the constitution's written text, which question the constitutional appropriateness of political activity

and which challenge the symmetry between constitutional *law* and constitutional *legitimacy*.

Chapters One and Two of this thesis will review the *Patriation Reference* and *Secession Reference* cases respectively, including the political circumstances which gave rise to each case, a discussion of the Court's majority and minority decisions, and a brief review of some commentary on the Court's opinions.

Chapter Three will discuss the unique nature of Canada's Constitution, the development of unwritten constitutional principles, and the use of these principles in Canadian jurisprudence. This chapter will also consider the argument that the Court's identification and consideration of unwritten constitutional principles in the *Patriation* and *Secession References* can be justified, on the basis of the Court's prior jurisprudence involving unwritten elements of the Constitution. It will ultimately be concluded, however, that this argument fails in at least two regards, namely: i) the limited use to which unwritten constitutional principles have been put in prior jurisprudence, and ii) the Court's departure from this prior use in the *Patriation* and *Secession References*.

Finally, Chapter Four will outline a number of theories regarding constitutional interpretation in general, and the role of the Supreme Court of Canada in constitutional law cases in particular. It is here that the proposed role of 'constitutional advisor' will be introduced and defined, as a means of examining the Court's decisions in the *Patriation* and *Secession Reference* cases and as a suggested model for future constitutional jurisprudence. Ultimately, it will be argued that there is indeed a useful role for the Court to fulfill in cases in which constitutional *law* and

legitimacy diverge. The proposed role of constitutional advisor would involve the Court in the consideration of unwritten constitutional principles, but would limit this consideration to non-binding 'advice' from the Court regarding the constitutional propriety of particular political action. The impetus behind the suggested role of 'constitutional advisor', and indeed the entire argument regarding the distinction between law and legitimacy, stems from concerns about the continued utility of the Constitution's written provisions. When cases are decided by reference to constitutional principles alone, without some anchor or starting point from within the Constitution's text, the query becomes whether that text retains any significance in constitutional adjudication. This thesis should not be taken as an argument against the consideration of 'fundamental constitutional principles', or other elements outside of the Constitution's text, in every case. Rather, what this thesis questions is the use to which these other elements are put once they are considered. It is suggested here that, while consideration of unwritten constitutional principles can serve an invaluable purpose in cases for which little or no textual support exists, the written text should serve as the principal starting point from which any discussion evolves, and should not be disregarded in favour of unwritten principles, especially where the dictates of those principles and the constitutional text diverge.

Chapter One: The Patriation Reference

Introduction

The *Patriation Reference*[8] arose from a unique set of Canadian constitutional circumstances, the significance of which had never before, or since, been equalled. It was about more than the difficulties of reaching political agreement on a constitutional amendment. The constitutional developments which led to, and resulted from, the *Patriation Reference* were extraordinarily significant, not only in what they achieved, but in how they came about. As such, the questions posed to the Supreme Court of Canada in this case were significant and necessitated a decision as unique as the situation confronting it. The resulting decision, comprised of four separate judgments on issues of constitutional law and political convention, led to the most significant constitutional amendments in Canada's history.

This chapter will review the unique circumstances which led to the *Patriation Reference* and will examine the four judgments comprising the Supreme Court of Canada's decision. Also considered will be some of the commentary regarding the Court's handling of the questions placed before it, the answers the Court provided, and the continuing impact of the decision on constitutional law and amendment in general.

History of the Patriation Reference

"The origins of the Constitutional Amendment Reference lay in the tangled web of Canada's historical connections with the United Kingdom."[9] In 1867, the

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[8] *Patriation Reference, supra* note 5.
[9] Colvin, *supra* note 1 at 4.

United Kingdom created the Dominion of Canada by enacting the *British North America Act, 1867*.[10] The *BNA Act* stipulated that Canada was to operate as a federal state, and provided for a division of legislative powers between the federal government and the various provinces. The *BNA Act* also stipulated that Canada's constitution was to be 'similar in principle' to that of the United Kingdom. However, the unwritten nature of the United Kingdom's constitution, and its adoption by the *BNA Act*, meant that Canada's constitution did not incorporate written provisions on every aspect of constitutionalism in Canada. For instance, Britain's system of parliamentary, or responsible, government was inherited by Canada but was not, and is still not, structured in the written provisions of any constitutional document.[11] One significant omission from the written provisions of the *BNA Act*, at least for our purposes, was the absence of some mechanism for amendment of the *BNA Act* itself from within Canada. As E. Colvin explained, "no domestic amending process was made available with regard to the overall structure of confederation. It was assumed, and this subsequently became the practice, that such amendments would be enacted by the U. K. Parliament as the parent of confederation and as a body with continuing authority over Canada."[12]

Canada's search for a domestic amending formula began in earnest after World War I. Until that time, "the development of a domestic constitutional amending formula was not regarded as a significant political issue."[13] As Patrick

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[10] *Constitution Act, 1867* (U.K.), 30 & 31 Victoria, c. 3 (formerly *British North America Act, 1867*) [hereinafter *BNA Act*].
[11] See Chapter 3 for more discussion on the 'similar in principle' concept and the partially unwritten nature of Canada's constitution.
[12] Colvin, *supra* note 1 at 5.
[13] P. Monahan, *Constitutional Law* (Concord, ON: Irwin Law, 1997) at 148.

Monahan has noted, "Canadian political leaders appeared content to leave the power to amend the BNA Act in the hands of Westminster, particularly since the amendments that were requested during this period were relatively few and did not involve major changes to the federation."[14] Following the First World War, however, Canada's federal and provincial governments began to place greater importance on the ability to manage the nation's affairs and to change its constitutional structure from within its own borders.[15] Peter Hogg has described the search for a domestic amending formula as starting in 1927, when the federal Minister of Justice placed the issue on the agenda of an intergovernmental conference.[16] According to Hogg, the Minister "was influenced by the Balfour declaration of 1926, in which Canada had been recognized as the equal of the United Kingdom. Equality plainly called for the elimination of the role of the United Kingdom Parliament in Canada's amendment process. But that could not be accomplished until a new domestic amending procedure had been enacted into Canada's constitution."[17] Other constitutional issues also arose, including provincial concerns regarding a variety of division of powers issues,[18] which combined with the search for a domestic amending formula to create substantial impetus for major constitutional change.

In the meantime, in order to procure an amendment to the constitution, a joint request of the federal House of Commons and Senate would be sent to the

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[14] *Ibid.*
[15] R. Roy McMurtry, "The Search for a Constitutional Accord – A Personal Memoir" (1983) 8 Queen's Law Journal 28 at 34; and Monahan, *supra* note 13 at 149.
[16] P. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 2002) at 65.
[17] *Ibid.*
[18] McMurtry, *supra* note 15 at 34-37.

Queen for placement before the U. K. Parliament, and Westminster would effect the requested amendment.[19] In addition, when a requested amendment would have the effect of altering the division of powers or affecting other aspects of provincial powers, "the established practice was for the federal government to secure the consent of the provinces before a joint address was adopted."[20]

As negotiations surrounding a domestic amending formula proceeded, constitutional guarantees were sought regarding the role of the provinces in future amendments. The federal and provincial governments nearly reached agreement on an amending formula on two occasions, prior to the final push which led to the *Patriation Reference*. In 1964, a conference of first ministers unanimously agreed on what was termed the Fulton-Favreau formula, which required the unanimous consent of the House of Commons and Senate as well as all provincial legislatures, to make any amendment to the division of powers.[21] The Premier of Quebec subsequently withdrew his support for the proposal, however, noting that "the unanimity requirement would block Quebec from obtaining the additional legislative powers it sought from Ottawa".[22] In the absence of Quebec's support, the Fulton-Favreau formula was not further pursued.[23] In 1971, a first ministers' conference again reached unanimous consent on a package of constitutional changes, called the Victoria Charter, which included provisions on political and language rights, income

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[19] Colvin, *supra* note 1 at 5.
[20] *Ibid.* at 6; Monahan, *supra* note 13 at 151; and W. R. Lederman, "The Supreme Court of Canada and Basic Constitutional Amendment" in K. Banting & R. Simeon (eds.), *And No One Cheered* (Toronto: Methuen Publications, 1983) at 177.
[21] Monahan, *supra* note 13 at 151; and Hogg, *supra* note 16 at 65.
[22] Monahan, *ibid.*
[23] *Ibid.*; and K. Banting & R. Simeon, "Federalism, Democracy and the Constitution" in Banting & Simeon (eds.), *supra* note 20 at 4.

security, and a domestic amending formula.[24] The Victoria Charter provided that the consent of Parliament, Ontario, Quebec, a majority of the 'Western provinces', and a majority of the 'Atlantic provinces' would be required to amend the constitution.[25] The Victoria Charter proposal failed to materialise when the Quebec Premier withdrew his support for the amending formula;[26] "in finally rejecting the Victoria Charter, [Premier] Bourassa pointed to its failure to specify clearly an enhanced role for Quebec in income security."[27] Additional resistance to the Victoria Charter formula was felt from newly elected provincial governments in western Canada, who opposed the proposal because it gave vetoes to Ontario and Quebec but not to any other province.[28]

The final push for constitutional reform began in the mid-1970s as a result of the election of the Parti Quebecois in the province of Quebec. The election of a separatist government in Quebec put the need for constitutional reform back on the agenda.[29] The threat of a referendum brought promises from the Prime Minister that there would indeed be changes made to Canada's constitution and a renewed federalism established.[30] A referendum was held in May 1980, and it returned a 'no' vote. The day after the referendum, then Justice Minister Jean Chretien began preparing for what would ultimately be a long summer of constitutional negotiations with provincial justice ministers and premiers.[31] In September 1980, provincial

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[24] K. McRoberts, *Quebec: Social Change and Political Crisis* (Toronto: McClelland & Stewart, 1988) at 495, footnote 18.
[25] Monahan, *supra* note 13 at 151; and Hogg, *supra* note 16 at 65.
[26] *Ibid.*; and Banting & Simeon, *supra* note 23 at 4.
[27] McRoberts, *supra* note 24.
[28] Monahan, *supra* note 13 at 151.
[29] *Ibid.* at 153.
[30] *Ibid.*; and Banting & Simeon, *supra* note 23 at 5; and McMurtry, *supra* note 15 at 41.
[31] McMurtry, *supra* note 15 at 41.

premiers met for what would be the final round of negotiations before the *Patriation Reference* would unfold. While agreement was reached on a number of issues over the summer, provincial premiers and the Prime Minister had little success reaching consensus on significant proposals for constitutional change. The September 1980 first ministers' conference ended without agreement. Former Attorney General for Ontario, Roy McMurtry, explained that, "at the end of the failed conference, it was clear that a successful resolution to the constitutional stalemate was further away than ever."[32] He continued:

> There were clearly only two alternatives. One was to put the Constitution on the 'back burner' for the next decade. Given the commitment to constitutional renewal, the enormous expenditure of resources and energy, and the Prime Minister's long standing ambition to achieve major constitutional change, this was hardly a realistic alternative for the federal government. The other alternative was almost as unpleasant, that being some form of unilateral action by the federal government to break through the constitutional log-jam.[33]

On 2 October 1980, merely nineteen days following the failure of the first ministers' conference, Prime Minister Trudeau chose to proceed unilaterally and tabled in the House of Commons a resolution to be sent to the United Kingdom requesting amendment of the Canadian Constitution in the absence of consent from the provinces.[34] Roy Romanow, then Attorney General for Saskatchewan, has noted that the unilateral action of the federal government "signified the abandonment by Canadian governments of compromise and accommodation as the means to patriate

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[32] *Ibid.* at 43.
[33] *Ibid.*
[34] B. Schwartz & J. Whyte, "The Patriation References and the Idea of Canada" (1983) 8 Queen's Law Journal 158 at 158.

the Constitution and renew the federation."[35] The federal government decided to act unilaterally not only because political consensus had been impossible to reach, and seemed unlikely in the near future, but also because it believed that it alone had the authority to act to achieve goals of national importance.[36] Canada's provinces responded immediately. With only two of the ten provinces in support of the proposal,[37] the stage was set for a fierce political and legal challenge. Representatives from six of the dissenting provinces met in Winnipeg within three weeks of the Prime Minister's announcement to prepare a strategy of legal opposition to the federal government's plans.[38] The dissenting provinces had to decide, in very little time, exactly how they wanted a legal challenge to the proposed resolution to proceed:

> The issues which were before the lawyers were: first, the wisdom of urging a legal challenge on their respective cabinets; second, the mode of bringing such a challenge to court; third, the provinces in which legal actions should be commenced; and fourth, if the preferred route were a reference by provincial cabinets to provincial courts of appeal, the precise questions to be referred.[39]

The provinces determined that there were indeed strong arguments to be made regarding the impropriety of the unilateral federal action and decided to proceed by way of the reference procedure.[40] The best argument, according to the

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[35] R. Romanow, "Reworking the Miracle: The Constitutional Accord 1981" (1983) 8 Queen's Law Journal 74 at 76.
[36] *Ibid.* at 77, and Schwartz & Whyte, *supra* note 34 at 159.
[37] Only the governments of New Brunswick and Ontario expressed approval of the federal government's proposed resolution: Colvin, *supra* note 1 at 6.
[38] Schwartz & Whyte, *supra* note 34 at 159; and R. Romanow, J. Whyte & H. Leeson, *Canada...Notwithstanding: The Making of the Constitution 1976-1982* (Toronto: Carswell/Methuen, 1984) at 159.
[39] Romanow, Whyte & Leeson, *ibid.* at 159.
[40] *Ibid.* at 160.

lawyers for the dissenting provinces, was that unilateral amendment of the constitution

> violated a clear constitutional convention under which the Senate and House of Commons would not request the U. K. Parliament to enact changes to the British North America Act which alter federal-provincial relations, or affect provincial powers, without the consent of the provinces.[41]

'Constitutional conventions' are "binding rules of constitutional behaviour which are considered to be binding by and upon those who operate the Constitution, but which are not enforced by the law courts (although the courts may recognize their existence)...".[42] Some have referred to conventions as "the positive morality of the Constitution – the beliefs that the major participants in the political process as a matter of fact have about what is required of them" and importantly note that, "in so far as a convention defines duties or obligations, they remain morally and politically, but not legally, binding."[43] Lawyers from the dissenting provinces recognised that there may not have been a legal rule requiring provincial consent for constitutional amendments, but were confident that such a constitutional convention existed so as to render unilateral federal action illegitimate, even if not illegal.[44] The dissenting provinces therefore needed to get the question of constitutional conventions before the courts; and it was agreed that the reference procedure was the best way to proceed.[45] It was also agreed that the legal challenge was to be focused, rather than having a number of legal challenges occurring simultaneously in various provinces. The provinces of Manitoba, Newfoundland and Quebec, due to their strong

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[41] Schwartz & Whyte, *supra* note 34 at 159.
[42] A. Heard, *Canadian Constitutional Conventions: The Marriage of Law and Politics* (Toronto: Oxford University Press, 1991) at 3.
[43] G. Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* (Oxford: Clarendon Press, 1984) at 17.
[44] Romanow, Whyte & Leeson, *supra* note 38 at 160.
[45] *Ibid.* at 160; and Schwartz & Whyte, *supra* note 34 at 160.

opposition to the federal initiative and, in the case of Newfoundland, its unique relationship with the federal government, would refer questions to their respective courts of appeal, regarding the constitutionality of the federal government's proposed resolution.[46]

Patriation References – Manitoba, Newfoundland and Quebec

On 24 October 1980, the Executive Council of Manitoba referred three questions to the Manitoba Court of Appeal:

1. If the amendments to the Constitution of Canada sought in the Proposed Resolution for a Joint Address to Her Majesty the Queen respecting the Constitution of Canada, or any of them, were enacted, would federal-provincial relationships or the powers, rights or privileges granted or secured by the Constitution of Canada to the provinces, their legislatures or governments be affected and if so, in what respect or respects?

2. Is it a constitutional convention that the House of Commons and Senate of Canada will not request Her Majesty the Queen to lay before the Parliament of the United Kingdom of Great Britain and Northern Ireland a measure to amend the Constitution of Canada affecting federal-provincial relationships or the powers, rights or privileges granted or secured by the Constitution of Canada to the provinces, their legislatures or governments without first obtaining the agreement of the provinces?

3. Is the agreement of the provinces of Canada constitutionally required for amendment to the Constitution of Canada where such amendment affects federal-provincial relationships or alters the powers, rights or privileges granted or secured by the Constitution of Canada to the provinces, their legislatures or governments?[47]

The same three questions were posed by the Government of Newfoundland to its Court of Appeal on 5 December 1980.[48] On 17 December 1980, the Government of

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[46] Romanow, Whyte & Leeson, *supra* note 38 at 161.
[47] *Reference Re Constitution of Canada*, (1981), 117 D.L.R. (3d) 1 (Man. C.A.) [hereinafter *Manitoba Reference*] at 10.
[48] *Reference Re Constitution of Canada (No. 2)*, (1981), 29 Nfld. & P.E.I.R. 503 (Nfld. C.A.) [hereinafter *Newfoundland Reference*] at 506. A fourth question was also referred to

Quebec submitted two questions for consideration by Quebec's Court of Appeal.

The two questions posed in Quebec read:

A. If the Canada Act and the Constitution Act 1981 should come into force and if they should be valid in all respects in Canada, would they affect:
   i) the legislative competence of the provincial legislatures in virtue of the Canadian Constitution?
   ii) the status or role of the provincial legislatures or governments within the Canadian Federation?

B. Does the Canadian Constitution empower, whether by statute, convention or otherwise, the Senate and the House of Commons of Canada to cause the Canadian Constitution to be amended without the consent of the provinces and in spite of the objection of several of them, in such a manner as to affect:
   i) the legislative competence of the provincial legislatures in virtue of the Canadian Constitution?
   ii) the status or role of the provincial legislatures or governments within the Canadian Federation?[49]

In each reference, the provinces argued that a constitutional convention existed which required participation of the provinces in any amendment to the Constitution that would affect federal-provincial relationships or provincial powers; "the provincial argument based on convention depended to a very large extent on the discovery of a coherent and consistent historic pattern relating to provincial involvement in past constitutional amendments."[50] Before Manitoba's Court of Appeal, the Attorney General for Manitoba outlined what was necessary for a practice to be recognized as a constitutional convention. Adopting the test set out by Sir Ivor Jennings in *The Law and the Constitution*, the Attorney General noted: "three questions should be asked: (i) What are the precedents? (ii) Did the actors in

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Newfoundland's Court of Appeal regarding the method by which Newfoundland's Terms of Union and section 3 of the *British North America Act, 1871* could be amended. This question, and the responses of the Newfoundland Court of Appeal and the Supreme Court of Canada, will not be considered here.

[49] *Reference Re Constitution of Canada (No. 3)*, (1981), 120 D.L.R. (3d) 385 (Que. C.A.) [hereinafter *Quebec Reference*] at 389-90.

[50] Schwartz & Whyte, *supra* note 34 at 162.

the precedents believe that they were bound by a rule? (iii) Is there a reason for the rule?"[51] The Attorney General argued that there were two reasons for the rule in this particular case. First, "the British North America Act, 1867, embodies a compromise under which the original provinces agreed to federate".[52] Any amendment that would alter the powers, rights, and privileges of provinces as secured by the *British North America Act, 1867*, would constitute a renegotiation of the 'deal' reached between each province and the federal government upon that province's entry into the union. The Attorney General argued that this was "a valid reason for the establishment of a convention requiring provincial agreement to constitutional amendments which affect the relationships between the federal entity and the provinces...".[53] The second reason for the rule, according to Manitoba's Attorney General, was that "the powers, rights and privileges granted to the original provinces of Canada, and extended to provinces subsequently admitted to the Union, were granted by or pursuant to Imperial sovereignty. The Imperial Parliament alone could alter them."[54] While the federal government could request that the Imperial Parliament effect such an amendment, this would allow the federal government to "do indirectly...that which it could not do directly".[55] This anomaly, argued the Attorney General, was the second reason for establishment of the convention requiring provincial agreement to such amendments.[56]

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[51] *Reference Re Constitution of Canada*, (1981), 117 D.L.R. (3d) 1 (Man. C.A.) (Factum of the Attorney General for Manitoba) [hereinafter Factum AG Man.] at 15; originally in W. Ivor Jennings, *The Law and the Constitution*, 5th ed. (London: University of London Press, 1959) at 136.
[52] Factum AG Man., *ibid.*
[53] *Ibid.* at 17-18.
[54] *Ibid.* at 18.
[55] *Ibid.*
[56] *Ibid.* at 19.

The Attorney General then turned to the first branch of Jennings' three-step test and argued that the history of constitutional amendments contained precedents for a convention of provincial consent. The Attorney General relied on a 1965 federal government White Paper titled "The Amendment of the Constitution of Canada" which recounted all amendments to the Constitution of Canada since 1867. After a review of the twenty-two constitutional amendments since 1867, the Attorney General argued that "no amendment considered by the federal government to affect federal provincial relationships has been sought without provincial consent"[57] and that those amendments which proceeded without provincial consent involved matters of exclusive federal concern.[58] The 1965 White Paper also summarised a number of principles regarding constitutional amendment. The fourth principle stated:

> the Canadian Parliament will not request an amendment directly affecting federal-provincial relationships without prior consultation and agreement with the provinces. This principle did not emerge as early as others but since 1907, and particularly since 1930, has gained increasing recognition and acceptance. The nature and the degree of provincial participation in the amending process, however, have not lent themselves to easy definition.[59]

The Attorney General concluded: "[t]here is, thus, ample precedent that provincial agreement is required to effect amendments affecting federal provincial relationships, no such amendment having been passed without it."[60]

Finally, the Attorney General considered whether the actors affected by the convention accepted it as binding. The Attorney General reviewed a number of statements by Canadian parliamentarians, often Prime Ministers, endorsing the view

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[57] *Ibid.* at 30.
[58] *Ibid.*
[59] *Ibid.* at 29.
[60] *Ibid.*

that amendments affecting the provinces could not proceed without consultation with the provinces.[61] On other occasions, notably an amendment initiated in 1940 which transferred authority over unemployment insurance from the provinces to Parliament, the federal government did not proceed with the amendment until the consent of all provinces had been obtained. In this case, it took twenty years for the consent of all provinces to be tabled in the House of Commons, and Parliament refrained from proceeding without provincial approval in the interim.[62] The Attorney General concluded that there was "abundant evidence that the actors in the precedents believed they were bound by the rule."[63]

In response to Question Three, whether the agreement of the provinces was constitutionally required to effect an amendment altering the powers, rights or privileges of the provinces, the Attorney General for Manitoba made two arguments in the affirmative. First, the Attorney General argued that the convention relied upon in this case had crystallized into a rule of law.[64] The judgment of Chief Justice Duff in the 1936 case *Reference Re Weekly Rest in Industrial Undertakings Act*[65] was cited as support for this proposition. The case involved the authority of a Governor General to conclude a treaty with a foreign state, an authority that, while conventional, arguably did not have the force of law.[66] Chief Justice Duff stated that, "as a rule, the crystallization of constitutional usage into a rule of constitutional law to which the Courts will give effect is a slow process extending over a long

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[61] *Ibid.* at 30-37
[62] *Ibid.* at 34-35.
[63] *Ibid.* at 37.
[64] *Ibid.* at 38.
[65] [1936] S.C.R. 461 [hereinafter *Reference Re Weekly Rest*].
[66] Factum AG Man., *supra* note 51 at 38-39.

period of time; but the Great War accelerated the pace of development...and it would seem that the usages to which I have referred...must be recognized by the Courts as having the force of law."[67] The Attorney General also noted a number of cases in which courts of law had recognised constitutional practice.[68]

The second argument proposed by the Attorney General for Manitoba in favour of a constitutional requirement for provincial consent was that "full sovereign power, within limits of area and subject matter, has been transferred to the provincial legislatures and no alteration of their sovereign powers can be effected without their consent."[69] Pursuant to this argument, the Attorney General for Manitoba argued that "in a federal state the sovereignty is divided and the superior sovereignty which the British Parliament previously exercised over both levels passed to each level within its respective sphere."[70] It was concluded that neither level of government could infringe on the other's jurisdiction, nor could either do so indirectly by a request to the U. K. Parliament; "the request must come from those whose sovereignty is to be affected."[71]

In response to the convention question, the Attorney General for Canada argued that the convention question was not appropriate for judicial determination because it was a non-legal question, purely political in nature.[72] It was argued that "the purpose and function of a convention is to allow political practices to change

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[67] *Reference Re Weekly Rest*, *supra* note 65 at 476.
[68] Factum AG Man., *supra* note 51 at 40; See *Hull* v. *McKenna*, [1912] I.R. 402; *British Coal Corp.* v. *The King*, [1935] A.C. 500; *Ibralebbe* v. *The Queen*, [1963] A.C. 900; *Copyright Owners Ltd.* v. *E.M.I. (Australia) Pty Ltd.* (1958), 100 C.L.R. 597; *Commercial Cable Co.* v. *Newfoundland*, [1916] 2 A.C. 610.
[69] Factum AG Man., *supra* note 51 at 38.
[70] *Ibid.* at 45.
[71] *Ibid.* at 48.
[72] *Reference Re Constitution of Canada*, (1981), 117 D.L.R. (3d) 1 (Man. C.A.) (Factum of the Attorney General for Canada) [hereinafter Factum AG Can.] at 9.

with changing circumstances; therefore, they must be inherently imprecise and flexible."[73] As well, various authorities were cited in which different definitions of conventions were offered. For instance, Professor Peter Hogg wrote that a convention became established as a result of "a longstanding invariable practice, and a belief by the officials to whom it applies that the practice is obligatory."[74] De Smith noted that "a convention can be created without any background or existing usage... – the important element is the belief by those to whom it applies that the practice is obligatory."[75] The Attorney General for Canada concluded that it was "the imprecision and flexibility, in addition to the political character of conventions, which makes them unsuitable for enforcement by the courts."[76]

In the alternative, the Attorney General for Canada argued that a convention requiring provincial consent did not exist; "the historical pattern of consultation and consent [was] a practice of political prudence or convenience and not a convention."[77] The Attorney General reviewed the same constitutional amendments since 1867 as were examined by counsel for Manitoba, and reached the conclusion that "the consent of the provinces has not been sought and obtained on all amendments affecting federal-provincial relationships or affecting provincial powers, rights or privileges. On some occasions, the provinces were not even consulted."[78] How could the Attorneys General for Manitoba and Canada reach such disparate conclusions from a review of identical constitutional amendments?

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[73] *Ibid.* at 19.
[74] *Ibid.*; cited to P. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1977) at 7-11.
[75] Factum AG Can., *ibid.* at 19-20; cited to De Smith, *Constitutional and Administrative Law*, 3rd ed. (Harmondsworth, Midd: Penguin, 1977) at 58.
[76] Factum AG Can., *ibid.* at 20.
[77] *Ibid.* at 159-160.
[78] *Ibid.* at 30.

The difference was in the characterization of the subject matter of the amendments and whether it could be characterized as affecting the powers, rights or privileges of the provinces. For instance, the *British North America Act, 1871*, authorized establishment of new provinces by the Parliament of Canada.[79] The Attorney General for Manitoba argued that this amendment did not affect the powers, rights or privileges of the existing provinces (and therefore did not consider this amendment as one for which provincial consent would have been required).[80] The Attorney General for Canada, however, argued that this amendment empowered Parliament to "alter significantly the balance between province and province and between province and the federal government."[81] Given that no provincial consent was sought or given before this amendment was passed, the Attorney General argued that this was one example which weakened the provinces' argument that a convention had emerged from precedent.[82] Similarly, an amendment empowering Parliament to provide for territorial representation in the Senate and House of Commons was seen by the Attorney General for Manitoba as not involving any provincial power, right or privilege; while the Attorney General for Canada viewed the amendment as affecting the relative voice of the provinces in the Senate and, therefore, affecting the powers, rights or privileges of the provinces.[83]

After reviewing the constitutional amendments, the Attorney General for Canada concluded that, while provincial consent had been obtained on some

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[79] Factum AG Man., *supra* note 51 at 19; and Factum AG Can., *supra* note 72 at 30.
[80] Factum AG Man., *ibid.* at 19-20.
[81] Factum AG Can., *supra* note 72 at 30.
[82] *Ibid.* at 30, 50.
[83] Factum AG Man., *supra* note 51 at 20; and Factum AG Can., *ibid.* at 31.

occasions, it had not been obtained on others.[84] Therefore, while provincial consent for a constitutional amendment was considered by federal and provincial governments to be desirable, it was not considered necessary. As well, the Attorney General for Canada raised a number of questions regarding the alleged convention, including: when did it come into existence? To what, and whom, does it apply? Does it require unanimous consent of all provinces?[85] The Attorney General concluded that, "since no one is able to answer these questions with certainty, ...the varying practices and usages concerning the provincial role in the amendment process that have been followed over the years have not achieved the degree of precision that characterizes a true constitutional convention."[86]

In response to Question Three, whether provincial consent was constitutionally required, the Attorney General for Canada interpreted 'constitutionally required' as meaning 'required by constitutional law', and concluded that there was no legal requirement that the provinces consent to an amendment affecting their powers, rights or privileges.[87] First, the Attorney General noted that "the British North America Acts are statutes of the Parliament of the United Kingdom, and that body retains full legal authority over their amendment...; there is no statutory requirement that the consent of the provinces or indeed of the Parliament or government of Canada must be obtained before the United Kingdom Parliament can act."[88] The Attorney General also argued that, even if a constitutional convention was established and breached, there would still be no legal

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[84] Factum AG Can., *ibid.* at 50.
[85] *Ibid.* at 57-58.
[86] *Ibid.* at 58.
[87] *Ibid.* at 60.
[88] *Ibid.* at 61.

impediment to the U. K. Parliament's amendment of Canada's Constitution.[89] In support of this argument, the Attorney General relied on what it termed 'overwhelming legal authority' to the effect that conventions are not legally binding or enforceable.[90] Attached to the Attorney General of Canada's factum was an appendix which included a list of over ninety books, articles, and other documents, all of which, according to the Attorney General, expressly stated or clearly implied that conventions are not legally binding.[91]

Counsel for Canada then responded to the 'crystallization' argument forwarded by the Attorney General for Manitoba. Noting that the only authority for the crystallization of a convention into a rule of law was Chief Justice Duff's comments in *Reference Re Weekly Rest in Industrial Undertakings Act*, the Attorney General for Canada explained that Duff C.J.C.'s statement in this case was merely *obiter dictum* and also inapplicable in this case because it related to a question of international law.[92] Further, the Attorney General argued that "any doubt about the inapplicability of Chief Justice Duff's dictum to internal Canadian constitutional law was removed two years later in *Reference Re Disallowance and Reservation of Provincial Legislation.*"[93] In that case, the Supreme Court of Canada unanimously recognised the legal powers of the Governor General in Council to disallow or withhold royal assent from provincial legislation, and Chief Justice Duff stated "we are not concerned with constitutional usage. We are concerned with questions of

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[89] *Ibid.*
[90] *Ibid.* at 61-62.
[91] Appendix VII to Factum AG Can., *ibid.*
[92] Factum AG Can., *supra* note 72 at 65-66.
[93] *Ibid.* at 67; [1938] S.C.R. 71 [hereinafter *Re Disallowance*].

law...".[94] As for the other cases cited by the Attorney General for Manitoba regarding judicial recognition of conventions, the Attorney General for Canada argued that these cases "involved mere factual recognition by courts of the existence of certain conventions, without enforcing them directly."[95] In support of its own argument, that conventions are not judicially enforced, the Attorney General for Canada relied on *Madzimbamuto* v. *Lardner Burke*[96], in which the Privy Council acknowledged that a convention had been established that the British Parliament would no longer legislate for Southern Rhodesia without its agreement, but determined that "that was a very important convention but it had no legal effect in limiting the legal power of Parliament."[97]

Newfoundland Court of Appeal

Ultimately, the provincial argument in favour of a constitutional convention was only successful in the Newfoundland Court of Appeal. In Newfoundland, a unanimous Court of Appeal adopted the position that

> the requirement for provincial consent...goes much further than mere custom and usage. In our view, it would be inconsistent with the federal character of Canada's constitutional system to treat the Canadian Parliament alone as having the power to secure the amendment of any part of that system, disregarding the views of provincial Governments and legislatures affected by these amendments.[98]

The Court answered the convention question in the affirmative, and also answered affirmatively to the third question regarding whether consent of the provinces was constitutionally required. The Court concluded that, given the federal nature of

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[94] *Re Disallowance*, *ibid* at 78.
[95] Factum AG Can., *supra* note 72 at 69.
[96] [1969] 1 A.C. 645.
[97] *Ibid.* at 722.
[98] *Newfoundland Reference, supra* note 48 at 528.

Canada's constitutional structure, and the provinces' sovereignty over their exclusive areas of jurisdiction, "any amendment enacted by the Parliament of Great Britain affecting the legislative competence of either of the parties, without that party's consent...could defeat the whole scheme of the Canadian federal Constitution."[99]

Manitoba Court of Appeal

Neither the Manitoba nor Quebec Courts of Appeal accepted the convention argument. In Manitoba, Chief Justice Freedman, whose decision on the convention question was concurred in by the majority of the Court, concluded that:

> Indeed the desirability of securing provincial agreement to amendments involving the distribution of legislative power has hardly ever been doubted. What has been and continues to be a subject of debate is whether provincial agreement in such cases is necessary. That provincial agreement was sought and obtained in [two particular instances] is admittedly a circumstance supporting the contention of the provinces on this reference. But the amendments...do not in themselves constitute a pattern of parliamentary or legislative conduct, nor do they possess the vigour, warranting the ascription to them of a constitutional convention.[100]

The majority of the Manitoba Court of Appeal, therefore, found that there was no constitutional convention requiring the consent of the provinces to send the federal resolution to the U. K. to amend the Constitution. In a minority judgment, Hall J.A. concluded that the convention question was not appropriate for judicial determination. He noted that "the custom or convention of the Constitution consists of those rules that are not enforceable by the judicial process but which are recognized and sanctioned by practice and convenience in the political process."[101] Justice Hall cited a host of authorities in which the distinction between convention

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[99] *Ibid.* at 518.
[100] *Manitoba Reference, supra* note 47 at 19.
[101] *Ibid.* at 27.

and law was emphasised, and concluded that "constitutional conventions are not a matter for courts at all but are political and better left in that process...".[102]

The majority of Manitoba's Court of Appeal also answered Question Three in the negative, concluding that there was no constitutional requirement of agreement of the provinces.[103] In his majority judgment, Chief Justice Freedman wrote that "the third question stands or falls on the answer to the second question" and, having already determined that no constitutional convention for provincial consent was established, accordingly found that there was no constitutional requirement for provincial consent.[104] Two judges on Manitoba's Court of Appeal took a dissenting view. Justices O'Sullivan and Huband both found that, while no constitutional convention existed, a constitutional requirement did exist, on other grounds, that the consent of the provinces was required in order to effect the amendment in question. Justice O'Sullivan, whose opinion found support from Huband J. A., accepted the provinces' sovereignty argument, noting that:

> I think the principle has been well established that in all matters pertaining to federal power, when the Queen acts, she must act on the advice of her federal ministers; in all matters pertaining to provincial power, when the Queen acts, she must act on the advice of her provincial ministers. In matters affecting both, she must act on the advice of both federal and provincial ministers. It would be unconstitutional for her to act except on the advice of responsible ministers....In my opinion, the Queen's Canadian ministers would be acting unconstitutionally if they advised the Queen to act in matters for which they are not responsible to a Legislature with jurisdiction over such matters.[105]

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[102] *Ibid.*
[103] *Ibid.* at 1-2.
[104] *Ibid.* at 22.
[105] *Ibid.* at 51.

Quebec Court of Appeal

In Quebec, a majority of the Court of Appeal found that Parliament was empowered to amend the Constitution without the consent of the provinces. Chief Justice Crete considered the history of constitutional amendment in Canada and noted that some amendments have been brought about without the consent of the provinces, sometimes in spite of provincial opposition.[106] The Chief Justice concluded that "the argument of the Provinces on this point is far from conclusive."[107] Justice Turgeon, who reached a similar conclusion, went even further and asserted that "an analysis of the procedure which has been followed since 1867...clearly indicates that a constitutional convention to this effect does not exist. On the contrary, if a constitutional convention did exist, it would support the proposed resolution."[108] Justice Bisson dissented from the majority, noting:

> To accept that, despite the objection of the Provinces, the Parliament of Canada has the legal capacity to approach London in order to request...constitutional changes in areas which deal with matters considered within the exclusive legislative competence of the Provinces...would be equivalent to saying that Canada is, at the present time, constitutionally, a quasi-unitary State. This would be equivalent to shattering the legal concept of the exclusive legislative competence of the Provinces on matters which have always been legislatively recognized as being theirs.[109]

Each of the provincial reference decisions were appealed to the Supreme Court of Canada, and it ordered that all three appeals be heard together. On 28 September 1981, the Court delivered its decision in the *Patriation Reference*.

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[106] *Quebec Reference, supra* note 49 at 401.
[107] *Ibid.* at 398.
[108] *Ibid.* at 425.
[109] *Ibid.* at 465.

Supreme Court of Canada

The decision of the Supreme Court in the *Patriation Reference* comprised four separate judgments: majority and dissenting opinions on the question of law, and majority and dissenting opinions on the question of convention.[110] The length of the decision, and the thorough review of arguments placed before the Court, illustrated its significance far beyond the circumstances from which the three reference cases originated. The Court was deciding fundamental questions of the nature of constitutionalism in Canada, and the future of political negotiations surrounding the amendment of the Constitution hung in the balance.

'Constitutionally Required' - Majority Opinion

On the question of constitutional law, or what is 'constitutionally required', which arose from Question Three in the Manitoba and Newfoundland References and the legal aspect of Question B in the Quebec Reference, seven members of the nine person Court found no legal requirement of provincial consent in order for the Senate and House of Commons to send a resolution to the U. K. requesting amendment of the constitution. The majority, comprised of Chief Justice Laskin and Dickson, Beetz, Estey, McIntyre, Chouinard and Lamer JJ., indicated that there were two broad aspects to consider under this question: "i) the authority of the two federal Houses to proceed by Resolution where provincial powers and federal-provincial relationships are thereby affected, and ii) the role or authority of the Parliament of the United Kingdom to act on the Resolution."[111]

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[110] All members of the Court answered Question One in the affirmative.
[111] *Patriation Reference, supra* note 5 at 773.

First, the majority rejected the argument of the provinces that a convention, if one existed, could 'crystallize' into law and thus become a rule of law enforceable by the courts. The majority found that no instance of the 'crystallization' of a convention had been shown, and further, "the very nature of a convention, as political in inception and as depending on a consistent course of political recognition by those for whose benefit and to whose detriment (if any) the convention developed over a considerable period of time is inconsistent with its legal enforcement."[112] The majority also rejected the contention that a number of earlier cases had indeed given legal force to conventions. The majority instead accepted the position of the Attorney General for Canada and distinguished these cases as having merely recognised the existence of conventions; but then, refusing to give the conventions precedence over 'law', relied on 'firm statutory or other legal principles' to ultimately dispose of the cases.[113] As for Chief Justice Duff's comments, which were relied upon by the provinces in support of the 'crystallization' argument, the majority concluded that "what the learned Chief Justice was dealing with was an evolution which is characteristic of customary international law" and explained:

> International law perforce has had to develop, if it was to exist at all, through commonly recognized political practices of States, there being no governing constitution, no legislating authority, no executive enforcement authority and no generally accepted judicial organ through which international law could be developed. The situation is entirely different in domestic law, in the position of a State having its own governing legislative, executive and judicial organs and, in most cases, an overarching written constitution.[114]

The majority then proceeded to consider the authority of the Senate and House of Commons to pass and deliver a resolution to the United Kingdom for

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[112] *Ibid.* at 774-5.
[113] *Ibid.* at 778-9.
[114] *Ibid.* at 778.

amendment of the Canadian Constitution. The majority concluded that there was "no limit anywhere in law, either in Canada or in the United Kingdom…to the power of the Houses to pass resolutions."[115] The majority noted section 18 of the *BNA Act, 1867*, under which "the federal Parliament may by statute define those privileges, immunities and powers, so long as they do not exceed those held and enjoyed by the British House of Commons at the time of the passing of the federal statute."[116] Furthermore, the majority rejected arguments regarding provincial 'sovereignty'. In response to this argument, the majority of the Court first clarified that, regardless of whether the federal Houses could propose such a resolution, the authority of the U. K. Parliament over amendment of the *BNA Act, 1867* remained unimpaired. Therefore, even if the unilateral federal resolution breached some 'intra-Canadian conventional procedures', the discretion and legal authority to enact the resolution remained with the U. K. Parliament and the resolution could be validly enacted by Westminster.[117] Next, the majority indicated that, while Sections 91 and 92 of the *BNA Act, 1867* divided legislative powers among the federal and provincial authorities, federal paramountcy remained the general rule in the exercise of these powers.[118] The majority also noted that, given the international 'foreign relations' aspect of the relationship between Canada and the United Kingdom, "any formal communication between a province and its Lieutenant-Governor with the United Kingdom Government or with the Queen, must be through the federal

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[115] *Ibid.* at 784.
[116] *Ibid* at 784-5.
[117] *Ibid.* at 801.
[118] *Ibid.*

Government or through the Governor-General."[119] In the end, the majority of the Court concluded that "the law knows nothing of any requirement of provincial consent, either to a resolution of the federal Houses or as a condition of the exercise of United Kingdom legislative power."[120]

'Constitutionally Required' - Dissenting Opinion

Justices Martland and Ritchie wrote a dissenting opinion on the question of constitutional law. They accepted the argument of the provinces regarding provincial sovereignty within their delegated areas of legislative authority. The minority opinion stated:

> the enactment of the BNA Act created a federal Constitution of Canada which confided the whole area of self-government within Canada to the Parliament of Canada and the provincial legislatures each being supreme within its own defined sphere and area. It can fairly be said, therefore, that the dominant principle of Canadian constitutional law is federalism. The implications of that principle are clear. Each level of government should not be permitted to encroach on the other, either directly or indirectly.[121]

The minority also challenged the basis of the federal Parliament's authority to pass resolutions of the type proposed in this case. It had been argued that "the power of the Senate and the House of Commons to pass resolutions of any kind, and to use such resolutions for any purpose...have been recognized in section 18 of the BNA Act...".[122] This section provided that the privileges, immunities and powers of the Senate and House of Commons would be those defined by Parliament, so long as those privileges, immunities and powers did not exceed those enjoyed by the U. K.

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[119] *Ibid.* at 802.
[120] *Ibid.* at 807.
[121] *Ibid.* at 821.
[122] *Ibid.* at 837.

Parliament.[123] Canada's Parliament subsequently defined its privileges, immunities and powers in the *Senate and House of Commons Act* (now the *Parliament of Canada Act*) as those that were held by the U. K. Parliament in 1867, so far as they are consistent with and not repugnant to the *BNA Act*.[124] Justices Martland and Ritchie found significance in this provision, noting that it

> took into account the fact that, whereas the House of Commons in the United Kingdom was one of the Houses in Parliament of a unitary State, the Canadian Senate and House of Commons were Houses in a Parliament in a federal State, whose powers were not all embracing, but were specifically limited by the Act which created it.[125]

Given that Canada is a federal state, and given the division of powers enunciated in the *BNA Act*, the minority opinion concluded that the unlimited powers available to the U. K. Parliament could not be similarly exercised by the Canadian Parliament, because exercise of such power would be inconsistent with and repugnant to the federal nature of Canada's system as provided in the *BNA Act*. The minority concluded that, "since it is beyond the power of the federal Parliament to enact such an amendment [as would affect provincial interests], it is equally beyond the power of its two Houses to effect such an amendment through an agency of the Imperial Parliament."[126] Therefore, according to Justices Martland and Ritchie, the federal Parliament had no legal authority to proceed with its proposed resolution in the absence of provincial consent.

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[123] *BNA Act, supra* note 10 at section 18.
[124] *Parliament of Canada Act,* R.S.C. 1985, c. P-1, s. 4.
[125] *Patriation Reference, supra* note 5 at 839.
[126] *Ibid.* at 846.

Constitutional Convention - Majority Opinion

The portion of the Court's decision which garnered the most commentary was its handling of, and response to, the question of constitutional convention. This question, like the question on constitutional requirements or law, prompted two separate judgments from the Court.

The majority on the convention question, comprised of Martland, Ritchie, Dickson, Beetz, Chouinard, and Lamer JJ., started its judgment with a discussion of the nature of constitutional conventions and their place within the constitutional structure of Canada.[127] This majority noted the importance of unwritten aspects of Canada's constitution, stating "many Canadians would perhaps be surprised to learn that important parts of the Constitution of Canada...are nowhere to be found in the law of the Constitution."[128] The majority listed examples of these unwritten constitutional rules, many emanating from the principle of responsible government including the requirement that "if the Opposition obtains the majority at the polls, the Government must tender its resignation forthwith"[129] or that Ministers must "have the confidence of the elected branch of the Legislature" and, should they lose it, "they must either resign or ask the Crown for a dissolution of the Legislature and the holding of a general election."[130] The majority then noted that, while "none of these essential rules of the Constitution can be said to be a law of the Constitution", they were all 'conventions of the Constitution'.[131] The purpose of constitutional conventions, according to the majority, was "to ensure that the legal framework of

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[127] More on conventions as part of Canada's unwritten constitution can be found in Chapter Three.
[128] *Patriation Reference, supra* note 5 at 877-8.
[129] *Ibid.* at 878.
[130] *Ibid.*
[131] *Ibid.*

the Constitution will be operated in accordance with the prevailing constitutional values or principles of the period."[132] The majority then noted that unlike the laws of the Constitution, conventions are not, and could not be, enforced by courts of law.[133] The majority explained:

> perhaps the main reason why conventional rules cannot be enforced by the courts is that they are generally in conflict with the legal rules which they postulate and the Courts are bound to enforce the legal rules. The conflict is not of a type which would entail the commission of any illegality. It results from the fact that legal rules create wide powers, discretions and rights which conventions prescribe should be exercised only in a certain limited manner, if at all.[134]

The majority concluded that "it is because the sanctions of convention rest with institutions of government other than Courts, such as the Governor General or the Lieutenant-Governor, or the Houses of Parliament, or with public opinion and ultimately, with the electorate that it is generally said that they are political."[135]

After describing the nature of conventions, the majority noted that, while they were distinct from laws and could not be enforced as such, some conventions may actually be more important than some laws; and they serve as important aspects of Canada's Constitution.[136] As such, the majority concluded that it was "perfectly appropriate to say that to violate a convention is to do something which is 'unconstitutional' although it entails no direct legal consequence" and that "constitutional conventions plus constitutional law equal the total constitution of the country."[137] Because conventions form an integral part of the Constitution, the

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[132] *Ibid.* at 880.
[133] *Ibid.*
[134] *Ibid.* at 880-1.
[135] *Ibid.* at 882-3.
[136] *Ibid.* at 883.
[137] *Ibid.* at 883-4.

majority found the question on constitutional convention posed to the Court to be a proper matter for its consideration:

> [the convention question] is not confined to an issue of pure legality but it has to do with a fundamental issue of constitutionality and legitimacy. Given the broad statutory basis upon which the Governments of Manitoba, Newfoundland and Quebec are empowered to put questions to their three respective Courts of Appeal, they are in our view entitled to an answer to a question of this type.[138]

The majority also noted that they were not being asked, in this case, to enforce a convention. Rather, they were being asked to recognise if a convention existed: "[c]ourts have done this very thing many times…".[139]

To determine the existence of a convention, the majority relied on the three-step formula enunciated by Sir W. Ivor Jennings: "first, what are the precedents; secondly, did the actors in the precedents believe that they were bound by a rule; and thirdly, is there a reason for the rule?"[140] The majority began by considering the precedents, that is, the history of constitutional amendments in Canada. It noted that all constitutional amendments can be grouped in one of three categories: i) amendments which may be made by a provincial legislature acting alone; ii) amendments which may be made by the Parliament of Canada acting alone; and iii) all other amendments.[141] The majority determined that the third category was the only category relevant to the Court's consideration. Since the matter before the Court was Parliament's proposed resolution, and since the first question posed to the Court was whether this resolution would have the effect of altering federal-provincial relationships or provincial rights, powers or privileges, the majority

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[138] *Ibid.* at 884.
[139] *Ibid.* at 885.
[140] *Ibid.* at 888; originally in Jennings, *supra* note 51 at 136.
[141] *Ibid.* at 886.

concluded that "the issue raised by the second question...is whether there is a constitutional convention for agreement of the provinces to amendments which change legislative powers and provide for a method of effecting such change."[142] To determine the existence of such a convention, therefore, only those historical amendments in this same category needed to be considered.

The majority considered the twenty-two constitutional amendments reviewed in the federal government's 1965 White Paper, and noted that only five of these directly affected federal-provincial relationships in the sense of changing provincial powers.[143] After reviewing the amendments, the majority noted that "every one of these five amendments was agreed upon by each province whose legislative authority was affected."[144] The majority also noted a number of constitutional amendment attempts that did not proceed in the absence of provincial consent. It concluded that, "in negative terms, no amendment changing provincial legislative powers has been made since Confederation when agreement of a Province whose legislative powers would have been changed was withheld. There are no exceptions."[145] For instance, earlier in this Chapter, failed attempts at reaching agreement on a domestic amending formula were reviewed. The majority considered these same attempts and noted significance in the fact that proposals like the Fulton-Favreau formula and the Victoria Charter did not succeed, even where only one or two provinces refused to consent.[146]

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[142] *Ibid.* at 887.
[143] *Ibid.* at 891.
[144] *Ibid.* at 893.
[145] *Ibid.* at 893.
[146] *Ibid.* at 893-4.

The majority then considered the next step in the Jennings 'formula', whether political actors to which an alleged convention applied treated the rule as binding upon them. As noted earlier, a 1965 federal government White Paper enunciated four 'accepted constitutional rules and principles'. The last of these four principles stated that "the Canadian Parliament will not request an amendment directly affecting federal-provincial relationships without prior consultation and agreement with the provinces...The nature and the degree of provincial participation in the amending process, however, have not lent themselves to easy definition."[147] The majority concluded that "this statement is not a casual utterance. It is contained in a carefully drafted document which had been circulated to all the provinces prior to its publication and been found satisfactory by all of them" and continued, "this statement is a recognition by all the actors in the precedents that the requirement of provincial agreement is a constitutional rule."[148] As for the last line in the principle, regarding the uncertain degree of provincial consent, the majority believed that "this statement expressed some uncertainty as to whether unanimity is a necessity, but none as to whether substantial provincial support is required."[149] The majority determined that, "while the precedents point at unanimity, it does not appear that all the actors in the precedents have accepted the unanimity rule as a binding one."[150] According to the majority, a review of the precedents, including previous unsuccessful attempts at formulating a domestic amending formula, indicated that "no consensus was reached on this issue. But the discussion of this very issue for

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[147] *Ibid.* at 899.
[148] *Ibid.* at 900.
[149] *Ibid.* at 902.
[150] *Ibid.* at 904.

more than fifty years postulates a clear recognition by all the Governments concerned of the principle that a substantial degree of provincial consent is required."[151] However, the majority refused to articulate what it believed to be the amount, or degree, of provincial consent required to comply with the constitutional convention. It noted, "[i]t would not be appropriate for the Court to devise in the abstract a specific formula which would indicate in positive terms what measure of provincial agreement is required for the convention to be complied with."[152] The majority concluded, "it is sufficient for the Court to decide that at least a substantial measure of provincial consent is required and to decide further whether the situation before the Court meets with this requirement."[153] With the support of only two of the ten provinces, the majority concluded that Parliament's proposed resolution did not garner a sufficient measure of provincial support to be considered in accordance with the constitutional convention.[154]

The final consideration from Jennings' formula for determining the existence of conventions is whether there is a reason for the rule. The majority found that the reason for the convention of provincial consent was the federal principle which underlies Canadian constitutionalism, and noted that "the federal principle cannot be reconciled with a state of affairs where the modification of provincial legislative powers could be obtained by the unilateral action of the federal authorities."[155] The majority concluded that "the purpose of this conventional rule is to protect the federal character of the Canadian Constitution and prevent the anomaly that the

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[151] *Ibid.* at 904-5.
[152] *Ibid.* at 905.
[153] *Ibid.*
[154] *Ibid.*
[155] *Ibid.* at 905-6.

House of Commons and Senate could obtain by simple resolutions what they could not validly accomplish by statute."[156]

Ultimately, the majority of the Court concluded that a substantial measure of provincial consent was constitutionally required, according to convention, for the passing of the proposed resolution; "passing of this resolution without such agreement would be unconstitutional in the conventional sense".[157]

Constitutional Convention - Dissenting Opinion

Three members of the Court, namely Chief Justice Laskin, and Estey and McIntyre JJ., comprised the minority on the convention question. The minority stated that it agreed with much of the discussion in the majority judgment regarding the nature of constitutional conventions, their relation to constitutional law, and their role within the constitutional structure of Canada.[158] As to whether a convention regarding provincial consent to constitutional amendments existed, the minority found it was 'abundantly clear' that the answer was 'no'.[159] The minority noted, "the degree of provincial participation in constitutional amendments has been a subject of lasting controversy in Canadian political life for generations. It cannot be asserted, in our opinion, that any view on this subject has become so clear and so broadly accepted as to constitute a constitutional convention."[160] The minority stressed that the convention being proposed by the provinces would have the effect of limiting the functioning of the federal executive and legislative branches; and such a convention "would require for its recognition, even in the non-legal, political

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[156] *Ibid.* at 908.
[157] *Ibid.* at 909.
[158] *Ibid.* at 852.
[159] *Ibid.* at 858.
[160] *Ibid.*

sphere, the clearest signal from the plenary unit intended to be bound, and not simply a plea from the majority of the beneficiaries of such a convention...".[161]

The minority proceeded to review the same twenty-two constitutional amendments since 1867 that had been noted by the majority. However, instead of narrowing the consideration of these amendments down to only those five which directly affected provincial legislative authority, the minority stated that "consideration must be given in according weight to the various amendments, to the reaction they provoked from the provinces" and concluded "on many occasions provinces considered that amendments not affecting the distribution of legislative power were sufficiently undesirable to call for strenuous opposition. The test of whether the convention exists, or has existed, is to be found by examining the results of such opposition."[162] After reviewing the amendments, and a number of excerpts from Parliamentary debates on prior amendments, the minority noted that, "it is surely obvious that the federal Government would always prefer to have, as a political matter, provincial approval, but the position of the federal authorities...does not support the proposition that they considered that they were bound by any convention."[163] It ultimately concluded that an historical review of the circumstances surrounding historical constitutional amendments did not reveal the emergence of a convention of provincial consent; "...in many cases, the federal Government has proceeded with amendments in the face of active provincial opposition. In our view, it is unrealistic in the extreme to say that the convention has

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[161] *Ibid.* at 859.
[162] *Ibid.* at 863.
[163] *Ibid.* at 866-7.

emerged."[164] The minority then considered the principle enunciated in the 1965 White Paper and emphasised the last sentence which stated that the degree of required provincial consent remained uncertain. The minority noted that "it is the very difficulty of fixing the degree of provincial participation which, while it remains unresolved, prevents the formation or recognition of any convention."[165]

The minority also rejected the argument that the importance of the federal principle in Canada required recognition of a convention of provincial consent. In response, the minority noted that

> the BNA Act has not created a perfect or ideal federal state. Its provisions have accorded a measure of paramountcy to the federal Parliament....It is this special nature of Canadian federalism which deprives the federalism argument described above of its force. This is particularly true when it involves the final settlement of Canadian constitutional affairs with an external government, the federal authority being the sole conduit for communication between Canada and the Sovereign and Canada alone having the power to deal in external matters.[166]

The minority therefore rejected the argument that the preservation of federalism required recognition of a convention of provincial consent.[167]

In summary, while different views on both constitutional law and constitutional convention were found within the Court's decision in the *Patriation Reference*, a majority of the Court ultimately concluded that delivery of the federal Parliament's proposed resolution to the United Kingdom without a substantial measure of provincial consent was in compliance with constitutional law, but in violation of constitutional convention governing amendment to Canada's Constitution. This decision was of fundamental importance to constitutionalism in

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[164] *Ibid.* at 869.
[165] *Ibid.* at 871.
[166] *Ibid.* at 872.
[167] *Ibid.*

this country, given its recognition of unwritten constitutional conventions and its declaration that a violation of these conventions threatens the legitimacy of the legislative initiative in question by rendering it 'unconstitutional'.

Commentary and Criticism of the Court's Decision in the Patriation Reference

The Court's decision in the *Patriation Reference* met an array of reactions. As one commentator noted, it is hard to dispute that the *Patriation Reference* was "unquestionably the most important judicial decision ever rendered in the history of Canadian constitutional law. Its importance with respect to the future orientation of our law, parliamentarianism and federalism cannot be overestimated."[168] Reaction was immediate and diverse. A scathing critique appeared in the *Ottawa Citizen* the day after the decision was released. Journalist Frank Howard said the ruling was "so full of holes it wouldn't make it across the Ottawa River" and lamented that "the country entrusted its constitutional destiny to the Court. We expected an historic decision. Instead we witnessed the majesty of the law turning to jelly."[169] Eric Colvin provided a glimpse of other possible reactions to the Court's decision:

> Historians and political scientists may well salute the Court for its achievement in including the federal and most of the provincial governments to negotiate a settlement of their disagreements over the patriation of the Canadian constitution and the entrenchment of a charter of rights and freedoms. Constitutional lawyers may admire the political dexterity of the Court, while holding reservations about its handling of the wider questions raised by the case. The reaction of legal theorists, however, is likely to be exasperation at the failure of the Court to recognize the jurisprudential character of the issues at stake and to utilize the insights of contemporary legal theory in their resolution.[170]

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[168] G. Remillard, "Legality, Legitimacy and the Supreme Court" in Banting & Simeon (eds.), *supra* note 13 at 203.
[169] F. Howard, "Bureaucrats" *Ottawa Citizen* (29 September 1981) 4.
[170] Colvin, *supra* note 1 at 3.

Colvin explained that, while the Court's decision in the *Patriation Reference* may well have effectively responded to "an exigent or potential crisis of government", the decision must still "meet the standards required of all judicial decisions by displaying a logical coherence and theoretical underpinning which will enable its use beyond its own facts."[171] Colvin concluded that the Court was less than successful in this respect, noting that "although the Court struggled valiantly in unfamiliar territory, some of its theoretical formulations were far from convincing."[172] For instance, Colvin reviewed the Court's distinction between convention and law, and its assertion that the power of the U. K. Parliament to amend Canada's Constitution remained untrammeled, and responded by stating that "we are entitled to be suspicious of a line of reasoning which produced conclusions at odds with the common understanding, on both sides of the Atlantic, of political realities."[173] In essence, the Court's decision maintained that the U. K. Parliament could legally amend Canada's Constitution at will, even though this might be in violation of constitutional convention. This was an overstated assertion, according to Colvin, because political realities would never allow for such conduct.

Other commentators on the *Patriation Reference* decision have noted that the theoretical basis for the decision was not the only consideration; "the rationality of a decision of this kind might have to be tested on two planes – one, more narrowly jurisprudential and related to the internal logic of the decision, and the other, more

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[171] *Ibid.*
[172] *Ibid.* at 4.
[173] *Ibid.* at 8.

politically prudential and related to the exigencies of the national crisis."[174] Along these lines, some critics accused the Court of moulding its decision to serve the particular political purpose of encouraging a compromise between the parties involved. Indeed, this is exactly what occurred after the *Patriation Reference* decision was handed down.[175] Peter Russell feared that concurrence with the majority judgments in the *Patriation Reference*, on grounds that the judgments led to a beneficial political outcome, meant subscribing to "a 'result-oriented' jurisprudence which assesses judicial decisions in terms of whether they support one's personal political preferences".[176] He concluded that this was no way to assess the internal rationality of a legal decision.[177]

Perhaps the most common criticism related to the justiciability of the questions themselves, and the appropriateness of the Court's consideration and handling of the 'convention question'. Peter Hogg, for example, noted that the only purpose served by answering the convention question was to influence the political negotiations on constitutional amendment in favour of the provinces.[178] Hogg concluded that "in my view, the Court, which is not an elected body, and which is not politically accountable for its actions, should have confined itself to answering the legal question, and should not have gone beyond the legal question to exert any further influence over the negotiations."[179] Hogg also rejected the Court's claim that

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[174] P. Russell, "The Supreme Court Decision: Bold Statescraft based on Questionable Jurisprudence" [hereinafter "Bold Statescraft"] in P. Russell, *et al.*, *The Court and the Constitution: Comment on the Supreme Court Reference on Constitutional Amendment* (Kingston: Institute of Intergovernmental Relations, 1982) at 3.
[175] See Chapter Four for a discussion of the political aftermath of the *Patriation Reference*.
[176] Russell, "Bold Statescraft", *supra* note 174 at 27.
[177] *Ibid.*
[178] Hogg, *supra* note 16 at 22.
[179] *Ibid.*

it was justified in considering the convention question because the existence of conventions had previously been recognised by courts of law. Hogg responded that "in the previous cases the existence of the convention had been relevant to the disposition of a legal issue. That was not true in the *Patriation Reference*, where the answer to the convention question had no bearing on the answer to the legal question."[180] This view was echoed by Richard Kay who noted that, while "the explication of the law governing a case often requires a court to consider and use entirely non-legal matters...[h]ere the determination of the non-legal issue was the very objective of the enterprise."[181] Eugene Forsey painted a much darker picture of the effect of the Court's consideration of the convention question:

> it is not desirable, or even safe, to have the courts making such decisions. On the contrary, it is most dangerous. Acceptance of the Supreme Court's decision on conventions in the patriation case would mean a Quiet Revolution in our system of government. It would blur the distinction between convention and law. It could lead to suppression of the law set out in the written Constitution by judicially determined 'convention'. It could provide a means of circumventing the explicit provisions for constitutional amendment set out in the Constitution Act, 1982. It could subvert parliamentary government.[182]

Aside from the appropriateness of the consideration of the convention question, some have questioned the Court's enunciation of the relevant convention in this case. Even if it was not inappropriate for a court to enunciate a convention, it has been argued that the Court in this case enunciated the wrong one:

> The one conclusion that emerges unmistakably from examination of the precedents is that, for a constitutional convention requiring the agreement or consent of more than two but less than ten provinces to amendments of the

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[180] *Ibid.* at 21.
[181] R. Kay, "Courts as Constitution-Makers in Canada and the United States" (1982) 4 Supreme Court Law Review 23 at 28.
[182] E. Forsey, "The Courts and the Conventions of the Constitution" (1984) 33 University of New Brunswick Law Journal 11 at 42.

> kind contemplated, there is no precedent whatsoever. A constitutional convention without a single precedent to support it is a house without any foundation.[183]

Eugene Forsey provided a persuasive argument against the Court's formulation of the 'substantial degree of provincial consent' convention. Noting the Court's inability, or unwillingness, to determine in more precise terms the exact measure of agreement necessary to comply with the convention, Forsey argued that if this convention existed, the Court should have been able to explain exactly what the convention entailed:

> If [the Court] recognized something which it assures us already existed, it should have been able to tell us what it was. If we are constitutionally bound by a rule, we have a right to know what the rule is. Otherwise, how can we know whether, or when, or how it is being transgressed?...All the clue we get to solving the puzzle is: more than two, but less than ten, must consent.[184]

Needless to say, reaction to the Court's handling of the convention question in the *Patriation Reference* was certainly not all positive. Concerns have been expressed about the Court's consideration of such 'non-legal' issues, and its intervention in the political affairs of the country. Instead of confining its decision to the legal aspects of patriation, the Court embarked on a unique exercise and "introduced for the first time in Canadian law the distinction between legality and constitutionality."[185] As one commentator explained,

> [o]n the one hand, the Supreme Court confirms the essential role of constitutional conventions in relation to the respecting of legitimacy; on the other hand, it confines itself to a doctrinal conception of law which ignores them, basing itself exclusively on positive law – legislative rules and of common law....In doing so, for the first time in our constitutional history the

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[183] *Ibid.* at 34.
[184] *Ibid.* at 36.
[185] Remillard, *supra* note 168 at 189.

> Court expressly erects an impenetrable barrier between law and its practice, between legality and legitimacy.[186]

In addition to distinguishing between law and legitimacy, the majority on the convention question proceeded to term a breach of legitimacy 'unconstitutional'.[187] The term 'unconstitutional' had, until then, been reserved for breaches of the *law* of the Constitution. Some conceded that this was an appropriate term to apply to a breach of convention. Peter Russell noted that, "to deny that behaviour which is merely a breach of convention can be considered unconstitutional is to take most of the political sting out of the finding that it would be a breach of convention for the federal Parliament to proceed...without a substantial measure of provincial support."[188] However, it did not go unnoticed by a number of observers that this use of the term 'unconstitutional' could theoretically lead to rather strange results. For instance, had the federal government proceeded unilaterally to amend the Constitution, "Canada might find itself in the predicament of having an 'unconstitutional' constitution."[189] The Supreme Court of Canada could have found itself in the awkward position of having to enforce the provisions of a new constitution that the Court itself had deemed 'unconstitutional', that is, constitutionally illegitimate. Because the unilateral federal action was found to be legal, however, the Court could not have refused to recognise the amended constitution as the new 'supreme law' of Canada.

While one might conclude (and this author does) that the majority of the Court in this case ultimately came to the correct conclusion, namely that unilateral

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[186] *Ibid.* at 192-3.
[187] *Patriation Reference, supra* note 5 at 883.
[188] Russell, "Bold Statescraft", *supra* note 174 at 13.
[189] *Ibid.* at 8.

amendment by the federal government was technically legal but conventionally illegitimate, there are some elements of the majority's decision in the *Patriation Reference* that are problematic. First is the majority's articulation of the 'substantial measure of provincial consent' convention. While the Court reviewed prior jurisprudence in which constitutional conventions had been recognized by courts of law, what occurred in the *Patriation Reference* arguably went beyond recognition. Here, the majority actually articulated what the convention required. After acknowledging that conventions are born, changed and applied in the political arena alone, the majority appeared to then create a convention on its own initiative. Even if one accepts the Court's authority to consider constitutional conventions in the course of its decisions (which is still debatable), it is questionable how this authority extends to the articulation of a convention on which agreement among political actors is absent. Granted, the majority of the Court determined that there was indeed agreement among political actors that some degree of provincial consent was required in order to effect amendments. But a more precise statement about what the convention required, namely the degree of provincial consent, proved elusive. While exact certainty might not be required in order to recognize the existence of a convention, the imprecision regarding the degree of provincial consent required might cast some doubt upon the existence of a convention in this case. If a convention exists, should we not be able to recognize it when we see it?

As for considering the 'convention question' at all, the unique nature of Canada's Constitution - and the importance of unwritten elements, like conventions, to the exercise of constitutional provisions - arguably made the Court's consideration

of this question acceptable.[190] However, the majority's conclusion as to the impact of a breach of convention is the second problematic element of the *Patriation Reference* decision. The majority found that activity breaching a constitutional convention could, and should, be termed 'unconstitutional'. For the purposes of this thesis, this is the most troubling part of the majority's decision in this case. As noted above, Peter Russell argued that the term 'unconstitutional' captured the 'political sting' of a breach of convention. While this might be true, use of the term in this situation is misleading in its impact. An 'unconstitutional' breach of convention has no impact on the legality of the activity in question or the results of that activity. Yet, simply using the term conjures up images of violations of constitutional law, and the deemed invalidity of the product of such violations. After the *Patriation Reference*, use of the term 'unconstitutional' gives no indication of whether the action in question contravened a written provision of a constitutional statute (in which case, it would be deemed legally invalid pursuant to Section 52 of the *Constitution Act, 1982*) or a convention (in which case no legal effect arises). The impact of a finding of unconstitutionality is of great legal significance in one case, and of no legal significance in the other. Therefore, use of the same term in both instances is unhelpful. As well, by using the same term in each case, an element of perceived illegality is added to a breach of convention. By allowing 'non-legal' matters appear to be legal matters, the distinction between the written law of the Constitution and the unwritten dictates of constitutional conventions becomes blurred. Some might argue that constitutional conventions do indeed constitute part of the 'law' of the Constitution, and therefore, rendering a breach of convention

[190] This question is discussed in greater detail in Chapter Three, pp. 129-131.

'unconstitutional' is not misleading at all: to breach constitutional convention is to breach constitutional law. The problem with this understanding of constitutional 'law' is that it leads to a number of inconsistencies. For instance, a written provision of the constitutional text is enforceable in a court of law. A constitutional convention is not. If both text and convention are considered constitutional law, why is it that only part of the constitutional law of this country is appropriately enforced by the courts? Considering conventions to be constitutional law is also problematic when one considers how conventions are to relate to written constitutional provisions. If a written provision and a convention are at odds, to which is given the force of law? Given the position proposed in this thesis, the answer would be simple: the written provision prevails. But for those who consider both provisions and conventions to constitute 'law', they are now faced with conflicting 'law'. When the text dictates one thing and convention dictates another, what exactly is the 'law' to be followed in that instance? To avoid this situation, it is argued here that 'law' and 'convention' should be kept separate. Conventions may indeed dictate the most constitutionally legitimate or proper way to act according to, or exercise, a particular textual provision. For this reason, they serve a useful purpose and should not be ignored. However, to lose the distinction between constitutional law and legitimacy would be misleading, and to pass off non-legal determinations as legal findings would be, quite frankly, dishonest.

The distinction between constitutional law and constitutional legitimacy, and the Court's consideration of constitutional conventions along those lines, was arguably the most novel, and controversial, aspect of the Supreme Court of Canada's

decision in the *Patriation Reference*. Can the Court's consideration of the convention question and its opinions on the constitutional legitimacy of 'legal' conduct be justified, by reference to the Court's prior jurisprudence regarding unwritten constitutional principles; or was this decision merely 'result-oriented jurisprudence', as suggested by Peter Russell, and an illegitimate invasion by the Court into the crux of a national political dispute? Perhaps the most accurate answer is found somewhere in between these two propositions. The truth may be that the decision in the *Patriation Reference* cannot be justified in terms of some 'internal logic' or adherence to strict legal theory. Perhaps there is a discontinuity between previous jurisprudence on constitutional issues and the Court's consideration of the broader issues of constitutional morality, or legitimacy, in the *Patriation Reference*. But, as will be suggested in Chapter Four, this discontinuity, this inability to justify the Court's consideration of matters beyond constitutional *law*, does not preclude the utility of the *Patriation Reference* decision. Perhaps the Supreme Court of Canada has a role to play in terms of the articulation and discussion of broader constitutional values. And, contrary to being an illegitimate intrusion into political disputes, perhaps this function of the Court respects the jurisdiction of political actors by leaving the determination of political matters in their hands while providing those actors, and the Canadian public, with a better understanding of the constitutional propriety of certain political activities.

Chapter Two: The Secession Reference

Introduction

The *Secession Reference*[191] raised issues aimed at the very core of constitutionalism in Canada. Nowhere in Canada's Constitution could there be said to be a formula for dissolution of the federation, yet the Supreme Court of Canada was asked to advise the federal government on how the Constitution would govern such a significant process. With little assistance available from written constitutional provisions, the Court embarked on a review of the development of constitutional principles and the nature of constitutional relations in Canada. The result was a unanimous Court decision on the constitutional principles which would guide any future significant amendment to Canada's foundation, including the separation of a province from the federation. The Court's decision sparked much commentary aimed at the merits of the decision itself, as well as the appropriate role of the Court when asked to give an opinion on matters of great political, as well as legal, significance.

This chapter will review events leading to the *Secession Reference*, starting with Quebec's exclusion from the constitutional amendments of 1982 and ending with the Supreme Court of Canada's opinion on the issue of Quebec's separation from Canada. Commentary and criticism of the Court's opinion will also be canvassed, with an emphasis on the Court's consideration of unwritten constitutional principles and its enunciation of the 'duty to negotiate'.

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[191] *Secession Reference, supra* note 6.

History of the *Secession Reference*

Interestingly, the history of the *Secession Reference* includes, and continues from, the *Patriation Reference* discussed in the preceding chapter. Following that Supreme Court of Canada decision, the federal government and all ten provincial governments returned to the negotiating table to hammer out a new set of constitutional amendments.[192] Agreement was reached on the amendment package in November 1981. The proposed amendments were agreed to by all governments in Canada, except the provincial government of Quebec. Because the Supreme Court of Canada had concluded in the *Patriation Reference* that merely 'substantial agreement', and not unanimous consent, of the provinces was required to legitimise the amendments, the Prime Minister and the nine provinces proceeded with their constitutional agreement, and it was ultimately enacted without the consent of Quebec's Premier.

On 25 November 1981, Quebec referred the following question to its Court of Appeal:

> Is the consent of the Province of Quebec constitutionally required, by convention, for the adoption by the Senate and House of Commons of Canada of a resolution the purpose of which is to cause the Canadian Constitution to be amended in such a manner as to affect (i) the legislative competence of the Legislature of the Province of Quebec in virtue of the Canadian Constitution; (ii) the status or role of the Legislature or Government of the Province of Quebec within the Canadian federation; and does the objection of the Province of Quebec render the adoption of such resolution unconstitutional in the conventional sense?[193]

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[192] A more substantive review of the political aftermath of the *Patriation Reference* can be found in Chapter Four.

[193] *Re Attorney General of Quebec and Attorney General of Canada*, (1982), 134 D.L.R. (3d) 719 (Que. C.A.); aff'd [1982] 2 S.C.R. 793 [hereinafter *Quebec Veto Reference*] at 798 (cited to S.C.C.).

The Attorney General of Quebec argued that there was either a convention requiring unanimous consent of the provinces to a constitutional amendment of the type being implemented, or, "because of the principle of duality, Quebec had by convention a power of veto over any constitutional amendment affecting the legislative competence of the province or the status or role of its legislature or government within the Canadian federation."[194] The principle of 'duality' "is frequently used to refer to the two larger linguistic groups in Canada and to the constitutional protection afforded to the official languages".[195] Quebec's Attorney General made the following argument:

> In the context of this reference, the word 'duality' covers all the circumstances that have contributed to making Quebec a distinct society, since the foundation of Canada and long before, and the range of guarantees that were made to Quebec in 1867, as a province which the Task Force on Canadian Unity has described as 'the stronghold of the French-Canadian people' and the 'living heart of the French presence in North America'....In 1867, the French Canadian minority became a majority within the Quebec Legislature. This is what accounts for the special nature of this province, and it is the reason underlying the convention that powers of its Legislature cannot be reduced without consent.[196]

On 7 April 1982, Quebec's Court of Appeal unanimously answered the reference question in the negative, noting that the *Patriation Reference* had already ruled out any convention requiring unanimous consent, and that the Attorney General of Quebec had not established that "either the Government of Canada or the other provinces had conventionally recognized in Quebec any special power of veto over constitutional amendment not possessed by the other provinces."[197] Quebec appealed the decision to the Supreme Court of Canada, and its decision was released

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[194] *Ibid.* at 800.
[195] *Ibid.* at 812.
[196] *Ibid.* at 813.
[197] *Ibid.* at 800.

on 6 December 1982. The Court unanimously found that both the majority and minority opinions in the *Patriation Reference* rejected a conventional rule of unanimity, and no reason was given as to why the Court's previous opinion on this matter should be modified.[198] As for Quebec's second argument, that it had a constitutional power of veto, the Court found that the Attorney General for Quebec "failed completely to demonstrate compliance with the most important requirement for establishing a convention, that is, acceptance or recognition by the actors in the precedents" and concluded that there was not "a single statement made by any representative of the federal authorities recognizing either explicitly or by necessary implication that Quebec had a conventional power of veto over certain types of constitutional amendments."[199]

After the events of the early 1980s, the idea of sovereignty grew stronger in Quebec while efforts elsewhere were focused on finding a way to have Quebec 'sign on' to the Constitution once and for all. In 1987, the Prime Minister and all ten provincial premiers reached an agreement on what was known as the Meech Lake Accord, which would have entrenched recognition of Quebec as a distinct society in the main body of the Constitution, given Quebec a constitutional veto, and made other changes amenable to Quebec.[200] However, the Accord was ultimately defeated in June 1990 when two provincial legislatures failed to ratify it within the three year deadline.[201] In 1992, a second attempt at constitutional renewal was negotiated, namely the Charlottetown Accord. This was also defeated, this time at the hands of

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[198] *Ibid.* at 808.
[199] *Ibid.* at 814.
[200] Hogg, *supra* note 16 at 68.
[201] *Ibid.* at 69.

Canadian citizens in a national referendum which rejected the constitutional amendment.[202] Shortly thereafter, the Parti Quebecois re-emerged as the governing party in Quebec, with the goal of separation from Canada.[203]

On 6 December 1994, the Premier of Quebec tabled a draft bill entitled *An Act Respecting the Sovereignty of Quebec*.[204] The explanatory notes accompanying the Draft Bill stated that the objective of the Draft Bill was that Quebec become a sovereign country,[205] and noted that

> [t]he accession to full sovereignty has been defined by the National Assembly as the accession of Quebec to a position of exclusive jurisdiction, through its democratic institutions, to make laws and levy taxes in its territory and to act on the international scene for the making of agreements and treaties of any kind with other independent States and to participate in various international organizations.[206]

But the process outlined in the draft legislation was completely internal in that it authorized the National Assembly of Quebec to single-handedly secure its own sovereignty; "nowhere could the process, as set out in the explanatory notes and the Premier of Quebec's statements accompanying the tabling of the draft bill, be said to contemplate, expressly or implicitly, an amendment to the Constitution of Canada…; what it portended was nothing less than a revolution, an overthrow of the established legal order of Canada."[207] The process outlined in the Draft Bill included "publication of the draft bill, a period of information and participation for the purposes of improving the bill…, discussion of the bill respecting the sovereignty of

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[202] *Ibid.* at 69-70.
[203] M. Dawson, "Reflections on the Opinion of the Supreme Court of Canada in the Quebec Secession Reference" (1999) 11 N.J.C.L. 5 at 9.
[204] W. Newman, *The Quebec Secession Reference: The Rule of Law and the Position of the Attorney General of Canada* (Toronto: York University Press, 1999) at 5.
[205] *Reference re Secession of Quebec,* [1998] 2 S.C.R. 217 (Factum of the Attorney General of Canada) [hereinafter Factum AG Can. (Secession)] at 1.
[206] *Ibid.* at 1, 2.
[207] Newman, *supra* note 204 at 5, 7.

Quebec and passage by the National Assembly, approval of the Act by the population in a referendum, a period of discussions with Canada on the transitional measures to be set in place..., and the accession of Quebec to sovereignty."[208]

On 12 June 1995, an agreement was reached between the leaders of the Parti Quebecois, the Bloc Quebecois, and the Action Democratique, which outlined their common goals for the sovereignty of Quebec.[209] The agreement indicated that, following a 'yes' vote in the referendum contemplated in the Draft Bill, the National Assembly of Quebec would be authorized to propose a treaty to Canada regarding a new economic and political partnership with negotiations not to exceed one year, and if negotiations surrounding the treaty were 'fruitless', the National Assembly would be empowered to declare the sovereignty of Quebec without further delay.[210]

Guy Bertrand, a lawyer in Quebec City, filed an action for a declaratory judgment and injunction on 10 August 1995,

> challenging the constitutional validity of the Draft Bill and the Government of Quebec's process for 'accession to sovereignty'. Mr. Bertrand argued that the Draft Bill jeopardized his rights and freedoms as protected by the *Canadian Charter of Rights and Freedoms*.[211] Mr. Bertrand also filed a motion for interlocutory measures, seeking declaratory and injunctive relief against the legality and the holding of the upcoming sovereignty referendum itself, to the extent it was directed to illegal and unconstitutional ends.[212]

The Attorney General for Quebec responded that the motion should be dismissed and argued that, if the Court gave Mr. Bertrand what he was asking for, it would be interfering in the legislative powers, functions and privileges of the National

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[208] *Ibid.* at 2.
[209] *Ibid.* at 5.
[210] *Ibid.* at 6.
[211] *Bertrand* v. *Quebec (Attorney General)*, [1995] R.J.Q. 2500, 127 D.L.R. (4th) 408 (Que. Sup. Ct.) at 413 (cited to D.L.R.).
[212] Newman, *supra* note 204 at 10.

Assembly of Quebec.[213] Justice Lesage of the Superior Court of Quebec denied the Attorney General's motion to dismiss Mr. Bertrand's application and determined that the case would proceed.[214] When the proceedings resumed on September 5, the Attorney General withdrew from further participation in the case.[215] Two days later, the National Assembly of Quebec met for an emergency meeting. The Premier tabled a new referendum question and introduced Bill 1, *An Act Respecting the Future of Quebec*, which provided that the National Assembly was authorized to proclaim the sovereignty of Quebec.[216]

Justice Lesage rendered a decision in Mr. Bertrand's case on 8 September 1995. He noted,

> the Quebec government has no intention of resorting to the amending formula in the Constitution to accomplish the secession of Quebec. In this regard, the Quebec government is giving itself a mandate that the Constitution of Canada does not confer on it.[217]

Regarding the request for an injunction, Lesage J. noted that the Court could not paralyse the functioning of the National Assembly or prohibit it from debating the issue.[218] He did conclude, however, that a declaratory judgment might be even more effective than an injunction and was the preferred remedy in constitutional matters.[219] Therefore, Lesage J. declared that

> Bill 1...which would grant the National Assembly of Quebec the power to proclaim that Quebec will become a sovereign country without the need to follow the amending procedure provided for in Part V of the Constitution

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[213] *Ibid.*
[214] *Ibid.* at 11.
[215] *Ibid.*; also Factum AG Can. (Secession), *supra* note 205 at 7.
[216] Factum AG Can. (Secession), *ibid.* at 8.
[217] *Bertrand* v. *Quebec (Attorney General), supra* note 211 at 428.
[218] *Ibid.* at 431.
[219] *Ibid.*

> Act, 1982, constitutes a serious threat to the rights and freedoms of the plaintiff guaranteed by the Canadian Charter of Rights and Freedoms....[220]

The National Assembly of Quebec proceeded with the referendum as planned and as required under the procedure for separation outlined in Bill 1. On 30 October 1995, Quebecers were asked the following question:

> Do you agree that Quebec should become sovereign, after having made a formal offer to Canada for a new economic and political partnership, within the scope of the Bill respecting the future of Quebec and of the agreement signed on June 12, 1995?[221]

The results of the referendum came dangerously close to plunging Canada's political and constitutional scenes deep into unknown territory. The vote indicated 50.58% support for the No side, and 49.42% for the Yes side.[222] As Mary Dawson has noted, this was a "close vote by anyone's standards" and "[i]t became apparent to the Government of Canada, and others not wishing to see Quebec leave Canada, that the situation was serious."[223]

On 3 January 1996, Guy Bertrand returned to the Superior Court of Quebec with a revised action for declaratory judgment and permanent injunction.[224] The Attorney General of Quebec again argued that Bertrand's application should be dismissed, arguing that "[n]ot only did the court have no supervisory role in the process leading to the accession of Quebec to sovereignty, [but also that] Bertrand's case was now entirely hypothetical – the referendum vote having been lost."[225] Not having been a part of Mr. Bertrand's earlier proceedings, the federal government

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[220] *Ibid.* at 432.
[221] Newman, *supra* note 204 at 12; also Factum AG Can. (Secession), *supra* note 205 at 12.
[222] Newman, *ibid.* at 18; also Factum AG Can. (Secession), *ibid.* at 13.
[223] Dawson, *supra* note 203 at 10.
[224] Newman, *supra* note 204 at 19; also Factum AG Can. (Secession), *supra* note 205 at 13.
[225] D. Schneiderman, "Introduction" in D. Schneiderman (ed.), *The Quebec Decision: Perspectives on the Supreme Court Ruling on Secession* (Toronto: James Lorimer & Company, 1999) at 3.

took Bertrand's second appearance before the court as its opportunity to present its own arguments on the constitutionality of Quebec's sovereignty plans. Federal Justice Minister Allan Rock "intervened to argue that Quebec was bound by the Constitution and that the Constitution prohibited a unilateral declaration of independence."[226] Justice Pidgeon rendered a decision in Bertrand's second case on 30 August 1996.[227] He rejected the Attorney General of Quebec's motion to dismiss the case, stating that

> while some of the questions submitted may appear hypothetical or theoretical to the defendant, their consequences are highly practical for the plaintiff....Furthermore, the enactment by the National Assembly during the court hearing of a resolution...reaffirming that the people of Quebec are free to assume their own destiny and to determine, without interference, their political status, tends to support his proposition that this plan is still alive.[228]

Justice Pidgeon concluded that Mr. Bertrand's application should not be dismissed as there were significant constitutional issues raised by his application which deserved a determination on the merits, including:

> [i]s the right to self-determination synonymous with the right to secession? Can Quebec unilaterally secede from Canada? Is Quebec's process for achieving sovereignty consistent with international law? Does international law prevail over domestic law?[229]

In the days following the decision of the Superior Court of Quebec to allow Mr. Bertrand's application to proceed, the Attorney General of Quebec announced that the Government of Quebec would no longer participate in the *Bertrand* case.[230] As Warren Newman has noted, "[t]he decision of the Attorney General of Quebec not to participate in the hearing on the merits of the Bertrand case before the

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[226] *Ibid.*
[227] *Bertrand* v. *Quebec (Attorney General)*, [1996] R.J.Q. 2393, 138 D.L.R. (4th) 481 (Que. Sup. Ct.).
[228] *Ibid.* at 507 (cited to D.L.R).
[229] *Ibid.* at 507-8.
[230] Factum AG Can. (Secession), *supra* note 205 at 17.

Superior Court...meant that the Bertrand case was unlikely to be a successful vehicle for obtaining an early, authoritative, and definitive judicial ruling on the controversy."[231] Without benefit of argument on all sides of the issue, most importantly the arguments of the Government of Quebec, it became apparent that another route might have to be attempted in order to secure a definitive ruling on Quebec separation, before another referendum or legislative attempt by the National Assembly of Quebec clouded the issue even further. On 26 September 1996, federal Justice Minister Allan Rock announced that the federal government would submit a reference, regarding the unilateral secession of Quebec, to the Supreme Court of Canada.[232] Some observers of the *Bertrand* cases believed that the federal government should have intervened long before it did;

> [s]ome suggested that the Government of Canada should act boldly to challenge the Government of Quebec in its attempts to take Quebec out of Canada. Some even claimed that it was the duty of the Government of Canada to take such action....It came down to a judgment call on the part of our political leaders at the federal level whether and when to challenge some of the assertions of the Government of Quebec. As we know, the Government of Canada considered that the time had come in September 1996.[233]

In a letter to the Attorney General of Quebec, Justice Minister Rock wrote that

> [t]here are...profound disagreements between citizens on the whole question [of secession] as to which process to follow. As responsible governments, we have the duty to ensure that this crucial question is clarified. We need to know the state of Canadian domestic law, of international law, and which of them takes priority.[234]

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[231] Newman, *supra* note 204 at 27.
[232] *Ibid.* at 27; also Factum AG Can. (Secession), *supra* note 205 at 17.
[233] Dawson, *supra* note 203 at 11-12.
[234] Factum AG Can. (Secession), *supra* note 205 at 18.

Minister Rock also noted that he would use the judgment of Justice Pidgeon as the basis for the formulation of the questions that would be posed to the Supreme Court of Canada.[235]

The Attorney General of Quebec indicated that it would not participate in the federal government's reference to the Supreme Court of Canada, maintaining that Quebec's sovereignty could not be decided by a court of law, questioning the Supreme Court's "legitimacy as an independent arbiter in Canada's federal system".[236] After the Court's rulings in the *Patriation Reference*, and the *Quebec Veto Reference*, "[e]lite opinion had charged for some time that the Court was biased against Quebec."[237] In fact, political leaders in Quebec had often quipped that "like the leaning tower of Pisa, the Supreme Court of Canada always tilts the same way."[238] In a story printed in the *Globe and Mail* the day after the federal government's reference announcement, Quebec's Premier was said to have

> accused [Prime Minister] Chretien of attempting to use the Supreme Court as a political advisory body to justify denying Quebec's right to secede. He said whatever the Supreme Court of Canada rules, it will have no bearing on how sovereigntists pursue their agenda after a referendum victory.[239]

The story further noted that "Quebec not only refuses to participate in the court debate, it will ignore the ruling" according to Quebec Premier Bouchard.[240] In the absence of representation for the Government of Quebec, the Supreme Court of Canada appointed an *amicus curiae*, or 'friend of the court', to make arguments on

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[235] *Ibid.*
[236] Schneiderman, *supra* note 225 at 6.
[237] *Ibid.* at 4.
[238] *Globe and Mail* (12 May 1998) as cited in R. Young, "A Most Politic Judgement" (1998) 10:1 Constitutional Forum 14 at 15.
[239] R. Seguin & S. Delacourt, "Bouchard dismisses bid for ruling on sovereignty" *Globe and Mail* (27 September 1996) A1 at A6.
[240] *Ibid.*

Quebec's behalf in order to ensure that all sides of the issue were represented, and that the Court would have the benefit of all arguments before rendering a decision on the question of Quebec's unilateral separation from Canada.

Secession Reference – Supreme Court of Canada

Arguments on the secession issue were not heard by the Court until February 1998, and on 20 August of that same year, the Court gave its unanimous opinion. The federal government had referred three questions to the Court for its consideration:

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

ii) 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?

iii) 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?[241]

Before moving into its decision on the questions, the Court began by emphasising the importance of the task placed before it. The Court noted that the reference case "requires us to consider momentous questions that go to the heart of our system of constitutional government"[242] and concluded that it would not be possible to answer the questions posed by the federal government without consideration of a number of

[241] *Secession Reference, supra* note 6 at 228.
[242] *Ibid.* at 227.

underlying constitutional principles; "[o]nly once those underlying principles have been examined and delineated", the Court stated, "may a considered response to the questions we are required to answer emerge".[243]

The Court's first task was to deal with objections to its jurisdiction to consider the questions being asked. The *amicus curiae*, on behalf of the province of Quebec, argued that the Court lacked jurisdiction to deal with the question on international law; and further, that the questions posed to the Court in this instance were speculative, of a political nature, and not ripe for judicial decision and therefore were not justiciable.[244] The *amicus curiae* also challenged the validity of the Court's reference jurisdiction, asserting that the *Constitution Act, 1867*, did not give Parliament the authority to grant a reference jurisdiction to the Court.[245] In response to this objection, the Court reviewed prior jurisprudence which had upheld the constitutional validity of the Court's reference jurisdiction, and ultimately concluded that this was not a bar to the Court's consideration of the questions in this case.[246] As for justiciability of the referred questions, the Court determined that all three questions were appropriate for judicial determination: Question One was directed to interpretation of the *Constitution Acts*, Questions One and Two related to powers of the legislature or government of a Canadian province, and all three questions were clearly important questions of law or fact. As such, all three fell within the Court's reference jurisdiction as outlined in Section 53 of the *Supreme*

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[243] *Ibid.* at 228.
[244] *Ibid.* at 228-9.
[245] *Ibid.* at 228.
[246] *Ibid.* at 229-33.

Court Act.[247] In addition, the Court noted that, while Question Two required consideration of international law, "[i]n 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."[248] Finally, the Court reviewed arguments of the *amicus curiae* as to the justiciability of questions which were not yet 'ripe' for decision. The Court reviewed the unique role of courts in reference cases and concluded that the questions in this case

> ...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.[249]

The first question was whether the Constitution of Canada allowed the government of Quebec to effect unilaterally its own secession from Canada. The Court reviewed the nature of Canada's Constitution, noting that "the constitutional texts enumerated in s. 52(2) of the *Constitution Act, 1982*...have a primary place in determining constitutional rules",[250] but also placing significant emphasis on the existence of unwritten principles and rules which "emerge from an understanding of the constitutional text itself, the historical context, and previous judicial interpretations of constitutional meaning."[251] The Court explained:

> 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

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[247] *Ibid.* at 234.
[248] *Ibid.* at 235.
[249] *Ibid.* at 239.
[250] *Ibid.*
[251] *Ibid.* at 240.

> which are capable of providing an exhaustive legal framework for our system of government.[252]

The Court stated that, in its view, there were four 'fundamental and organizing principles' of the Constitution which it deemed relevant to deal with the questions in this case: federalism, democracy, constitutionalism and the rule of law, and respect for minorities.[253] Before discussing each principle separately, the Court delved into a review of 'the legal evolution of the Constitution and the foundational principles governing constitutional amendment' in order to establish the context necessary for an understanding of the Court's consideration of the four principles mentioned above.[254]

The Court began its historical review by noting that "our constitutional history demonstrates that our governing institutions have adapted and changed to reflect changing social and political values".[255] It then explained that,

> [b]ecause 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.[256]

The Court then embarked on a historical review of constitutional amendment in Canada, dating back to the 19th century and the years leading up to Confederation in 1867 which, as the Court noted, "was an initiative of elected representatives....It was not initiated by Imperial *fiat*."[257] In 1864, delegates met and agreed to a plan for

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[252] *Ibid.*
[253] *Ibid.*
[254] *Ibid.*
[255] *Ibid.*
[256] *Ibid.*
[257] *Ibid.* at 241.

a federal union for Canada.[258] The Court emphasised that "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."[259] The Court reviewed subsequent meetings of delegates from Newfoundland, New Brunswick, Nova Scotia, Prince Edward Island and the Province of Canada, and noted that "[p]recise consideration of each aspect of the federal structure preoccupied the political agenda."[260] At the Quebec Conference in October 1864, seventy-two resolutions were approved by the delegates, addressing "almost all of what subsequently made its way into the final text of the *Constitution Act, 1867*"[261] including "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)."[262] The Court concluded from these resolutions that "the protection of minorities was thus reaffirmed."[263]

Once the resolutions had been agreed to, they merely required passage 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

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[258] *Ibid.*
[259] *Ibid.*
[260] *Ibid.* at 242.
[261] *Ibid.*
[262] *Ibid.*
[263] *Ibid.*

adopted by the Conference'."[264] After being approved by each province, the resolutions were incorporated into the *British North America Act*, which was passed by the Imperial Parliament in March 1867 and proclaimed on 1 July of the same year.[265]

The Court then reviewed the first attempt at secession from within the newly formed Dominion of Canada. It noted that, in September of 1867,

> [n]ewly elected [Nova Scotia] 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:
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> > '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...'.[266]

The Court concluded that "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."[267]

The Court found that "[f]ederalism was a legal response to the underlying political and cultural realities that existed at Confederation and continue to exist today....Federalism was the political mechanism by which diversity could be reconciled with unity."[268] The division of powers between the federal and provincial spheres of government necessitated a written constitution and the *BNA Act* stated

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[264] *Ibid.*; cited in J. Pope, ed., *Confederation: Being a Series of Hitherto Unpublished Documents Bearing on the British North America Act* (Toronto: Carswell, 1895) at 52.
[265] *Secession Reference, supra* note 6 at 243.
[266] *Ibid.* at 243-4; 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 168.
[267] *Secession Reference, supra* note 6 at 244.
[268] *Ibid.*

that "the new Dominion was to have 'a Constitution similar in Principle to that of the United Kingdom'."[269] Therefore, noted the Court, while the governance of Canada and the United Kingdom were to have obvious differences, "it was nevertheless thought important to emphasize the continuity of constitutional principles, including democratic institutions and the rule of law...".[270] Tracking Canada's constitutional development, the Court found that "Canada's independence from Britain was achieved through legal and political evolution with an adherence to the rule of law and stability."[271] As well, 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*."[272] The Court then reviewed the 1982 patriation of the Constitution, noting that

> legal continuity, which requires an orderly transfer of authority, necessitated 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 were in accordance with our Constitution.[273]

After undertaking its historical review of Canada's constitutional development, the Court concluded the following:

> 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

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[269] *Ibid.* at 245.
[270] *Ibid.*
[271] *Ibid.* at 246.
[272] *Ibid.*
[273] *Ibid.*

> minorities, insistence that governments adhere to constitutional conduct and a desire for continuity and stability.[274]

It was against this background that the Court extrapolated its four 'foundational principles' and explained their relevance and impact on the question of Quebec's unilateral secession. To begin its discussion, the Court explained the nature of constitutional principles:

> [B]ehind the written word [of the Constitution] 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.[275]

The Court then concluded that the principles of federalism, democracy, constitutionalism and the rule of law, and respect for minority rights were the 'foundational constitutional principles' most relevant to the case at hand.[276] The Court emphasised that, while these principles were not made part of the Constitution by any written provision, "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."[277]

As for the purpose of such fundamental principles, the Court noted that 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" and that "observance of and respect for these principles is essential to the ongoing process of constitutional development and evolution of our Constitution

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[274] *Ibid.* at 247.
[275] *Ibid.*
[276] *Ibid.* at 248.
[277] *Ibid.*

as a 'living tree'...".[278] Next, the Court considered what use it could make of underlying constitutional principles. It reasserted comments made by a majority of the Court in the *Judges Reference*[279] which indicated that "the recognition of these constitutional principles...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."[280] However, the Court also noted that "the effect of the preamble to the Constitution Act, 1867 was to incorporate certain constitutional principles by reference" and 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'."[281] Finally, the Court discussed the impact that unwritten principles might have in particular cases:

> ...[u]nderlying constitutional principles may in certain circumstances give rise to substantive legal obligations..., 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.[282]

Federalism

The first foundational principle identified by the Court was that of federalism. The Court explained, "in a federal system of government such as ours, political power is shared by two orders of government: the federal government on

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[278] *Ibid.*
[279] *Reference Re Remuneration of Judges of the Provincial Court of Prince Edward Island,* [1997] 3 S.C.R. 3 [hereinafter *Judges Reference*].
[280] *Secession Reference, supra* note 6 at 249.
[281] *Ibid.*; also *Judges Reference, supra* note 279 at para. 104.
[282] *Secession Reference, supra* note 6 at 249.

the one hand, and the provinces on the other. Each is assigned respective spheres of jurisdiction by the *Constitution Act, 1867*."[283] The Court continued, "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."[284] While acknowledging that, "on paper, the federal government retained sweeping powers which threatened to undermine the autonomy of the provinces", the Court also pointed out that "a review of the written provisions of the Constitution does not provide the entire picture" and concluded that "[o]ur political and constitutional practice has adhered to an underlying principle of federalism, and has interpreted the written provisions of the Constitution in this light."[285] For example, the Court noted that the *Constitution Act, 1867* included the federal power of disallowance, but "the underlying principle of federalism triumphed early" and "many constitutional scholars contend that the federal power of disallowance has been abandoned."[286] The Court concluded that the "underlying principle of federalism, then, has exercised a role of considerable importance in the interpretation of the written provisions of our Constitution"[287] and that "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."[288]

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[283] *Ibid.* at 250.
[284] *Ibid.* at 251.
[285] *Ibid.* at 250.
[286] *Ibid.*
[287] *Ibid.* at 251.
[288] *Ibid.* at 250-1.

Democracy

Next, the Court focused its discussion on the principle of democracy. It noted that, "[h]istorically, 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…and as candidates."[289] The Court explained that "democracy is a fundamental value in our constitutional law and political culture" and that "[t]he principle of democracy has always informed the design of our constitutional structure, and continues to act as an essential interpretive consideration to this day."[290] The Court expressed its belief that the principle of democracy was the 'baseline' against which those acting under the authority of the Constitution have always acted, and that it would thus have appeared 'redundant' or 'silly' to the framers of the Constitution to have included the democratic principle explicitly in the written text of a constitutional document.[291] The Court stated that "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."[292]

However, the Court did note that the principle of democracy may be understood to have different meanings. For example, "[d]emocracy is commonly understood as being a political system of majority rule."[293] The Court explained:

> The evolution of our democratic tradition can be traced back to the *Magna Carta* (1215) and before, through the long struggle for Parliamentary supremacy…, the emergence of representative political institutions in the

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[289] *Ibid.* at 255.
[290] *Ibid.* at 252-3.
[291] *Ibid.* at 253.
[292] *Ibid.*
[293] *Ibid.*

> colonial era, the development of responsible government..., and eventually the achievement of Confederation itself in 1867.[294]

The Court also noted that "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."[295] The Court then emphasised that the principle of democracy was not concerned merely with the process of government;

> on the contrary,...democracy is fundamentally connected to substantive goals, most importantly, the promotion of self-government. Democracy accommodates cultural and group identities. Put another way, a sovereign people exercises its right to self-government through the democratic process.[296]

The Court stated that it was true that democracy expressed the 'sovereign will of the people', but noted that this "must be taken in the context of the other institutional values we have identified as pertinent to this Reference."[297] The Court stressed that, when combined with the principle of federalism and other constitutional considerations, "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...".[298] The Court also stressed that democracy could not exist in any real sense without the rule of law. It explained, "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

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[294] *Ibid.* at 253-4.
[295] *Ibid.* at 254.
[296] *Ibid.*
[297] *Ibid.* at 255.
[298] *Ibid.*

created under the Constitution."[299] The Court concluded that it would be a 'grave mistake' to equate legitimacy with majority rule alone, to the exclusion of other values.[300] In a final word on the democratic principle, the Court stated that "a functioning democracy requires a continuous process of discussion" and that "the need to build majorities necessitates compromise, negotiation, and deliberation."[301] Noting that there would inevitably be dissenting voices during such deliberation and discussion, the Court noted that "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."[302] The Court pointed out that the *Constitution Act, 1982*, "gives expression to this principle by conferring a right to initiate constitutional change on each participant in Confederation."[303] The Court held that 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."[304] This duty, said the Court, was inherent in the democratic principle.[305]

Constitutionalism and the Rule of Law

The Court then considered the third of its 'foundational principles', namely constitutionalism and the rule of law. The Court noted that these principles "lie at the root of our system of government"[306] and explained that the rule of law

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[299] *Ibid.* at 256.
[300] *Ibid.*
[301] *Ibid.*
[302] *Ibid.* at 257.
[303] *Ibid.*; see *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U. K.), 1982, c. 11 at s. 46.
[304] *Secession Reference, supra* note 6 at 257.
[305] *Ibid.*
[306] *Ibid.*

"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."[307] The Court reiterated the elements of the rule of law, previously enunciated by the Court in the *Language Reference*.[308] First, "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."[309] Second, "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."[310] Third, "'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."[311] The Court concluded that, "taken together, these three considerations make up a principle of profound constitutional and political significance."[312]

Closely related to the rule of law was the principle of constitutionalism, defined by the Court as requiring that all governmental action comply with the Constitution.[313] The Court noted that "the essence of constitutionalism in Canada is embodied in s. 52(1) of the Constitution Act, 1982, which provides that 'the 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'."[314] Combining the principles of constitutionalism and the rule of law, the Court concluded that "all government

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[307] *Ibid.*
[308] *Re Manitoba Language Rights,* [1985] 1 S.C.R. 721 [hereinafter *Language Reference*].
[309] *Secession Reference, supra* note 6 at 258.
[310] *Ibid.*; also *Language Reference, supra* note 308 at 749.
[311] *Secession Reference, supra* note 6 at 258; also *Judges Reference, supra* note 279 at para 10.
[312] *Secession Reference, ibid.*
[313] *Ibid.*
[314] *Ibid.*

action must comply with the law, including the Constitution."[315] In the context of the controversial issue of the separation of Quebec, the Court admitted that

> [t]he 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.[316]

But the Court quickly pointed out that such an argument was 'unsound' because it "misunderstands the meaning of popular sovereignty and the essence of a constitutional democracy" and concluded that "Canadians have never accepted that ours is a system of simple majority rule."[317] The Court concluded that "democracy may be harmonized with our belief in constitutionalism" because

> [c]onstitutional 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.[318]

Contrary to being incompatible with democracy, stated the Court, "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."[319]

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[315] *Ibid.*
[316] *Ibid.* at 259.
[317] *Ibid.* at 260.
[318] *Ibid.*
[319] *Ibid.* at 260-1.

Protection of Minorities

The fourth and final foundational principle identified by the Court was the protection of minorities. The Court noted that there were various written provisions in the Constitution which protected minority rights, specifically language, religion and education rights.[320] Some of these, stated the Court, were "the product of historical compromises;...the protection of minority religious education rights was a central consideration in the negotiations leading to Confederation."[321] While provisions protecting minority rights were secured in the Constitution, the Court noted that "the protection of minority rights is itself an independent principle underlying our constitutional order."[322] The Court stated that "one of the key considerations motivating the enactment of the *Charter*...is the protection of minorities" and that, even before the explicit recognition of many minority rights in the *Charter*, the principle of protecting minority rights had always "exercised influence in the operation and interpretation of our Constitution."[323]

Application of Constitutional Principles to Secession Reference Questions

After reviewing the four underlying constitutional principles it deemed relevant to the question of secession, the Court discussed the operation of these principles in the context of the reference questions before it. The Court defined secession as "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

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[320] *Ibid.* at 261.
[321] *Ibid.*
[322] *Ibid.* at 261-2.
[323] *Ibid.* at 262.

for a new territorial unit on the international plane" and recognised the secession of Quebec as being both a legal act and a political act.[324] As for the legal aspect of secession, the Court concluded that "[t]he secession of a province from Canada must be considered, in legal terms, to require an amendment to the Constitution, which perforce requires negotiation."[325] The Court emphasised the significant and 'radical' nature of the amendments required to effect the separation of a province, and noted that while the Constitution did not expressly authorize or prohibit 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."[326]

The first question referred to the Court asked whether Quebec could effect secession from Canada unilaterally. The Court interpreted this question as asking whether Quebec had the "right to effectuate secession without prior negotiations with the other provinces and the federal government."[327] Given the Court's understanding of the nature of secession, and that it would require a negotiated amendment to the Constitution, the answer to this question seemed clear. However, the Court refrained from providing a simple answer to Question One, explaining that:

> [a]t 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.[328]

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[324] *Ibid.* at 263.
[325] *Ibid.*
[326] *Ibid.*
[327] *Ibid.* at 264.
[328] *Ibid.* at 264-5.

First, the Court explained that the referendum procedure, while not addressed in the Constitution itself and not of any legal effect, "may provide a democratic method of ascertaining the views of the electorate on important political questions on a particular occasion."[329] Then, the Court applied the principle of democracy and concluded that this principle "would demand that considerable weight be given to a clear expression by the people of Quebec of their will to secede from Canada,"[330] even though that expression would not, in itself, effect a legal secession. A positive referendum result would, however, "confer legitimacy on the efforts of the government of Quebec to initiate the Constitution's amendment process in order to secede by constitutional means."[331] The Court also pointed out that, in order to be a true reflection of the democratic will of the people, the referendum results must be "free from ambiguity both in terms of the question asked and in terms of the support it achieves"[332], suggesting that the excruciatingly close referendum result witnessed in 1995 would not be a sufficient indication of democratic will.

The Court then added the 'federalism' principle to the mix, which resulted in one of the most discussed aspects of the *Secession Reference* decision. The Court stated:

> 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.[333]

The Court explained the foundation for this 'duty to negotiate' as follows:

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[329] *Ibid.* at 265.
[330] *Ibid.*
[331] *Ibid.*
[332] *Ibid.*
[333] *Ibid.*

> 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.[334]

Applied to the context of the secession of Quebec, the Court explained that

> [t]he 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.[335]

The Court elaborated on what the new duty to negotiate would entail, and explained that, because the negotiations would have to adhere to the constitutional principles discussed above, two 'absolutist propositions' were automatically rejected. For instance, the Court concluded that the democracy principle could not be used to trump the principles of federalism and the rule of law in order to impose a legal obligation on the rest of Canada to agree to secession, if a referendum in Quebec were to indicate the democratic will to so proceed.[336] Conversely, the Court also noted that the proposition that absolutely no obligations would arise from a referendum vote also had to be rejected as "[t]his would amount to the assertion that

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[334] *Ibid.* at 265-6.
[335] *Ibid.* at 266.
[336] *Ibid.* at 266-7.

other constitutionally recognized principles necessarily trump the clearly expressed democratic will of the people of Quebec."[337]

As to implications that would follow should the duty to negotiate be breached, the Court warned that "[r]efusal 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."[338] Yet, the Court also noted that, while negotiations would undoubtedly be difficult and complex, and the idea of secession accepted as a possibility, "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."[339] The Court reiterated that, ultimately, secession would require the negotiation of an amendment to the Constitution.[340]

The Court then discussed what the respective roles of the courts and political actors would be in discharging the constitutional obligations identified.[341] The Court referred to its decision in the *Patriation Reference* in which "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 only carry political sanctions."[342] The Court noted that its role in this particular case was limited to the identification of the 'relevant aspects of the Constitution in their broadest sense'. To that end, the Court concluded:

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[337] *Ibid.* at 267.
[338] *Ibid.* at 268.
[339] *Ibid.* at 270.
[340] *Ibid.*
[341] *Ibid.*
[342] *Ibid.*

> 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.[343]

Similarly, the Court noted that the determination of what constituted a clear majority on a clear question was to be a purely political determination.[344] As for the binding effect of the obligations discussed above, the Court said:

> 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...the appropriate recourse in some circumstances lies through the workings of the political process rather than the courts.[345]

To conclude its comments on Question One, the Court summarised its opinion as follows:

> ...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....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....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.[346]

The second question posed to the Court queried whether international law gave the government of Quebec the right to secede unilaterally from Canada. While the Court did not want to speculate about the conduct of international states should Quebec attempt unilateral secession, it did note that international law currently did

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[343] *Ibid.* at 271.
[344] *Ibid.*
[345] *Ibid.* at 272.
[346] *Ibid.* at 273.

not specifically grant parts of sovereign states the legal right to secede unilaterally.[347] On this point, the Court concluded that international law would likely not accept a unilateral secession that was incompatible with the domestic Constitution of the 'parent' nation, subject to the right of 'peoples' to seek self-determination.[348] The Court found that this right of self-determination was a general principle of international law, noting its presence in a number of international documents and United Nations conventions, which was to be exercised "by peoples within the framework of existing sovereign states and consistently with the maintenance of the territorial integrity of those states", except in exceptional circumstances.[349] When applied to the questions before it, the Court found that even if the people of Quebec were a 'people' for the purposes of self-determination, "their right of self-determination cannot in the present circumstances be said to ground a right to unilateral secession."[350] The justification for self-determination 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."[351] The Court concluded that this could not be said to be Quebec's circumstance within the nation of Canada, noting Quebec's access to government, the fact that Quebecers occupied prominent positions within the Canadian government, that the residents of Quebec could freely make political choices, and that Quebec's population was equitably represented in legislative, executive and judicial institutions.[352] Since

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[347] *Ibid.* at 277.
[348] *Ibid.*
[349] *Ibid.* at 280-1.
[350] *Ibid.* at 282.
[351] *Ibid.* at 285.
[352] *Ibid.* at 286-7.

Quebec did not fall into the exceptional categories of an oppressed people or a group denied meaningful access to government, the Court concluded that international law did not grant it a right to secede unilaterally from Canada.[353]

The Court also considered the 'effectivity' principle, which proposed 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."[354] For instance, if Quebec were to secede unilaterally from Canada, and while this would be contrary to the domestic constitutional procedure, Quebec might nevertheless ultimately receive international recognition as an independent state. The Court admitted that this might well be true, but warned that

> 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.[355]

The Court did not answer the third reference question, which asked whether international or domestic law would take precedence in the effect of a conflict, because the Court found no conflict in these circumstances.[356]

In its summary, the Court again emphasised the significance of the questions posed to it in this reference case, and the necessity of embracing not just the written provisions of our Constitution, but "the entire global system of rules and principles which govern the exercise of constitutional authority."[357] In fact, the Court stressed that a "superficial reading of selected provisions of the written constitutional

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[353] *Ibid.* at 287.
[354] *Ibid.* at 288.
[355] *Ibid.* at 290.
[356] *Ibid.* at 292.
[357] *Ibid.*

enactment, without more, may be misleading" and it was "necessary to make a more profound investigation of the underlying principles that animate the whole of our Constitution...".[358] The Court also noted that its role in this reference case was "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."[359] As such, the Court left for those in the political arena a number of determinations, including what would constitute a 'clear majority' on a clear referendum question, and when and how any resulting negotiations would be conducted. The Court made it clear that it would play no supervisory role over such negotiations.[360]

Commentary and Criticism of the Supreme Court's Decision in the Secession Reference

Much like the *Patriation Reference* discussed in Chapter One, the Court's decision in the *Secession Reference* received immediate response and criticism. The responses were varied, as the decision received high praise from some observers and elicited grave concerns from others, while being hailed by both federalists and sovereigntists as confirming 'what they had been saying all along'.[361] Noting that the case was one of the most important the Supreme Court of Canada has ever had to consider, Warren Newman praised the opinion for being "one of the most well-written decisions that the Court has rendered. It is a delicately balanced, incisive, and highly persuasive piece of legal reasoning that clarifies many difficult issues and

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[358] *Ibid.*
[359] *Ibid.* at 294.
[360] *Ibid.* at 295.
[361] G. Fraser, "Political leaders react cautiously", *Globe and Mail* (21 August 1998) A1 at A7.

that combines clear exposition with subtle and sophisticated messaging."[362]

Similarly, David Schneiderman noted that

> the justices of the Supreme Court of Canada recognized the importance of this constitutional moment. Rather than being mired only in a detailed reading of constitutional text and past legal rulings, the unanimous decision of the Court is more concerned with constitutional purposes and political realities.[363]

However, the Court's consideration of principles outside of the Constitution's written text and its enunciation of the duty to negotiate were not universally praised. Ted Morton criticized that, as a result of the Court's opinion on the secession issue, "we are not one step closer to closure on the Quebec neverendum…[and] the Court's ruling has actually complicated the matter by arming the separatists with new legal rights."[364] Morton continued:

> Translated into ordinary English, then, here is the message that the Court has sent to Quebec: UDI [unilateral declaration of independence] is illegal, unless you can get away with it. And if you win a fairly worded referendum, Ottawa has a constitutional duty to negotiate with you in good faith. Indeed, if Ottawa doesn't negotiate in good faith, then you are justified in getting away with it.[365]

The Court, unable to please all of the people all of the time, was simultaneously seen as creatively tackling complex legal and constitutional issues, while being criticized for providing little guidance on how the secession of a province from Canada could ultimately take place.

There were some aspects of the Court's decision that seemed to garner more critical response than others. One aspect which aroused some concern was the Court's consideration of the four unwritten 'foundational' principles. One criticism

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[362] Newman, *supra* note 204 at 3.
[363] Schneiderman, *supra* note 225 at 2.
[364] T. Morton, "Liberal Party Wins, Canada Loses" in Schneiderman (ed.), *supra* note 225 at 120.
[365] *Ibid.* at 121-2.

was that the Court's consideration of unwritten principles was simply unnecessary. Peter Hogg noted that "the absence of any provisions in the Constitution authorizing secession makes clear that no unilateral secession is possible."[366] As such, the Court could have rendered its legal opinion, that unilateral secession was contrary to constitutional law, and ended its judgment there. Other commentators have also noted the 'obvious' nature of the legal answer to the secession question. Prior to the release of the Court's decision in the case, Dr. Bryan Schwartz noted that "it is obvious to any objective observer that Quebec has no legal right to secede unilaterally under either the constitution of Canada or international law" and that "unilateral secession is clearly illegal…".[367] But Schwartz suggested that this did not go unnoticed by separatists in Quebec. He explained that "[t]he separatists of Quebec generally choose not to defend the legality of their action under Canadian law" and "adopt a different approach. They urge us to move beyond narrow legalism to the higher moral perspective. Democracy is good;…if most of 'the people' vote to secede, they have a right to do so."[368] Schwartz concluded, "separatists claim that they have a fundamental right, in political morality, to independently determine their own destiny."[369]

Just as in the *Patriation Reference*, the Court in the *Secession Reference* was faced with a distinction between the law of the Constitution and some broader concept of constitutional morality or legitimacy; "the sagacity – the brilliance, even – of the Supreme Court of Canada's judgment in the Quebec Secession Reference

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[366] Hogg, *supra* note 16 at 133.
[367] B. Schwartz, *Last Best Hope: Quebec Secession – Lincoln's Lessons for Canada* (Calgary: Detselig Enterprises Ltd., 1998) [hereinafter *Last Best Hope*] at p. iii and 13.
[368] *Ibid.* at 13.
[369] *Ibid.* at p. iii.

lies in the Court's having had the vision to wed the value of constitutional legality with that of political legitimacy...".[370] The distinction between legality and legitimacy is what surely led to the Court's consideration of the four foundational principles, and to the enunciation of the duty to negotiate. These principles outlined what the Court determined to be the dictates of constitutional legitimacy on the issue of secession. John Whyte suggested that the Court likely felt as though this was "the only effective role open to it – simply to identify what conduct is legitimate in a unique Canadian historical moment and what conduct is not, and hope that the protagonists believe that legitimacy matters."[371]

Aside from the necessity of the Court's discussion of 'foundational principles' in the *Secession Reference*, some critics expressed concern with the origin of the principles themselves and how they might relate to the Constitution's written provisions. W. H. Hurlburt has provided a critique of recent Supreme Court of Canada decisions which include the consideration of unwritten constitutional principles, and has argued that many propositions advanced by the Court in these cases "are neither stated in the texts of the constitutional instruments nor...implied by those texts."[372] Hurlburt noted that, while the Court acknowledged that secession would require an amendment to the Constitution, it did not rely on the amendment provisions of the Constitution to reach this conclusion:

> ...the Supreme Court said that amendments would be needed for secession. But it did not say that any of the amendment provisions in Part V of the 1982 Act apply. Nor did it say that amendment provisions do not apply. Nor did

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[370] Newman, *supra* note 204 at 84.
[371] J. Whyte, "The Secession Reference and Constitutional Paradox" in Schneiderman (ed.), *supra* note 225 at 133.
[372] W. H. Hurlburt, "Fairy Tales and Living Trees: Observations on Some Recent Constitutional Decisions of the Supreme Court of Canada" (1999) 26:2 Manitoba Law Journal 181 at 181.

> it say that principles of democracy, federalism and constitutionalism provide another procedure for a secession amendment. Nor did it say that there is no provision for a secession amendment. While the Court agreed that the written provisions of the Constitution have primacy, it dealt with the written provisions for amendments by ignoring them.[373]

Donna Greschner studied the *Secession Reference* and its implications for the amending formula provided in Part V of the *Constitution Act, 1982*. She noted that "the Court's description of the functions of principles and the duty to negotiate, when coupled with the absence of Part V in the reasoning, leads to the inference that in the secession context the strict application of Part V rules will give way to broader principles."[374] She concluded that "the Court's message to political actors is that the written rules, and the rights of parties that flow from the rules, are not as important as underlying constitutional principles."[375]

The duty to negotiate, which was said by the Court to arise from the four foundational principles considered, has received much attention from scholars and commentators since its creation in the *Secession Reference*; "[t]his constitutional duty to negotiate certainly is the most surprising aspect of the decision. It does not arise clearly from the Constitution's text, our constitutional history, past practice or the practice of other federations."[376] Some have gone as far as to say that the Court "pulled the duty to negotiate out of rarefied air."[377] And it has been pointed out that

> [p]rior to (and except as interpreted by) the Supreme Court decision in the secession reference, the Canadian Constitution contained no provision at all for the separation of a province....Nothing in the 1982 Constitution warranted a referendum as a trigger for secession and there was no duty to

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[373] *Ibid.* at 185.
[374] D. Greschner, "The Quebec Secession Reference: Goodbye to Part V?" (1998) 10:1 Constitutional Forum 19 at 23.
[375] *Ibid.*
[376] Schneiderman, *supra* note 225 at 8.
[377] Whyte, *supra* note 371 at 133.

> negotiate. These have been invented by the Canadian Supreme Court in the secession reference.[378]

But some commentators have indicated that there is no need for concern regarding the Court's enunciation of the duty to negotiate. While acknowledging that the duty did not emanate from the Constitution's provisions, David Schneiderman argued that the Court appropriately emphasised that the duty was not a legally enforceable one.[379] Therefore, it could not be said that the Court was creating new legal duties which had little or no support in constitutional text. Others have argued that it is hard to quarrel with the legitimacy of the duty to negotiate;

> [n]egotiations are indeed, on both a theoretical and a practical level, a necessary first step for any constitutional amendment. As well, no one can dispute the moral obligation that would exist for the remaining partners in the Canadian federation if one of its provinces expressed a clear desire to leave Canada.[380]

In this sense, it can be argued that the Court was merely pointing out the obvious: secession of a province would require an amendment to the Constitution, and this, in turn, would require negotiation. Along these lines, Dan Usher noted that "out of context, these statements might be interpreted as asserting nothing more than the bare fact that a process as important as the reconstruction or break-up of Canada entails a great deal of negotiation."[381] He qualified this, however, by pointing out that "that is not the meaning of these statements within the context of the judgment. Negotiation becomes a constitutionally-mandated duty of governments, whether

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[378] D. Usher, "The New Constitutional Duty to Negotiate" (January/February 1999) Policy Options 41 at 41-2.
[379] Schneiderman, *supra* note 225 at 9.
[380] Dawson, *supra* note 203 at 33.
[381] Usher, *supra* note 378 at 41.

they wish to negotiate or not."[382] Hurlburt similarly noted that the conduct of negotiations in light of the four fundamental principles outlined by the Court was certainly "a statement of a course of action that parties to a fundamental disagreement should follow in their own enlightened self-interest and indeed would be compelled to follow by practical considerations."[383] He continued, however, that by imposing the duty to negotiate, the Court "has added to the Constitution's primary material that was not put there by a constitutional procedure"[384] and has determined that "the content of the Constitution of Canada includes materials which are not stated or implied in the text of the formally-adopted constitutional instruments".[385]

Aside from where the duty to negotiate originated from, commentators have also expressed concern regarding the practical value of the Court's enunciation of the duty to negotiate. The Court itself indicated that the course of such negotiations could not be predicted, and that the "possibility that they might not lead to an agreement amongst the parties must be recognized."[386] The details regarding when the duty would arise, and how the negotiations would be conducted, were left to the political actors to determine. Critics have thus queried what was really gained by the Court's imposition of the duty at all; "[w]hatever else happens, judges cannot be content to require the parties to negotiate because it is precisely the failure of

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[382] *Ibid.*
[383] Hurlburt, *supra* note 372 at 187.
[384] *Ibid.*
[385] *Ibid.*
[386] *Secession Reference*, *supra* note 6 at 269.

negotiation that drove the parties to court."[387] One commentator expressed his disappointment with the lack of guidance given by the Court as follows:

> We need rules for deciding when the people of Quebec can be said to want secession, for identifying consent in the rest of the country, and for setting the terms of separation.... What we needed from the Supreme Court was to fill the void in the law of separation. Any rules, within a wide spectrum, would have been better than no rules.[388]

Should negotiations fail, "we are back to where we began before the Reference – deadlock. In this light, the Court's ruling does not appear to have come to anyone's rescue."[389] A number of 'unanswered questions' have also been compiled by those unsatisfied with the Court's decision, including: what triggers the duty to negotiate? Who is to be a party to the negotiation? Who sets the agenda? How frequently can the duty be invoked? How is 'good faith' to be determined? And the question that has been posed most often: what happens if no agreement can be reached between the parties?[390] On these issues, the Court provided little guidance. And what little it did provide was somewhat unintelligible. For instance, the Court referred to the conduct of negotiations – pursuant to the new 'duty to negotiate' – as 'non-justiciable' and 'political issues', and noted that the Court could play no role in supervising these negotiations. But in the same paragraph, the Court suggested that a breach of the duty to negotiate would lead to 'serious legal repercussions'.[391] The Court also noted that 'where there are legal rights there are remedies' but that sometimes recourse lies 'through the workings of the political process rather than the

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[387] Usher, *supra* note 378 at 42.
[388] *Ibid.* at 44.
[389] Schneiderman, *supra* note 225 at 11.
[390] Usher, *supra* note 378 at 42-3; also C. Ryan, "What if Quebecers Voted Clearly for Secession?" in Schneiderman (ed.), *supra* note 225 at 151, and Hogg, *supra* note 16 at 137, 142.
[391] *Secession Reference, supra* note 6 at 272.

courts'.[392] It is difficult to reconcile these statements from the Court regarding the binding nature of the duty to negotiate. One has to wonder how the breach of a non-justiciable obligation could give rise to legal consequences, and how the legal repercussions would have to come from somewhere other than a court of law.

As with the *Patriation Reference*, there are, from this author's perspective, at least two troubling aspects of the Courts decision in the *Secession Reference*. First is the Court's discussion of the four 'foundational principles' underlying the Constitution's text. While consideration of unwritten elements might not be, in and of itself, improper, the Court's discussion of the four principles in this case, namely federalism, democracy, constitutionalism and the rule of law, and protection of minorities, raises the question of whether there are other 'foundational' principles which exist but remain unarticulated. In its judgment, the Court listed the principles relevant to addressing the secession question, but noted "this enumeration is by no means exhaustive."[393] This clearly leaves open the possibility that other fundamental principles exist. One then has to query how many of these principles exist, what these principles are, and in what circumstances they will be found by the Court to impact on political activity. A related question is where these principles come from. In its enunciation of the foundational principles relevant to secession, the Court traced the history of constitutional development in Canada, and found support for the four principles throughout this brief historical overview. The Court's review showed that Canadian constitutional behaviour and relationships have tended to support federalism; there has been an evolving but continued tendency toward the

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[392] *Ibid.*
[393] *Ibid.* at 240.

protection and advancement of democracy; there has been a pattern of increased recognition and protection of minority rights, and support for compliance with the Constitution and the rule of law. In essence, what the Court really found were 'themes' which run throughout Canada's Constitution. But, there are many themes which run throughout Canada's Constitution, including not only the four discussed in this case, but also themes of equality, fairness, liberty, and probably many others. Indeed, these are likely themes that run throughout the constitutions of many democratic nations. What is it about federalism, democracy, constitutionalism and the rule of law, and respect for minorities that raised them up to the status of 'constitutional principle' capable of being used to justify new legal obligations? In order to answer these questions, one would need further clarification on exactly what constitutes a 'principle'. It surely must mean something more than a 'theme', but the Court's judgment in the *Secession Reference* provides little assistance in terms of articulating why these particular elements of the Constitution were worthy of 'constitutional principle' status.

The recognition of these four 'themes' in and of themselves is likely not controversial. There can be no serious debate about whether they can appropriately be drawn from Canadian constitutional history. However, to declare that these themes are now something more - 'foundational principles' of the Constitution - is to give them greater influence than they should be given. To trace Canada's constitutional development and reach conclusions regarding patterns of constitutional behaviour over the past 130 years provides valuable guidance to political actors as to how their behaviour might be viewed against the historical

backdrop. But to find that patterns of behaviour, or themes of the Constitution, are indicative of fundamental principles gives the impression that these principles existed all along. If these are fundamental principles upon which the Constitution is based, surely they must have existed at the beginning of Canada's constitutional development. If that is the case, then why the need for the historical review of the development of such principles? They either exist or they don't. Conversely, if it is the enduring or recurring pattern of continued development of federalism, democracy, constitutionalism and the rule of law, and protection of minorities that makes these elements so important in assessing constitutional behaviour, then perhaps the Court should have concluded that these themes indicated guidelines for acceptable constitutional behaviour, but refrained from insisting that, as 'foundational principles of the Constitution', the four themes could combine to dictate new legal obligations. Any such obligations would be based on principles which themselves are based on history. This is not exactly the solid foundation upon which many would hope our Constitution, as 'supreme law', is based.

The second troubling aspect of the Court's decision in the *Secession Reference* is the creation of the duty to negotiate. The Court's discussion of the four foundational principles might have been sufficient to outline the 'preferred' political conduct, as opposed to the legally required conduct, in the event of a positive referendum result on secession. There was no need for the Court to have added to these requirements a new duty never before enunciated by political actors or judges. By doing so, the Court complicated the distinction between legal requirements and political appropriateness. As noted earlier, the Court stated that the new duty to

negotiate gave rise to 'serious legal repercussions' but also stated that such issues were non-justiciable. In addition to being confusing, these statements of the Court also tend to blur any distinction between constitutional law and constitutional legitimacy. While entering into negotiations following a clear referendum result might be the most logical and appropriate course of action, it cannot be said that such conduct is legally required by the Constitution. The Court should have made clear that the four foundational principles and the resulting duty to negotiate helped to identify the most appropriate political action, but should have refrained from suggesting that breach of these standards would warrant 'legal repercussions'. It is misleading to imply that these new, unwritten obligations are part of the law of the Constitution in the same way that written, textual provisions can be considered the law of the Constitution.

Like the Court's decision in the *Patriation Reference*, the most controversial aspect of the *Secession Reference* was the discussion of matters beyond constitutional *law* and the enunciation of obligations, emanating from sources beyond the Constitution's text, the fulfillment of which was required in order to ensure constitutional *legitimacy*. If the technical, legal answer to the secession question was evident, as some have suggested, what purpose was served by the Court's review of Canadian constitutional development, its recognition of the four foundational principles, and its creation of the duty to negotiate? Is the *Secession Reference* another example of 'result-oriented jurisprudence', or was the Court fulfilling a broader role, one which necessitated the consideration of constitutional values as well as constitutional texts? Indeed, the *Patriation* and *Secession*

References were by no means the first instances of the consideration of unwritten constitutional principles by the Supreme Court of Canada. As will be discussed in the following chapter, a brief review of the Court's prior jurisprudence regarding unwritten constitutional principles might provide one basis on which to explain the Court's consideration of matters beyond 'constitutional law' in both the *Patriation* and *Secession References*.

Chapter Three: The 'Unwritten' Constitution

Introduction

Any true and complete understanding of Canadian constitutional jurisprudence, including, but by no means limited to, the *Patriation Reference* and *Secession Reference*, must include an appreciation for the unique nature of this nation's Constitution. While the significance of written constitutional provisions should not be underestimated, the study of Canada's Constitution is shortchanged if it is limited to the written provisions of our various constitutional statutes. These statutes form an integral, but not complete, picture of Canada's constitutional structure. Complementing written constitutional provisions, and filling out the remainder of Canada's Constitution, are a number of unwritten customs, conventions, and principles.[394] The aggregate of these unwritten elements has sometimes been referred to collectively as Canada's 'unwritten constitution':

> The 'unwritten' constitution is made up of those rules or principles that define or limit the exercise of state power, even though they are not included in the core set of entrenched documents that represent the 'supreme law' of Canada.[395]

Within this broader picture, an attempt can be made to explain the Supreme Court of Canada's use of unwritten constitutional principles in the *Patriation* and *Secession References*.

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[394] See generally Hogg, *supra* note 16 at 3; P. Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw-Hill Ryerson, 1987) [hereinafter *The Judiciary in Canada*] at 75; Monahan, *Constitutional Law, supra* note 13 at 13; J. Magnet, *Constitutional Law of Canada: Cases, Notes and Materials*, 7th ed., Vol. 1 (Edmonton: Juriliber, 1998) at 1.

[395] Monahan, *Constitutional Law, supra* note 13 at 7.

The Constitution of Canada

Section 52 of the *Constitution Act, 1982*, 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."[396] Known as the Constitution's supremacy clause, this provision provides legitimacy to judicial review of the actions and legislation of Canada's elected institutions to ensure compliance with the Constitution. But this necessitates some definition of the 'Constitution' of Canada. Legislators need to know those boundaries within which they are required to act. Defining the 'constitution' of a nation might ordinarily be relatively simple. In the United States, for instance, "the constitutional document of 1787 (and its amendments) is the Constitution....they set out the essentials of the entire scheme of government - legislative, executive and judicial - in one impressive document."[397] But, as Peter Hogg explained, the task is a more difficult one in the Canadian context: "In Canada (as in the United Kingdom), there is no single document comparable to the Constitution of the United States, and the word 'Constitution' accordingly lacks a definite meaning."[398] Hogg opined that the single document that most resembles a primary constitutional statute in Canada is the *British North America Act, 1867*, which created the Dominion of Canada and established the rules of federalism.[399] However, the 1867 document was not meant to serve as an exhaustive source of constitutional power in the new Dominion; rather, "the B.N.A. Act did no more than was necessary to accomplish

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[396] *Constitution Act, 1982, supra* note 303 at section 52(1).
[397] Hogg, *supra* note 16 at 2.
[398] *Ibid.*
[399] *Ibid.*

confederation" and "much of Canada's constitutional law continued to be found in a variety of sources outside the B.N.A. Act."[400] The *Constitution Act, 1982*, filled in some of the gaps in the original 1867 constitutional document, including the provision of a domestic amending formula, and specific protection of civil rights and liberties. The 1982 Act also provides some assistance regarding the definition of the 'Constitution' of Canada. Section 52(2) declares that "[t]he Constitution of Canada includes (a) the Canada Act, 1982, including this Act; (b) the Acts and orders referred to in the Schedule; and (c) any amendment to any Act or order referred to in paragraph (a) or (b)." The Schedule contains a list of thirty statutes, including the *British North America Act, 1867,* amendments to that Act, and a number of Orders in Council, most of which had the effect of admitting new provinces to the Dominion of Canada.[401]

The definition of the Constitution of Canada contained in section 52(2) appears deceptively simple. In fact, this definition is not an exhaustive definition of the Constitution and therefore, while serving as an important starting point, is only a partial list of constitutional considerations. This point was affirmed by the Supreme Court of Canada in *New Brunswick Broadcasting Co.* v. *Nova Scotia (Speaker, House of Assembly).*[402] At issue in that case was the exercise of a parliamentary privilege by the Legislative Assembly of Nova Scotia denying access to broadcasting companies to televise proceedings of the Assembly with their own cameras. The broadcasting companies sought a declaration that the exercise of the privilege violated freedom of expression as protected in Section 2(b) of the

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[400] *Ibid.* at 3.
[401] Schedule to the *Constitution Act, 1982, supra* note 303.
[402] [1993] 1 S.C.R. 319 [hereinafter *New Brunswick Broadcasting*].

Canadian Charter of Rights and Freedoms.[403] Constitutional scholar, Joseph Maingot, defined parliamentary privilege as "the necessary immunity that the law provides for members of Parliament, and for members of the legislatures...in order for these legislators to do their legislative work....Finally, it is the authority and power of each House of Parliament and of each legislature to enforce that immunity."[404] The decision of the Nova Scotia Legislative Assembly to ban television cameras in this case was supported by four areas of parliamentary privilege: a) freedom of speech, including immunity from civil proceedings; b) exclusive control over the Assembly's own proceedings; c) ejection of strangers from the Assembly; and d) control of publication of debates and proceedings.[405]

The first issue for the Court to determine was whether the exercise of the privilege was immune from *Charter* review. If the privilege was part of the Constitution, the *Charter* would not apply. This proposition was based on the understanding that the *Charter* cannot be used to disallow another part of the Constitution.[406] Arguments presented to the Court as to why the *Charter* should not apply included: i) a strict interpretation of Section 32(1) of the *Charter* which stated that the *Charter* would apply to a 'legislature' or 'government', and the assertion that the House of Assembly was merely one component of a 'legislature' and therefore did not fall within the ambit of Section 32(1);[407] and ii) the assertion that parliamentary privileges were enshrined in the Constitution by deriving inherent

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[403] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, *supra* note 303.
[404] J. Maingot, *Parliamentary Privilege in Canada* (Toronto: Butterworths, 1982) at 12.
[405] *New Brunswick Broadcasting, supra* note 402 at 337.
[406] *Ibid.* This understanding was articulated in *Reference Re: Bill 30, an Act to Amend the Education Act (Ontario)*, [1987] 1 S.C.R. 1148.
[407] *New Brunswick Broadcasting, supra* note 402 at 351.

constitutional status from the preamble to the *Constitution Act, 1867*.[408] A majority of the Court ultimately concluded that the *Charter* did not apply to the exercise of privilege in this case, "not because a legislative body is never subject to the *Charter*, but because the action here in issue is an action taken pursuant to a right [in this case, a parliamentary privilege] which enjoys constitutional status."[409]

How a majority of the Supreme Court of Canada reached this conclusion will be discussed in greater detail immediately below. For our purposes here, however, it is important to note that the majority decision in this case had the effect of extending the definition of the Constitution of Canada as articulated in Section 52(2) of the *Constitution Act, 1982*, outlined above. As support for the majority's decision, Justice McLachlin, as she then was, indicated her agreement with constitutional expert Professor Peter Hogg that Section 52(2) was not meant to be an exhaustive definition, and concluded that she would be "unwilling to restrict the interpretation of that section in such a way as to preclude giving effect to the intention behind the preamble to the Constitution Act, 1867, thereby denying recognition to the minimal, but long-recognized and essential, inherent privileges of Canadian legislative bodies."[410] Professor Hogg noted that the word "includes" had generally been interpreted as meaning something less than an exhaustive definition; and because Section 52(2) of the *Constitution Act, 1982*, reads "[t]he Constitution of Canada 'includes'" the various constitutional statutes, the list should not be taken as exhaustive.[411] Patrick Monahan also indicated his agreement with McLachlin J.'s

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[408] *Ibid.*
[409] *Ibid.* at 368.
[410] *Ibid.* at 378.
[411] Hogg, *supra* note 16 at 7.

conclusion in this case, noting that "the Court's conclusion on this point is consistent with the established judicial approach to the interpretation of the term 'includes'" and "it would seem unwise to establish a categorical rule that denies any possibility of ever expanding the items included within the Constitution of Canada."[412] Monahan warned, however, that "the courts should be very cautious before deciding to add an enactment or a legal rule to the list of matters included in section 52, given the significant legal consequences that would flow from such a decision."[413]

As groundbreaking as the Court's decision in *New Brunswick Broadcasting* appeared to be, the inclusion of unwritten principles as part of Canada's Constitution, in this case those parliamentary privileges necessary for the functioning of democratically elected institutions, was not a novel proposition. Even before the *New Brunswick Broadcasting* decision, constitutional academics had noted that "the Canadian constitution does not consist solely of the Constitution Acts, 1867 to 1982. As with virtually all constitutional democracies, the corpus of constitutional rules in Canada includes, in addition to the formal 'written' Constitution, organic statutes, judicial decisions, and constitutional conventions."[414]

If the definition in Section 52 of the *Constitution Act, 1982*, was not, and had never been, exhaustive, then where did the various 'unwritten' aspects of Canada's Constitution come from, and how could they be legitimately incorporated into the Constitution? The Court found one answer to these questions in the Preamble to the *BNA Act*.

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[412] Monahan, *Constitutional Law, supra* note 13 at 163.
[413] *Ibid.*
[414] Russell, *The Judiciary in Canada, supra* note 394 at 75.

The Preamble to The British North America, 1867

Statutory preambles may serve a number of different purposes, but perhaps no other preamble has had as significant and lasting an impact on the development of law than the Preamble to the *British North America Act, 1867*, and its effect on constitutional jurisprudence in this country. It is through this "grand entrance hall"[415] to Canada's founding constitutional document that the Supreme Court of Canada found support for incorporation of unwritten principles into the Constitution of Canada.

The first clause of the Preamble to the *BNA Act* reads, "...the Provinces of Canada, Nova Scotia and New Brunswick have expressed their desire to be federally united into one Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in principle to that of the United Kingdom".[416] As Monahan noted,

> the precise meaning of this vague reference to the constitution of the United Kingdom is far from clear, particularly because...the British constitution is largely unwritten. Thus, the drafters of the 1867 Act were signalling that it would be impossible to understand the actual workings of the institutions of the Canadian state simply by reading the terms of the Act itself.[417]

Due to its unwritten nature, the Constitution of the United Kingdom functioned in accordance with traditional rules of practice, conventions, and principles. These traditions were inherited by Canada upon Confederation; but many of the most important principles underlying our inherited parliamentary system of government never found their way into the written provisions of the *BNA*

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[415] *Judges Reference, supra* note 279 at para. 109.
[416] Preamble to the *BNA Act*, *supra* note 10.
[417] Monahan, *Constitutional Law, supra* note 13 at 58.

Act.[418] However, without these underlying principles, the written constitutional statutes lacked coherence. For instance, "the institutions of the Prime Minister and Leader of the Opposition, indeed the entire system of responsible government, is nowhere mentioned in the written constitution. Yet, without understanding these usages, practices and conventions established in these institutions, Canada's constitution becomes unintelligible."[419] Peter Hogg also noted that:

> ...the system of responsible (or cabinet) government, which had been achieved before confederation by the uniting colonies, is another gap in the BNA Act. It was intended in 1867 that this system would apply to the new federal government, but it never seems to have occurred to anyone to write the rules of the system into the BNA Act, and so there is no mention of the Prime Minister, or of the cabinet, or of the dependence of the cabinet on the support of a majority in the House of Commons: the composition of the actual executive authority and its relationship to the legislative authority were left in the form of unwritten conventions – as in the United Kingdom. That is still their status today.[420]

It is by reference to the Preamble of the *BNA Act* that the absence of such important provisions in a written format has been remedied by the courts; the 'similar in principle' provision has provided an opening through which those parliamentary traditions which governed the United Kingdom in 1867 have been adopted and transplanted into the Canadian Constitution in order to supplement and give a broader, more complete, understanding of the *BNA Act*'s written text.

It was the Preamble which provided the Supreme Court of Canada with a mechanism to extend the definition of the Constitution of Canada in *New Brunswick Broadcasting* discussed above. Justice McLachlin wrote a judgment with which a majority of the Court concurred, and stated "it is reasonable and correct to find that

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[418] See Monahan, *ibid.* at 7, and Magnet, *supra* note 394 at 2.
[419] Magnet, *ibid.*
[420] Hogg, *supra* note 16 at 4.

the House of Assembly of Nova Scotia has the constitutional power to exclude strangers from its chamber on the basis of the preamble to the Constitution"[421] and "there is no question that this preamble constitutionally guarantees the continuance of parliamentary governance".[422] Justice McLachlin explained that, "given the clear and stated intention of the founders of our country in the Constitution Act, 1867 to establish a Constitution similar to that of the United Kingdom, the Constitution may also include such privileges as have been historically recognized as necessary to the proper functioning of our legislative bodies" and concluded

> I do not understand the entrenchment of written rights guarantees, or the adoption of specific written instruments, to negate the manifest intention expressed in the preamble of our Constitution that Canada retain the fundamental constitutional tenets upon which British parliamentary democracy rested.[423]

Note here that McLachlin J. did not view the inclusion of parliamentary privilege in the definition of the Constitution to be an extension of the Constitution to cover unwritten principles. She was careful to point this out by stating

> this is not a case of importing an unexpressed concept into our constitutional regime, but of recognizing a legal power fundamental to the constitutional regime which Canada has adopted in its Constitution Acts, 1867 to 1982. Nor are we here treating a mere convention to which the courts have not given legal effect; the authorities indicate that the legal status of inherent privileges has never been in doubt.[424]

While McLachlin J.'s disposition of this case was concurred in by a majority of her colleagues, not every member of the Court agreed with her views on the use of the Preamble to give parliamentary privileges constitutional status. For instance, Chief Justice Lamer conceded that "the privileges inherent in legislative bodies are

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[421] *New Brunswick Broadcasting, supra* note 402 at 374.
[422] *Ibid.* at 375.
[423] *Ibid.* at 377.
[424] *Ibid.* at 377-8.

fundamental to our system of government" but cautioned "I am unsure, however, that this argument can be taken so far as to grant parliamentary privileges a constitutional status which is on the same footing as the Charter" and concluded "I would be reluctant to import unexpressed concepts into the Constitution in a way that would evade scrutiny under the express guarantees of the Charter."[425] The Chief Justice ultimately concluded that the *Charter* did not apply to parliamentary privileges for different reasons, namely because "the term 'legislature' in s. 32 [of the Charter] does not, in general, include the House of Assembly itself because the constitutional text generally differentiates between...legislatures and their component parts."[426]

Some commentators have noted general concerns with the use of the Preamble to incorporate unwritten principles into Canada's Constitution. For instance, while it might be accepted that the Preamble allows for the adoption of some traditional British principles, "it must be concluded that the preambular entrance hall is closed to at least some British constitutional principles. But which ones?"[427] The most obvious concern is that there is no way of knowing beforehand which British principles might find their way into the Constitution by virtue of the Preamble until a judge has determined that such a process has taken place. This is troubling for at least two reasons. First, as noted earlier, legislators need to know those constitutional limits within which they are required to perform their duties. If aspects of the Constitution might be unknown until articulated by judges in a court

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[425] *Ibid.* at 354-5.
[426] *Ibid.* at 360-1.
[427] M. Walters, "The Common Law Constitution in Canada: Return of *Lex Non Scripta* as Fundamental Law" (2001) 51 University of Toronto Law Journal 91 at 103.

of law, political actors must function without a full understanding of the limits of their power and at risk of overstepping those limits with no forewarning. A second concern arising from judicial 'discovery' of unwritten principles is the significant discretion bestowed upon judges to 'find' such principles. The line between interpretation and creation of constitutional provisions becomes blurred when judges enunciate principles and grant them constitutional status.

Implied Bill of Rights

Long before McLachlin J.'s majority judgment in *New Brunswick Broadcasting*, the Preamble to the *BNA Act* was the instrument through which Canadian courts developed the concept of an 'implied bill of rights'[428]; certain individual political rights and freedoms, not at the time stated in any constitutional document, but recognised as inherent values underpinning and included in the Constitution of Canada. The first indication of the Supreme Court of Canada's acceptance of the 'implied bill of rights' theory was Chief Justice Duff's decision in *Reference Re Alberta Statutes*.[429] The Alberta Government had passed a series of legislative initiatives to address the fiscal crisis facing that province. Three of these pieces of legislation were disallowed by the Governor General, on the recommendation of the federal Minister of Justice. Following disallowance of those bills, the Alberta government passed three more bills, including Bill 9, "An Act to ensure the Publication of Accurate News and Information", a statute intended to impose certain duties on newspaper publishers in the province before printing information on government initiatives. The Premier of Alberta noted that, if there

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[428] D. Gibson, "Constitutional Amendment and the Implied Bill of Rights" (1966) 12:4 McGill Law Journal 497 [hereinafter "Implied Bill of Rights"] at 497.
[429] *Reference Re Alberta Statutes*, [1938] S.C.R. 100 [hereinafter *Alberta Statutes*].

was any doubt as to the validity of Bill 9, the matter could be referred to the courts for a decision.[430] The Supreme Court of Canada considered the constitutionality of the three statutes referred to it and determined that the first two statutes, dealing with economic matters, were *ultra vires* the provincial government as being in relation to 'Trade and Commerce' and 'Banking', both within the jurisdiction of the federal government pursuant to section 91 of the *BNA Act*.[431] When giving his decision on Bill 9, Chief Justice Duff noted that the bill was dependent on the two statutes already found to be *ultra vires*, and as such, Bill 9 also could not stand. However, the decision did not end there. Chief Justice Duff noted "this is sufficient for disposing of the question referred to us but, we think, there are some further observations upon the Bill which may properly be made."[432] The Chief Justice ultimately concluded that Bill 9 might have had the effect of infringing upon free public debate, a principle Duff C.J. found to emanate from the Preamble of the *BNA Act*. He noted:

> The preamble of the statute…shows plainly enough that the constitution of the Dominion is to be similar in principle to that of the United Kingdom. The statute contemplates a parliament working under the influence of public opinion and public discussion. There can be no controversy that such institutions derive their efficacy from the free public discussion of affairs; …from the freest and fullest analysis and examination from every point of view of political proposals.[433]

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[430] *Ibid.* at 105.
[431] *Ibid.* at 126, 132.
[432] *Ibid.* at 132.
[433] *Ibid.* at 133.

Indeed, Duff C.J. found that the right of free public discussion of political affairs was "the breath of life for parliamentary institutions"[434] and his thoughts were echoed by his colleague, Cannon J., who also noted that,

> as stated in the preamble of The British North America Act, our constitution is and will remain... 'similar in principle to that of the United Kingdom'. At the time of Confederation, the United Kingdom was a democracy. Democracy cannot be maintained without its foundation: free public opinion and free discussion throughout the nation of all matters affecting the State....[435]

The *Alberta Statutes* decision did not involve the striking down of legislation for incompatibility with some 'implied' guarantee of free public debate; Bill 9 was found to be invalid on other grounds. But even as an *obiter dictum*, Duff C.J.'s comments were an indication of, and a significant step toward, the recognition of constitutional principles beyond the written text of the *BNA Act*. The implied bill of rights concept was reasserted in Abbott J.'s decision in *Switzman* v. *Elbling*,[436] that "as our constitutional Act now stands, Parliament itself could not abrogate this right of discussion and debate."[437]

The implied bill of rights concept is not without controversy. Former law professor, Dale Gibson, noted a number of arguments against the idea of an implied bill of rights, as enunciated by Duff C.J. and Abbott J., but responded to each of them. The first argument was that statutory preambles had no legislative force. Therefore, one could not extract legal principles from the preamble and use these principles to invalidate legislative action. Gibson responded by noting that, in both the *Alberta Statutes* case and *Switzman* v. *Elbling*, the legislation in question was

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[434] *Ibid.*
[435] *Ibid.* at 146.
[436] [1957] S.C.R. 285.
[437] *Ibid.* at 328.

invalidated on other grounds and Duff C.J. and Abbott J. "simply used the preamble for the perfectly legitimate purpose of assisting them to interpret the word 'Parliament' in (Section 17 of the BNA Act)."[438] The second objection to the implied bill of rights theory was that the enunciation of implied provisions in the Constitution was not consistent with the doctrine of parliamentary sovereignty, the foundation of British constitutional law.[439] Gibson countered this argument by noting that Parliament had never enjoyed complete sovereignty under the *BNA Act*; indeed, the *Act* contained a number of provisions which restricted the freedom of Parliament.[440] Gibson noted a third objection to the implied bill of rights theory, namely that "the drafters of the British North America Act almost certainly had no intention of including the type of protection from legislative excesses that Chief Justice Duff and Mr. Justice Abbott have 'discovered' in it."[441] In response, Gibson stated that "[t]his is true, but irrelevant. If there is one thing that most constitutional authorities agree upon, it is that the courts must be allowed to exercise a substantial degree of creativity in interpreting the constitution."[442] This was a curious response; surely the intention of the drafters is not irrelevant to the interpretation of constitutional provisions, including the Preamble. Where do judges get authority to 'discover' such 'implied' rights via the Preamble if this was not intended by the Preamble's drafters? And Gibson's second statement, that courts must be allowed a substantial degree of creativity in interpreting the Constitution, raises some concerns, especially regarding the use of 'implied' and 'unwritten' principles. As

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[438] Gibson, "Implied Bill of Rights", *supra* note 428 at 498.
[439] *Ibid.*
[440] *Ibid.* at 498-9.
[441] *Ibid.* at 499.
[442] *Ibid.*

queried above, when does a court's 'creativity' cross the line from interpretation to creation? This concern applies not only to the implied bill of rights theory but to the use of unwritten constitutional principles in general.

There are other reasons for not recognising the 'implied bill of rights' theory as a significant shift or advancement in the area of unwritten constitutional principles. First, the implied bill of rights "purports only to protect those communicative freedoms which are essential to the existence of a democratic Parliament"[443] and only "insofar as [these freedoms are] related to the democratic debate."[444] Secondly, the implied bill of rights concept "has never been accepted by a majority of the members of the Supreme Court of Canada, or of any other court, for that matter" although "it has never been decisively rejected."[445]

Fundamental Principles

Aside from the limited freedoms known as the implied bill of rights, the Supreme Court of Canada has enunciated broader constitutional principles, not found in the Constitution's written text, but given constitutional force by virtue of the Preamble;

> The notion of a fundamental law superior to positive or written law operating as a sort of moral ballast for the legal system, providing it with normative consistency, coherence, and direction, is a compelling idea found throughout the history of jurisprudential writing.[446]

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[443] *Ibid.* at 498.
[444] A. Lajoie, "The Implied Bill of Rights, The Charter, and the Role of the Judiciary" (1995) 44 University of New Brunswick Law Journal 337 at 341.
[445] Gibson, "Implied Bill of Rights", *supra* note 428 at 497-8.
[446] Walters, *supra* note 427 at 93.

a) 'Rule of Law'

One such principle is the 'rule of law'; "at a minimum, the inspiration behind the 'rule of law' is a sense of order and hierarchy."[447] Patrick Monahan described the principle of the rule of law as "one of long standing, originating in the Magna Carta signed by King John of England in 1215, in which he affirmed that he would rule according to the law of the land."[448] In *Roncarelli* v. *Duplessis*,[449] Rand J. of the Supreme Court of Canada found the rule of law to be a "fundamental postulate of our constitutional structure"[450] and relied on the principle to invalidate a discretionary action of a senior political official. Justice Rand held that 'discretion' implied good faith in discharging a public duty, and that failure of a public official to act in good faith jeopardised the constitutional principle of the rule of law.[451]

In *Re Manitoba Language Rights*,[452] the Supreme Court of Canada confronted approximately ninety years of possibly unconstitutional legislation in the province of Manitoba. The *Manitoba Act, 1870*, Manitoba's constitution, guaranteed that all Manitoba statutes were to be printed in both English and French.[453] However, in 1890, the Manitoba government passed legislation making English Manitoba's only official language, and thereafter legislation was printed in English only. In 1981, a Manitoba lawyer challenged a speeding ticket on the ground that the statutes under which he had been charged were invalid because they

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[447] Magnet, *supra* note 394 at 125.
[448] Monahan, *Constitutional Law, supra* note 13 at 4.
[449] [1959] S.C.R. 121.
[450] *Ibid.* at 142.
[451] *Ibid.*
[452] *Language Reference, supra* note 308.
[453] *Manitoba Act, 1870*, S.C. 1870, c. 3, reprinted in R.S.C. 1985, Appendix II, No. 8, at section 23.

were printed in English only. The constitutionality of nearly a century's worth of provincial legislation was referred to the Supreme Court of Canada.[454]

The Court ultimately concluded that the English-only statutes passed in the province of Manitoba did not follow the constitutionally required manner and form as set out in the *Manitoba Act, 1870*, and, as a result, were invalid and of no force or effect.[455] However, the Court immediately continued, "the difficulty with the fact that the unilingual Acts of the Legislature of Manitoba must be declared invalid and of no force or effect is that, without going further, a legal vacuum will be created with consequent legal chaos in the Province of Manitoba"[456] and concluded "in the present case, declaring the Acts of the Legislature of Manitoba invalid and of no force or effect would, without more, undermine the principle of the rule of law."[457] The Court provided a more detailed explanation of this constitutional principle:

> The rule of law, a fundamental principle of our Constitution, must mean at least two things. First, that the law is supreme over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power. Indeed, it is because of the supremacy of law over the government, as established in s. 23 of the Manitoba Act, 1870 and s. 52 of the Constitution Act, 1982, that this Court must find the unconstitutional laws of Manitoba to be invalid and of no force and effect.
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> Second, 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. Law and order are indispensable elements of civilized life. "The rule of law in this sense implies ... simply the existence of public order." (W. I.
> Jennings, The Law and the Constitution (5th ed. 1959), at p.
> 43)....According to Wade and Phillips, Constitutional and Administrative Law (9th ed. 1977), at p. 89: "... the rule of law expresses a preference for law and order within a community rather than anarchy, warfare and constant

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[454] G. Mackintosh, "Heading Off Bilodeau: Attempting Constitutional Amendment" (1986) 15:3 Manitoba Law Journal 271.
[455] *Language Reference*, *supra* note 308 at 747.
[456] *Ibid.*
[457] *Ibid.* at 748.

> strife. In this sense, the rule of law is a philosophical view of society which in the Western tradition is linked with basic democratic notions".[458]

The Court explained that, in this instance, it was the second consideration noted above which was at stake, and that a declaration of invalidity of over ninety years worth of legislation would leave a legal void in the province of Manitoba; "such results" the Court concluded, "would certainly offend the rule of law".[459]

The Court found that the principle of the rule of law was implicitly included in the Preamble to the *BNA Act*, by virtue of the 'similar in principle' provision and its reference to the constitution of the United Kingdom; and further concluded that "the constitutional status of the rule of law is beyond question" because "the preamble to the Constitution Act, 1982, states: Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law."[460] The Court also explained that:

> Additional to the inclusion of the rule of law in the preambles of the Constitution Acts of 1867 and 1982, the principle is clearly implicit in the very nature of a Constitution. The Constitution, as the Supreme Law, must be understood as a purposive ordering of social relations providing a basis upon which an actual order of positive laws can be brought into existence. The founders of this nation must have intended, as one of the basic principles of nation building, that Canada be a society of legal order and normative structure: one governed by rule of law. While this is not set out in a specific provision, the principle of the rule of law is clearly a principle of our Constitution.[461]

b) Judicial Independence

Another principle found by the Supreme Court of Canada to underpin the written provisions of the Constitution was that of judicial independence. In the

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[458] *Ibid.* at 748-9.
[459] *Ibid.* at 749.
[460] *Ibid.* at 750.
[461] *Ibid.* at 750-1.

Judges Reference,[462] the Court considered the constitutionality of statutes, from various provinces, aimed at reducing the salaries of provincial court judges. The reference questions were posed to the Court to determine whether those provisions which had the effect of reducing the salaries of provincial court judges infringed on independence of the judiciary and were, therefore, unconstitutional.[463] Sections 96 to 100 of the *BNA Act* protected the independence of judges of the superior, district and county courts, and section 11(d) of the *Charter* guaranteed judicial independence for other courts and tribunals, but only when those courts or tribunals were exercising jurisdiction over criminal matters. Therefore, there was a 'gap' in the constitutional protection of judicial independence in that the written provisions of the Constitution did not protect provincial court judges while they were exercising jurisdiction in civil matters.[464]

Chief Justice Lamer, writing for the majority, ultimately decided the case on the basis of Section 11(d) of the *Charter*, but also said "I am of the view that judicial independence is at root an unwritten constitutional principle, in the sense that it is exterior to the particular sections of the Constitution Acts".[465] He concluded,

> the express provisions of the Constitution Act, 1867 and the Charter are not an exhaustive written code for the protection of judicial independence in Canada. Judicial independence is an unwritten norm, recognized and affirmed by the preamble to the Constitution Act, 1867. In fact, it is in that preamble, which serves as the grand entrance hall to the castle of the Constitution, that the true source of our commitment to this foundational principle is located.[466]

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[462] *Judges Reference, supra* note 279.
[463] *Ibid.* at para. 5
[464] *Ibid.* at para. 85-86.
[465] *Ibid.* at para. 83.
[466] *Ibid.* at para. 109.

The Chief Justice also elaborated on the significance of the Preamble to the *Constitution Act, 1867*, and its role in incorporating a variety of unwritten constitutional principles into the Constitution of Canada. He explained:

> [The Preamble] recognizes and affirms the basic principles which are the very source of the substantive provisions of the Constitution Act, 1867. As I have said above, those provisions merely elaborate those organizing principles in the institutional apparatus they create or contemplate. As such, the preamble is not only a key to construing the express provisions of the Constitution Act, 1867, but also invites the use of those organizing principles to fill out gaps in the express terms of the constitutional scheme. It is the means by which the underlying logic of the Act can be given the force of law.[467]

Before ending his judgment, Lamer C.J.C. added his views on what was required, under Section 11(d) of the *Charter*, to ensure fulfillment of the guarantee of judicial independence. He noted that:

> any changes to or freezes in judicial remuneration require prior recourse to a special process, which is independent, effective, and objective, for determining judicial remuneration, to avoid the possibility of, or the appearance of, political interference through economic manipulation. What judicial independence requires is an independent body, along the lines of the bodies that exist in many provinces and at the federal level to set or recommend the levels of judicial remuneration. Those bodies are often referred to as commissions, and for the sake of convenience, we will refer to the independent body required by s. 11(d) as a commission as well. Governments are constitutionally bound to go through the commission process. The recommendations of the commission would not be binding on the executive or the legislature. Nevertheless…they should not be set aside lightly, and, if the executive or the legislature chooses to depart from them, it has to justify its decision – if need be, in a court of law.[468]

Therefore, the majority of the Supreme Court of Canada not only found that judicial independence was an unwritten constitutional principle, derived from sources other than the explicit references to judicial independence in the constitution's text; the

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[467] *Ibid.* at para. 95.
[468] *Ibid.* at para. 133.

majority also declared that an independent commission on judges' salaries was a constitutional requirement, emanating from Section 11(d) of the *Charter*.

The *Judges Reference* served to highlight, once again, the unique nature of Canada's Constitution. The Supreme Court reasserted the existence of unwritten, underlying constitutional principles and found a means to channel these principles into the constitutional structure by way of the Preamble to the *BNA Act*. The decision did raise concerns, however, regarding the use of unwritten constitutional principles in the face of written provisions which appeared to cover the matters under deliberation. In his dissenting opinion in the *Judges Reference*, La Forest J. expressed concern for the majority's enunciation of the principle of judicial independence as emanating from the Preamble. He distinguished this case from *New Brunswick Broadcasting* as follows:

> In *New Brunswick Broadcasting*,...this Court held that the privileges of the Nova Scotia legislature had constitutional status by virtue of the statement in the preamble expressing the desire to have "a Constitution similar in Principle to that of the United Kingdom". In reaching this conclusion, the Court examined the historical basis for the privileges of the British Parliament....The effect of the preamble, the Court held, is to recognize and confirm that this long-standing principle of British constitutional law was continued or established in post-Confederation Canada. There is no similar historical basis, in contrast, for the idea that Parliament cannot interfere with judicial independence. At the time of Confederation (and indeed to this day), the British Constitution did not contemplate the notion that Parliament was limited in its ability to deal with judges.[469]

Justice La Forest believed that the 'fundamental components' of judicial independence were entrenched, but that this was accomplished by ss. 96-100 of the *Constitution Act, 1867*, and s. 11(d) of the *Charter*, not the Preamble.[470]

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[469] *Ibid.* at paras. 304-5.
[470] *Ibid.* at para. 311, 319.

Justice La Forest also found fault with Lamer C.J.C.'s statements regarding the constitutional requirement of an independent salary commission. He noted, "[w]hile both salary commissions and a concomitant policy to avoid discussing remuneration other than through the making of representations to commissions may be desirable as matters of legislative policy, they are not mandated by s. 11(d) of the Charter"[471] and concluded that "[r]equiring commissions *a priori*...is tantamount to enacting a new constitutional provision to extend the protection provided by s. 11(d)."[472]

Commentators on the *Judges Reference* decision have also noted difficulties with the majority's enunciation of the principle of judicial independence. Jeffrey Goldsworthy noted a number of objections to basing the principle of judicial independence on the Preamble. First, he pointed out that the majority accepted that the Preamble had no enacting force and was not a source of positive law; "[b]ut," Goldsworthy noted, "the Court immediately proceeded to adopt a contradictory understanding, without acknowledging the contradiction. It said that the Preamble nevertheless had 'important legal effects'"[473] and that the Preamble 'recognises and affirms' the organising principles of the Constitution.[474] Goldsworthy explained the contradiction as follows:

> It could be argued that the Preamble merely 'recognizes and affirms', but does not itself enact, the 'organizing principles' underlying the Constitution's express provisions. On this view, the Preamble is not itself the source of those principles, which exist independently of it: it merely assists in identifying them. Indeed, the same principles could be identified and

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[471] *Ibid.* at para. 329.
[472] *Ibid.* at para. 344.
[473] J. Goldsworthy, "The Preamble, Judicial Independence and Judicial Integrity" (2000) 11:2 Constitutional Forum 60 at 61.
[474] *Ibid.*

> enforced even if the Preamble did not exist. But in this case, this is an unconvincing and artificial distinction. If there was some evidence of the existence of the principle apart from the Preamble itself...the Preamble could be regarded as corroborating that evidence. But here there is no evidence of the existence of the supposed principle other than the Preamble itself.[475]

Goldsworthy also rejected the Court's assertion that the written provisions of the Constitution which guaranteed judicial independence to superior courts and courts exercising criminal jurisdiction provided evidence for the broader principle of judicial independence;

> the substantive provisions that partially protect judicial independence are not evidence of an underlying principle of complete judicial independence, precisely because their protection is only partial. Indeed, they are more plausibly regarded as evidence for the opposite conclusion, that the Constitution is based on an underlying principle that judicial independence warrants only partial constitutional protection.[476]

Goldsworthy then expressed concerns, generally, regarding the use of unwritten constitutional principles, and noted that enforcement of principles which supposedly underlie written constitutional provisions

> treats the written provisions as inadequate expressions of more general principles, rather than as deliberately chosen accommodations of competing principles. In so doing, it substitutes the judges' political judgment for that of the constitution-makers. In addition, it risks making the written provisions redundant.[477]

He concluded:

> If [the written provisions'] precise terms and limited scope can be exceeded whenever the judges deem them unable to fulfill their underlying principles, then they serve little purpose. Why bother with them at all? Why not in all cases go straight to the underlying principles? By *reductio ad absurdum*, the Court's reasoning is in danger of collapsing the Constitution Act, 1867 into a single norm: the general principles of the British Constitution, as the judges deem them to have 'evolved' in Canada since 1867.[478]

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[475] *Ibid.*
[476] *Ibid.*
[477] *Ibid.* at 63.
[478] *Ibid.*

This final comment from Goldsworthy articulates one of the greatest concerns expressed throughout this thesis: that the use of unwritten constitutional principles to establish legal obligations will render the written provisions of the Constitution meaningless, and that courts will be able to rely on unwritten principles "as they deem them to have evolved" to reach just about any conclusion they wish.

The Role of Unwritten Constitutional Principles

As evidenced above, a number of concerns have been raised in relation to the Supreme Court of Canada's use of the Preamble to 'recognize and affirm' unwritten constitutional principles, the application of these principles, and their relationship to the written provisions of our constitutional statutes. In a critique of the Supreme Court of Canada's use of unwritten principles in the *Judges Reference* and *Secession Reference*, Jean Leclair outlined what he believed were some of the primary concerns regarding resort to such principles and how the use of unwritten principles poses problems for the legitimacy of judicial review. Leclair stated, "if law requires certainty, unwritten principles are bound to create problems. Such principles exist in a space virtually unconfined by any textual limit, since their very purpose is to go beyond the text itself."[479] Goldsworthy expressed similar concerns, noting that the idea of unwritten principles "confers on judges an unbounded authority to find whatever they like in a constitution."[480] Leclair also queried whether there were particular contexts and circumstances in which unwritten constitutional principles

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[479] J. Leclair, "Canada's Unfathomable Unwritten Constitutional Principles" (2002) 27 Queen's Law Journal 389 at para. 16.
[480] Goldsworthy, *supra* note 473 at 62.

should be resorted to.[481] Leclair categorised the uses of unwritten principles to date as falling within one of three categories:

> The first is in cases involving the reconciliation of opposing components of the constitutional order. In such instances, no legislation has been challenged on the basis of unwritten principles. On the contrary, in all these cases the recourse to unwritten principles or rules enhanced rather than limited the power of the democratically elected institutions. Second, the underlying principles were resorted to in cases where the constitutional validity of a statute was challenged. Finally, they were invoked to shed light on the interpretation to be given to the explicit provisions of the Constitution.[482]

Even those suspicious of reliance on unwritten principles might admit that no harm can be done by resorting to unwritten constitutional principles as an aid to interpretation of the written provisions of constitutional documents. Where written provisions are unclear, or their application in a particular situation needs clarification, surely these are appropriate circumstances in which to resort to unexpressed but fundamental principles of the Canadian constitutional experience. Likewise, resort to unwritten principles in Leclair's first category should not be considered distasteful. When constitutional provisions are irreconcilable or result in an absurdity (for instance, the 'legal void' that would have been created in Manitoba had the Court not relied on the principle of the rule of law to extend the validity of the invalid statutes in the *Language Reference*), then unwritten constitutional principles may prove to be appropriate and helpful resources.

But, the justification becomes more problematic if unwritten aspects of the Constitution were to be relied upon to invalidate legislation. There is a sense of unfairness in striking down legislation as invalid when such legislation has not been shown to be in violation of any written constitutional provision. The unwritten

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[481] Leclair, *supra* note 479 at para. 18.
[482] *Ibid.* at para. 29.

nature of these principles means they may not be known by those who must abide by them; and there is little or no certainty as to when and in which circumstances they will be invoked and enforced by a court. This is the very concern raised by McLachlin J.'s decision in *New Brunswick Broadcasting*. The Constitution's supremacy clause renders any legislation deemed inconsistent with the Constitution of no force or effect. The problem with extending the definition of the Constitution to include unwritten provisions is that legislators cannot know ahead of time which constitutional requirements they are obliged to meet. What is perhaps even more problematic is that the inclusion of principles in the definition of the Constitution, and reliance on those principles to invalidate legislation, would effectively constitute judicially-driven amendments to the Constitution without resort to the Constitution's own amending procedure.

Criticism of the Court's use of unwritten principles seems to have stemmed largely from concerns regarding the relationship of these principles to written constitutional provisions. Jean Leclair noted, "the legitimacy of invoking unwritten principles will depend on the purpose they serve and on how the courts use them."[483] Leclair suggested that "courts have latitude in the interpretation of a constitution, but they must not appeal to unwritten constitutional principles with the intent of rewriting it."[484] These concerns might be eased if limits were placed on the use of unwritten principles when written constitutional provisions dealt with the matter being considered. If the use of unwritten principles in such circumstances was limited to aiding in the interpretation of written provisions – but not taking

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[483] *Ibid.* at para. 75.
[484] *Ibid.* at para. 74.

precedence over those written provisions – then written provisions would maintain their status as the 'supreme law' of Canada, and concerns regarding 'back-door' constitutional amendments would be unfounded.

Use of Unwritten Constitutional Principles in the *Patriation* and *Secession References*

Beginning with the insertion of the Preamble in the *BNA Act* and from the earliest development of the 'implied bill of rights' by Chief Justice Duff in 1938, Canadian courts have gradually developed a series of unwritten fundamental principles said to underlie our constitutional structure as inherited from the United Kingdom. It is against this backdrop that the Supreme Court of Canada's use of unwritten constitutional principles in both the *Patriation Reference* and the *Secession Reference* must be assessed.

In some aspects, parallels can be found between the Court's decisions in the *Patriation* and *Secession References* and its prior jurisprudence regarding unwritten constitutional principles. One parallel is the Court's use, in the *Patriation Reference*, of the Preamble to incorporate into the Constitution unwritten rules, like conventions. To start its decision on the convention issue, the majority of the Court noted:

> In these questions, the phrases "Constitution of Canada" and "Canadian Constitution"...are clearly meant in a broader sense and embrace 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.[485]

The majority also noted that these 'rules and principles', including constitutional conventions, "come within the meaning of the word 'Constitution' of the preamble

[485] *Patriation Reference, supra* note 5 at 874.

of the British North America Act, 1867."[486] Therefore, once again, the Preamble was used as the mechanism through which traditional British practices were adopted and included in the Constitution of Canada. Given the Supreme Court of Canada's extensive use of the Preamble in this manner, the use of the Preamble in this regard in the *Patriation Reference* was not overly spectacular. Numerous references to unwritten aspects of the Constitution by Canadian judges and scholars, some of which were noted earlier in this chapter, would seem to indicate that consideration of the entire set of constitutional rules (written and unwritten) might indeed be appropriate in constitutional cases.

As far as some commentators were concerned, however, the Court's consideration of the convention question in this case did diverge from prior jurisprudence regarding constitutional conventions in at least one respect. As mentioned in Chapter One, the majority on the convention question justified its consideration of conventions by noting that courts of law in both the U. K. and Canada had recognised the existence of conventions in their judgments.[487] This justification was rejected by some observers, because in the *Patriation Reference*, the majority of the Court did more than merely recognise the existence of a convention; indeed, the majority considered competing theories of what the convention (if it existed) required, and proceeded to reach its own conclusion as to what the convention required of political actors.[488] By concluding that the convention required a substantial measure of provincial consent, and that the consent of two provinces did not fulfill this obligation, the majority on this question

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[486] *Ibid.* at 883.
[487] *Ibid.* at 885.
[488] See Chapter One, at pp. 49 and 52, for the previous discussion of this criticism.

determined that between three and ten provinces were required to consent to the federal government's resolution to amend the Constitution in order for the convention to be satisfied. This, it is suggested, went beyond mere recognition of a convention and involved more active participation of the Court in the determination of the *content* of a constitutional convention. If so, this aspect of the *Patriation Reference* decision signalled a departure from the Court's prior jurisprudence regarding constitutional conventions.

In the *Secession Reference*, the Court also departed from its own past practice regarding the incorporation of unwritten principles via the Preamble. In this case, the Court determined that unwritten principles "inform and sustain the constitutional text; they are the vital unstated assumptions upon which the text is based" and that

> 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.[489]

What was different about the Court's use of unwritten principles in the *Secession Reference*, however, was that it did not rely on the Preamble to incorporate traditional British principles into Canada's Constitution. Rather, the Court enunciated the unwritten principles of federalism, democracy, constitutionalism and the rule of law, and protection of minorities, after a review of Canada's own constitutional history and development. As Mark Walters noted, by doing this,

> [t]he Court has therefore identified two distinct classes of unwritten constitutional law: free-standing unwritten constitutional norms, the normative source, or 'home', of which is 'exterior' to the written constitution

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[489] *Secession Reference, supra* note 6 at 247.

> [for example, a British source]; and text-emergent unwritten constitutional norms that derive, or 'emerge', from the written constitution itself.[490]

Instead of adopting British principles by virtue of the Preamble, as it had done on prior occasions, the Court, in the *Secession Reference*, appeared to use the Preamble as evidence of the Court's ability to enunciate unwritten principles. It then proceeded to enunciate unwritten principles the Court believed arose from Canada's own constitutional structure. This was a clear break from the Court's prior jurisprudence involving unwritten principles.

Another way to assess the *Patriation* and *Secession Reference* decisions for their adherence to prior jurisprudence is to review how the Court used the unwritten principles it enunciated in each case. In the *Patriation Reference*, the majority on the question of 'law' made it clear that unwritten principles would in no way supersede the written provisions of constitutional law governing constitutional amendment in Canada. The majority on the question of law in the *Patriation Reference* clearly stated that "[t]he law knows nothing of any requirement of provincial consent, either to a resolution of the federal Houses or as a condition of the exercise of United Kingdom legislative power."[491] The majority concluded that

> What is central here is the untrammelled authority at law of the two federal Houses to proceed as they wish in the management of their own procedures and hence to adopt the Resolution which is intended for submission to Her Majesty for action thereon by the United Kingdom Parliament. The British North America Act, 1867 does not, either in terms or by implication, control this authority or require that it be subordinated to provincial assent.[492]

Therefore, concerns regarding the use of unwritten constitutional principles to trump or essentially amend the written provisions of our Constitution found no legitimacy

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[490] Walters, *supra* note 427 at 98.
[491] *Patriation Reference, supra* note 5 at 807.
[492] *Ibid.* at 808.

in the *Patriation Reference* decision. The majority decision on the convention question in no way questioned the supremacy of the written provisions of the *BNA Act, 1867*.

Similar assurances were provided by the Court in the *Secession Reference*, as the Court did provide a determination of the *legality* of unilateral secession of Quebec pursuant to the written provisions of the Constitution, and conceded that unilateral secession would indeed be contrary to the written provisions of Canada's Constitution. The Court noted: "[t]he secession of a province from Canada must be considered, in legal terms, to require an amendment to the Constitution, which perforce requires negotiation"[493] and importantly pointed out "while the negotiators would have to contemplate the possibility of secession, there would be no absolute legal entitlement to it...".[494] However, the Court then complicated matters by suggesting that the four fundamental principles it considered, and the resulting duty to negotiate, resulted in "substantive legal obligations...which constitute substantive limitations upon government action"[495] The Court noted that some unwritten principles "are not merely descriptive, but are also invested with a powerful normative force, and are binding upon both courts and governments."[496] By enunciating new legal obligations arising from the Constitution, the Court was arguably effectively amending the Constitution and imposing a duty on governments never before, and not yet, articulated anywhere in Canada's constitutional text. What complicated the matter even further was the Court's assurance that the

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[493] *Secession Reference, supra* note 6 at 263.
[494] *Ibid.* at 270.
[495] *Ibid.* at 249.
[496] *Ibid.*

enforcement of these new 'legal obligations' would not come within the jurisdiction of a court of law. Rather, the supervision and enforcement of the new duty to negotiate would be the responsibility of the political actors themselves. The Court noted that "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 other is one that also defies legal analysis" and concluded "it is the obligation of the elected representative to give concrete form to the discharge of their constitutional obligations which only they and their electors can ultimately assess."[497] Therefore, while the Court termed the duty to negotiate a 'legal obligation', it simultaneously found that this obligation was not justiciable in the courts; rather, it would find its enforcement and consequences for its breach in the political arena only. This part of the Court's decision was confusing. How a 'legal' obligation would not be enforceable by a court of law is difficult to understand.

Additional concerns might also be raised regarding the use to which unwritten principles were put by the Court in the *Patriation* and *Secession References*. As discussed earlier in this chapter, prior jurisprudence has indicated that unwritten principles have been used by the Court to assist in the interpretation of written provisions, or, as in the *Judges Reference*, to fill 'gaps' in the written provisions of the Constitution. In the *Patriation Reference*, the Court did not consider unwritten constitutional conventions in the course of interpreting written constitutional provisions. Rather, its consideration of conventions was a completely separate exercise from the Court's consideration of the written Constitution.

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[497] *Ibid.* at 271-2.

Similarly, in the *Secession Reference*, the Court did not use unwritten principles to aid in interpretation, or to fill gaps in written provisions; in this case, the Court used unwritten principles to create new constitutional obligations which arose from sources completely removed from the written Constitution. A parallel might be drawn between the Court's enunciation of the duty to negotiate and its stipulation in the *Judges Reference*, that the creation of an independent salary commission was constitutionally required to fulfill the constitutional principle of judicial independence. However, as discussed earlier, there was much criticism of this aspect of the *Judges Reference* decision, including a strong dissenting opinion from La Forest J. The same criticisms would apply to the constitutional obligation to negotiate created by the Court in the *Secession Reference*, namely that the Court, by creating new constitutional obligations, effectively enacted new constitutional provisions not added to the Constitution through the accepted constitutional amendment process.

Another aspect of both the *Patriation* and *Secession References* that indicated a departure from previous jurisprudence regarding unwritten principles was the clear distinction made by the Court in each case between legality and legitimacy. In each case, the Court's judgment served two goals: the determination of the legality of proposed government action, and a discussion of broader, sometimes opposing, constitutional considerations which would guide constitutional morality, or legitimacy. This appeared to be a new development in the Supreme Court of Canada's jurisprudence. The explicit indication that law and legitimacy might not always coincide, as well as the provision of guidance on matters of

legitimacy as opposed to law, were aspects of the *Patriation* and *Secession Reference* decisions that signalled a departure from the Court's past practice in constitutional cases.

Conclusion

The Supreme Court of Canada's use of unwritten constitutional principles in the *Patriation* and *Secession References* highlighted significant aspects of Canada's Constitution. For instance, the Constitution is not comprised exclusively of written constitutional documents. A number of unwritten constitutional principles, rules and conventions have traditionally provided guidance on the context in which written constitutional provisions are to be interpreted. As Patrick Monahan noted,

> it is also important to remember that a constitutional lawyer is not simply concerned with the formal legal validity of legislation or of government decisions. Even though a statute or a government decision may be valid as a matter of law, it may offend or be inconsistent with some other unwritten principle of the constitution.[498]

This chapter reviewed some of the unwritten principles considered by the Supreme Court of Canada in its previous jurisprudence on constitutional matters. In some regards, the Court's decisions in the *Patriation* and *Secession References* adhered to this prior jurisprudence, including, for instance, the Court's reliance on the Preamble to incorporate unwritten principles into the Constitution, and the hesitation of the Court to override written constitutional provisions in lieu of unwritten considerations.

But this is arguably insufficient to 'justify' the Court's resort to unwritten principles in these two cases. First, even if the *Patriation* and *Secession Reference*

[498] Monahan, *Constitutional Law, supra* note 13 at 14.

decisions were completely consistent with prior jurisprudence, this chapter highlighted a number of criticisms of the Court's prior handling of unwritten principles, including use of the Preamble as a source of unwritten principles, the use to which unwritten principles have been put where written provisions specifically deal with the matter at hand, and concerns regarding judicial additions to the Constitution.

Second, in some respects, the *Patriation* and *Secession Reference* decisions marked clear departures from the Court's 'usual' treatment of constitutional cases, perhaps most notably evident in the Court's distinction between constitutional legality and constitutional legitimacy. The question still remains why the Court found it necessary to consider provisions outside of the written constitution when the significant legal question in each case was capable of disposition with resort to the written constitution alone and without the need of unwritten principles for interpretation. What purpose was to be served by the Court's consideration of unwritten constitutional principles in these cases?

This resort to broad principles for the purpose of defining constitutional legitimacy seems to be a recent invention of the Supreme Court of Canada in the *Patriation* and *Secession References*. Does this conclusion mean that these two cases constitute 'bad law', or that the decisions are of no value outside of the specific factual circumstances they addressed?

It may be premature to render the Court's decisions in these two cases of little or no utility simply because they did not adhere to past practice or some textbook legal theory. While the decisions might not be intellectually coherent in

their own right, there may be lessons to learn from the Court's use of unwritten principles and its discussion of the sometimes diverging elements of constitutional law and legitimacy. Perhaps it is possible to accept the Court's decisions as useful, as fulfilling some broader purpose, even if one has trouble accepting the intellectual integrity of the decisions themselves. What is being suggested here is that there may be a broader role for the Court to fulfill, a role that might justify resort to this new brand of 'big principles' constitutional decision-making by the Supreme Court of Canada, in which case, the *Patriation* and *Secession Reference* decisions might serve as useful examples of how this new brand of decision-making might work. This proposition is the focus of Chapter Four.

Chapter Four: The Role of 'Constitutional Advisor'

Introduction

As discussed in Chapter Three, the Supreme Court of Canada's decisions in the *Patriation* and *Secession Reference* cases seemed to lack continuity with the Court's prior use of unwritten constitutional principles, and signalled the emergence of a 'big principles' type of decision-making in Canadian constitutional cases. This kind of decision-making finds little support in the Court's past practice, but may turn out to be a valuable contribution to constitutional jurisprudence in the future. It is suggested here that a 'broad principles' approach to constitutional matters can be viewed as a component of the Supreme Court of Canada's role in Canadian society. The *Patriation* and *Secession Reference* decisions might be used as examples of how this role might work. Beyond the interpretation and enforcement of constitutional *law*, perhaps there is a need for the enunciation of principles of constitutional *legitimacy*. The 'law' of the Constitution might be defined as the written provisions of those statutes listed in Section 52(2) of the *Constitution Act, 1982*, any amendments to those statutes, and any case law that has accumulated regarding constitutional provisions.[499] The other element of the Constitution – the element that influences constitutional legitimacy – might be defined as those non-legal practices, usages and conventions that are not enforceable by the courts but are standards or rules of conduct which govern constitutional behaviour, or "prescribe the way in which legal powers shall be exercised."[500] While declarations on matters of constitutional legitimacy would not be legally enforceable, they could help to

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[499] Hogg, *supra* note16 at 6, 13.
[500] *Ibid.* at 19.

educate Canadians on the bigger picture – the origins of constitutional provisions and principles, their interrelationship, and how those principles would apply to current and future constitutional disputes. Guidance on these broader principles would arguably be of greater practical utility to those parties seeking the Court's assistance than would judicial determinations of narrow legal questions; "[n]ormally, the Court merely decides a legal problem put before it. However, the narrowness of the legal issue may, in a given case, bear no relation to the national repercussions of the decision. The ripple effect can be extraordinary."[501] In such instances, as was arguably the case in the *Patriation* and *Secession References*, a technical legal answer from the Court, without more, might severely underestimate broader constitutional concerns and the impact of the cases themselves on future constitutional relations in Canada. The role of the Court suggested in this chapter would acknowledge not only the legal ramifications of constitutional opinions, but also their impact on the political reality within which the Court's opinion must be implemented. This role might be one of 'constitutional advisor', or 'guide' on matters of constitutional legitimacy, and would be in addition to the Court's role as final arbiter of constitutional law.

Theories on Constitutional Interpretation and the Role of the Court

Constitutional Interpretation

A thorough treatise on the various theories of constitutional interpretation is beyond the scope of the current thesis. However, it must be noted that some of these

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[501] F. Moskoff, "The Role of the Supreme Court of Canada in the 1990s and Beyond" (1989) 8:2 Advocates' Society Journal 5 at 7.

theories, as will be discussed below, provide support for, and even encourage, 'non-textual' considerations in the context of constitutional adjudication. As such, a brief review of these theories of interpretation will provide an important perspective on the proposed role of constitutional advisor addressed later in this chapter.

i) Originalism/Intentionalism

The 'originalist' theory of constitutional interpretation "argues that the framers and drafters of the original Constitution and its amendments shared a collective state of mind, called the framers' intent, and that this state of mind somehow reveals the meanings that these people as a group intended various constitutional provisions to have."[502] Also known as 'intentionalism',[503] this theory places the focus of constitutional interpretation on the intention of those who drafted the text of the Constitution. The rationale for the theory is that the meaning given to the words of the Constitution should be that which the drafters intended. In practical terms, when faced with an unclear or otherwise insufficient provision of the Constitution, judges "should find out what the framers intended, or would have intended had they addressed themselves to the question before the court, and then enforce that intention in their constitutional judgement."[504]

There are a number of reasons why the originalist, or intentionalist, theory is unsatisfactory. First, who are the framers of the Constitution? Those men who signed on the dotted line almost 140 years ago? Those who actually crafted the

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[502] L. Simon, "The Authority of the Framers of the Constitution: Can Originalist Interpretation Be Justified?" (1985) 73 California Law Review 1482 at 1483.
[503] G. Craven, "The Crisis of Constitutional Literalism in Australia" (1992) 30 Alberta Law Review 492 at 511.
[504] A. Kavanagh, "The Idea of a Living Constitution" (2003) 16 Canadian Journal of Law and Jurisprudence 55 at 63.

constitutional text? Second, is it realistic to presume that all of those individuals involved in the 'making' of the Constitution had the same intention as far as the meaning of the textual provisions? And third, as noted by Larry Simon, it is quite likely that "the framers and originators of the Constitution were much more concerned about the present and near future than about the twentieth century and beyond."[505] Therefore, a question of relevance arises when applying 'original' intent to novel situations.

These criticisms of the originalist theory are legitimate; the indeterminate nature of the 'framers' intent', and its limited relationship to new and unforeseen constitutional dilemmas, renders the originalist theory of little practical assistance.

ii) Literalism

Literalism "comprises the view that the Constitution is to be interpreted by reading its words according to their natural sense and in documentary context, and then giving to them their full effect."[506] Greg Craven explains the 'four key features of literalism' as follows:

> First, literalism clearly assumes that the words of the Constitution will (at least as a general rule) have a determinate meaning which may be ascertained with reasonable readiness. Secondly, and following from this, there can (again as a general rule) be no occasion to search for meaning outside the text by reference to notions of grand constitutional theme or design, and only a very limited occasion to do so by reference to such humbler considerations as the wider history of the provision concerned. Thirdly, the policy results of a particular interpretation are, as such, irrelevant. Finally, despite its intrinsic textualism,...literalism itself does depend ultimately upon one wider canon of constitutional construction, namely, the necessity of finding the author's intent. This flows from the fact that the implicit basis of literalism's exclusive reliance upon the text is that it is the text which is the best and most reliable means of discerning the intent.[507]

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[505] Simon, *supra* note 502 at 1500.
[506] Craven, *supra* note 503 at 493.
[507] *Ibid.* at 493-4.

While the fourth 'key feature' identified by Craven relates to the 'author's intent', the focus of the literalist approach is undoubtedly the text of the constitutional document itself. In very simple terms, words have meaning, and one can determine the meaning of a constitutional provision by determining the meaning of the words contained therein. Like a mathematical formula, once these 'variables' are plugged into place, the 'answer' appears, and the constitutional conundrum is solved.

The biggest criticism of the literalist approach is its simplicity. Surely, the provisions of the Constitution are not capable of such mechanical application. Words may be given any number of different interpretations, often dependent on their context and the perspective of the interpreter. As well, constitutional provisions are purposely vague in the sense that they rarely spell out constitutional obligations in any great detail. Even if one were able to determine the 'meaning' of the text, this will rarely be sufficient to dispose of the constitutional matter at hand. This meaning must then be applied to a particular fact situation, a practice that becomes increasingly difficult as unforeseen controversies come before the courts.

iii) Purposive Interpretation

In general, the purposive approach suggests that "the primary focus in interpretation is not so much the meaning of the text as the reasons for enacting it and the directions in which it points."[508] Not long after the *Charter*'s inception, the Supreme Court of Canada decided that the purposive approach was the correct approach to the interpretation of the *Charter*'s provisions. In the 1984 case of *Hunter* v. *Southam*. Dickson J., writing for the Court, explained, "[t]he *Canadian*

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[508] R. Sullivan, *Driedger on the Construction of Statutes*, 3rd Ed. (Toronto: Butterworth's, 1994) at 35.

Charter of Rights and Freedoms is a purposive document. Its purpose is to guarantee and to protect, within the limits of reason, the enjoyment of the rights and freedoms it enshrines."[509] Dealing specifically with the section 8 right against unreasonable search and seizure, Dickson J. noted,

> "[s]ince the proper approach to the interpretation of the *Charter of Rights and Freedoms* is a purposive one, before it is possible to assess the reasonableness or unreasonableness of the impact of a search or of a statute authorizing a search, it is first necessary to specify the purpose underlying s. 8: in other words, to delineate the nature of the interests it is meant to protect."[510]

While the purposive approach is just as applicable to non-*Charter* constitutional provisions, it is certainly dominant in the *Charter* context.[511] For a document like the *Charter*, which embodies fundamental rights and freedoms, the purposive approach to interpretation seems a reasonable and appropriate fit. The *Charter* was likely not intended to protect specific behaviour, articulated and enumerated in detail in the *Charter*'s provisions. Rather, the provisions of the *Charter* indicate those areas of behaviour or activity deemed worthy of protection. Whether a particular activity or factual circumstance falls within one of these 'areas' is really what the Court is being asked to determine when a *Charter* case requires adjudication. A literal reading of the *Charter*'s provisions would exclude much activity from protection that would otherwise fall within one of these protected areas of behaviour. The purposive approach, however, would capture such activity.

An example of the purposive approach in action is the Court's jurisprudence on the 'analogous grounds' concept in relation to section 15's protection from

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[509] [1984] 2 S.C.R. 145 at 156.
[510] *Ibid.* at 157.
[511] L. Walton, "Making Sense of Canadian Constitutional Interpretation" (2001) 12 National Journal of Constitutional Law 315 at 343.

discrimination under the *Charter*. In *Andrews* v. *Law Society of B.C.*, McIntyre J. found that the proper reading of section 15 was to include those grounds listed in section 15, as well as analogous grounds, because "[t]his enumerated and analogous grounds approach most closely accords with the purposes of section 15".[512] In that case, McIntyre J. found that "the purpose of s. 15 is to ensure equality in the formulation and application of the law. The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration."[513] The analogous grounds approach can be seen in many of the Court's decisions on section 15 of the *Charter*, and has been used to identify grounds such as marital status[514] and sexual orientation[515] as being analogous to those grounds explicitly protected from discrimination under section 15.

The purposive approach to *Charter* interpretation, as exhibited by the Court's 'analogous grounds' jurisprudence, is arguably the best method to fulfill the true intent of the *Charter*'s provisions. While sexual orientation, for example, is not contained within the text of the *Charter*, surely discrimination faced by Canadians on the basis of this characteristic is the type of activity meant to be prohibited by section 15. Therefore, the true purpose of the equality provision is fulfilled by recognizing sexual orientation as an analogous ground. Conversely, the purpose of the equality provision would have been frustrated by excluding the ground of sexual

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[512] [1989] 1 S.C.R. 143 at 182. Note that McIntyre J.'s opinion formed the dissenting judgment, but his interpretation of section 15 was agreed to by the remainder of the Court.
[513] *Ibid.* at 171.
[514] *Miron* v. *Trudel*, [1995] 2 S.C.R. 418.
[515] *Egan* v. *Canada*, [1995] 2 S.C.R. 513; *Vriend* v. *Alberta*, [1998] 1 S.C.R. 493.

orientation merely because it was not one of the grounds originally enumerated within the *Charter*'s text.

iv) Progressive Interpretivism

Progressive interpretation "requires that the language used...in the Constitution is not to be frozen as it would have been understood in 1867. Rather, the words of the *Constitution Act, 1867* are to be given a 'progressive interpretation' so that they are continuously adapting to new conditions and new ideas."[516] The best known reference to the progressive interpretation approach is Lord Sankey's 'living tree' statement in the *Edwards* case.[517] While this approach focuses on the text of constitutional provisions, it strives to give meaning to those words in the context of current conditions and values. As Luanne Walton explains, "[p]rogressive interpretation requires that courts use the original understanding of constitutional provisions only as a starting point. The key is to examine the language of the relevant provisions in light of current conditions and to apply it in that context."[518]

Regardless of the constitutional provision in question, the progressive method of interpretation makes good sense. While it starts from the constitutional text, this approach ensures that the Constitution will remain 'up-to-date' and relevant to new and unforeseen social, political, technological, and other realities. One criticism of the progressive approach is that it allows judges to alter the Constitution without resort to the Constitution's strict amending procedure. This concern is probably overstated. Progressive interpretation does not alter any of the Constitution's provisions. It merely places the Constitutional text within a current

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[516] Walton, *supra* note 511 at 332.
[517] *Edwards* v. *A. G. Canada, supra* note 3 and accompanying text.
[518] Walton, *supra* note 511 at 339.

context. The concept of 'equality', for instance, is difficult for anyone to oppose. But what equality meant 140 years ago is surely different than what it means to Canadians today. By interpreting the Constitution's provisions within a current context, judges maintain the delicate balance between respecting the fundamental and enduring nature of constitutional statutes and ensuring the continued relevance of those statutes to new and future constitutional dilemmas.

v) Non-interpretivism

As Joseph Magnet explains, "[s]ome theorists have concluded that a constitutional text is too open and indeterminate to allow interpretation in the traditional sense. They see constitutional texts as empty vessels to be filled with meaning as the occasion requires."[519] Magnet refers to this type of interpretation as 'non-interpretivism' and cites Ronald Dworkin as one of this theory's most recognized supporters. Dworkin, Magnet explains, "contends that the constitutional text provides concepts which require concretization in the context of current value systems."[520] Magnet continues, "[t]he framers, according to Dworkin, did not intend to provide solutions for all future problems. Instead, they outlined central concepts as a frame of reference, which needs to be filled as required by concrete fact situations."[521] Dworkin has noted that, once you see the provisions of the Constitution this way, there is no need for concern regarding 'vagueness' or incompleteness of textual provisions; "[t]he clauses are vague only if we take them to be botched or incomplete or schematic attempts to lay down particular

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[519] Magnet, *supra* note 394 at 126.
[520] *Ibid.* at 127.
[521] *Ibid.*

conceptions. If we take them as appeals to moral concepts they could not be made more precise by being more detailed."[522]

One concern with this method of 'interpretation' is that it treats the constitutional text as an *aid* to interpretation, and not the *object* of interpretation. Surely, the text of the Constitution should play more than a supporting role in the process of constitutional interpretation. Given the enduring nature of constitutional texts, it is not surprising that many theories of constitutional interpretation involve an extension of, or extrapolation from, these texts in order to apply constitutional provisions to novel situations in the future. Indeed, the purposive and progressive interpretive theories discussed above involve similar exercises. Concern arises, however, when legal decisions are founded on these 'moral concepts' or 'principles' in the absence of any textual constitutional anchor. Recognizing textual provisions as references to broader principles or concepts is not in itself distasteful. It is conceded that the text of constitutional documents only goes so far, and the purpose behind those provisions is what should be extrapolated and applied to new and current situations. To expand textual provisions to apply to new situations is necessary when dealing with constitutional texts. To look behind the provision to determine its purpose, and to apply this purpose to new situations, is non-offensive; surely it is the purpose of the provision, and not its literal wording, that is to be enforced. But to use the Constitution solely as an aid to interpretation, and not at all the object of interpretation, is to do a great injustice to the status and purpose of constitutional documents.

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[522] R. Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977) at 136, as cited in Magnet, *supra* note 394 at 129.

Summary

The five approaches to constitutional interpretation discussed above are by no means exhaustive of the various approaches suggested or endorsed by constitutional scholars and judges. This thesis is not meant to advocate for the acceptance or rejection of a particular theory of constitutional interpretation. Rather, it raises concerns regarding any theory that completely rejects any role for constitutional text; "in order to be an interpretation *of the Constitution*, the text of the Constitution must be the object of the inquiry."[523] A distinction should be made between the expansion of rights and freedoms articulated in a constitution's text, as has occurred under the *Charter*, and the enunciation of new legal rights or obligations not emanating from constitutional text, as is, arguably, what occurred in the *Patriation* and *Secession References*. In the former case, written constitutional provisions are, themselves, being interpreted in such a manner as to fulfill the greater purpose behind the words. The text of the Constitution acts as a starting point and is then expanded to apply to perhaps novel social realities. To this method of *Charter* interpretation, this thesis holds no objection. In the latter case, however, there is no written provision being interpreted. The starting point of the 'interpretive' process is something, or somewhere, outside of the Constitution's text. Then, from this starting point, new 'law' is created. The concern is this: if unwritten constitutional principles can result in new legal obligations and act as the ultimate 'guides' in matters of constitutional cases, what purpose remains to be served by the Constitution's written text? Admittedly, written constitutional provisions can be seen to express certain themes - democracy, equality, etc. But to the extent that

[523] Kavanagh, *supra* note 504 at 95.

these various themes might conflict, not only with each other, but with written constitutional provisions, their superiority over written provisions should cause some concern. Indeed, in such cases, the written text is rendered impotent; "to discard the text in favour of the values of the day would seem to deny the purpose of a constitution."[524] While constitutional text cannot adequately serve as the sole consideration in constitutional matters, surely some purpose must be served by the written word of the Constitution, even if only as a starting point to a broader discussion. While interpretations of written text can vary, at least the text provides a common starting point from which debates might emerge. Debates about principles, however, are more problematic in that there is less certainty about their content. A creative and persuasive advocate or judge might be able to 'find' a principle to justify just about any desired result; "the game is too easy to play. Reach too far beneath the written text of the constitution and you can justify anything".[525] With no textual anchor, there is not even a starting point from which to assess new assertions of 'principle'.

In the *Patriation* and *Secession References*, the difficulty arose because there was little or no relevant constitutional text to interpret. In the *Patriation Reference,* no text existed regarding the role of provinces in constitutional amendment. Provisions existed regarding the authority of Parliament to send resolutions requesting amendment to the United Kingdom, but no mention of provincial participation was made. Similarly, in the *Secession Reference*, no written provision

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[524] D. Dawson, "Intention and the Constitution - Whose Intent?" (1990) 6 Australian Bar Review 93 at 95.
[525] D. Usher, "Profundity Rampant: Secession and The Court, II" (September 1999) Policy Options 44 at 46.

contemplated a departure of one province from the rest of the country. The Court had at its disposal the constitutional amendment procedures stipulated in the Constitution's text, but it was questionable whether these procedures could, or should, on their own govern dissolution of the federation itself. This thesis does not deny the inadequacy of the Constitution's text in these particular cases, and should not be seen as endorsing a strict reading of the Constitution's written provisions and a prohibition against the consideration of other elements, such as conventions or unwritten constitutional principles. Indeed, this chapter suggests and discusses a role for the Court which would include consideration of precisely these other elements. What this thesis questions is the use to which these other elements are put once they are considered. In a nutshell, while consideration of unwritten constitutional principles can serve an invaluable purpose in cases for which little or no textual support exists, it is suggested here that the written text, where it exists, should serve as the principal starting point from which any discussion evolves, and should not be disregarded in favour of an unwritten principle. While the written text might be supplemented with non-textual considerations, it should retain its superiority, especially where the dictates of text and principle diverge.

Role of the Court

A number of academics have written about the role of the Supreme Court of Canada and how it should render and interpret decisions on constitutional matters in particular. While their theories differ in some aspects, some common themes can be detected throughout: (1) constitutional matters are often not conducive to 'yes/no'

answers, nor are they often anticipated by the written text of the Constitution; (2) constitutional disputes are often also political disputes, in that they involve disputes among governments, or between a government and another party; in such cases, (3) where a constitutional matter requires determination, the Court's role should be that of an 'educator', a 'process-oriented listener', rather than merely a 'teller of truth'.[526] In essence, what has been proposed in a number of academic writings is that a strictly legal determination of constitutional issues by the Court, involving little more than a literal interpretation of constitutional text, may prove to be an inadequate response to matters of constitutional significance in that it would not account for broader considerations of constitutional practice, and it would result in the provision of a seemingly simplistic response to complex questions. In these cases, the Court should play a larger role and structure its decisions in such a way as to benefit future relations between the disputing parties, and to provide a framework within which the parties may solve current, and future, constitutional disputes.

Therapeutic Jurisprudence

Nathalie Des Rosiers wrote about the *Secession Reference* and, more broadly, the application of 'therapeutic jurisprudence' to minority-majority conflicts in Canadian constitutional law, namely those involving Quebec and the rest of Canada.[527] She explained that the central idea developed by the therapeutic jurisprudence movement is that parties to a dispute should feel better, not worse, after dealing with the justice system.[528] The justice system should, therefore, be

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[526] N. Des Rosiers, "From Quebec Veto to Quebec Secession: The Evolution of the Supreme Court of Canada on Quebec-Canada Disputes" (2000) 13:2 Canadian Journal of Law and Jurisprudence 171.
[527] *Ibid.*
[528] *Ibid.* at 173.

concerned about its effects on the mental health of parties involved in disputes, should try to minimise the damage it may cause, and aspire to help, and not undermine, the parties before it.[529] Des Rosiers acknowledged that the therapeutic jurisprudence approach has been more predominantly discussed in the context of private law, criminal law, and mental health law; but she goes on to outline a model for its application to constitutional law and argue that such an approach could assist in constitutional law disputes, particularly those involving minority-majority conflicts.

Des Rosiers laid as the foundation of her model two themes drawn from the therapeutic jurisprudence approach: the role of the Court as listener, and the role of the Court as educator.[530] On the role of the Court as listener, Des Rosiers explained, "[o]ne of the basic premises of the therapeutic movement has been to refocus the role of the court from a finality to a process;...In essence, it has valued the court process not as a rule imposition ritual, but rather as a process of explaining one's position."[531] She concluded, "in order for this process of explanation to be therapeutic, it had to be listened to by the court."[532] Des Rosiers also noted that "there is, in the therapeutic movement analysis, a willingness to avoid blaming which is seen as silencing the participants. The process must acknowledge the imbalance of power in the relationship and seek to re-establish an equilibrium

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[529] *Ibid.*
[530] *Ibid.* at 174.
[531] *Ibid.*
[532] *Ibid.*

through it, but always with the view to giving a voice to the participants."[533] Next, Des Rosiers considered the role of the Court as educator. She noted that

> [t]he therapeutic jurisprudence movement has valued the idea of looking at the relationship between the parties in its 'continuous aspect' as opposed to breaking the relationships along the lines of a series of isolated court battles. Hence, the role of the court is to strengthen the healthy aspects of the relationship between the parties, and to enhance their own ability to resolve their disputes.[534]

Des Rosiers then applied these aspects of therapeutic jurisprudence to constitutional law and the resolution of minority-majority conflicts in that context. She explained that "[c]onstitutional law is particularly apt to be analysed through the prism of the therapeutic jurisprudence model because the analysis of the results is so discouraging. The rulings appear inconsistent at times, and they never truly solve the conflict between the minority/majority."[535] She concluded,

> a constitutional court should, in my view, be seen as a forum, as a place where public policy is analysed slightly differently than on the political scene. There is often no real yes/no answer to some of the problems raised in constitutional law;...What I am arguing is that it is better to recognize [the Court's] potential as a forum than to deny this possibility and continue to clothe it with only the 'teller' function.[536]

Des Rosiers argued that the roles of the Court as listener and educator are especially relevant in the constitutional law context. She explained that, "in a constitutional context, people often come to court because they have not been heard elsewhere" and that "the value of this process should not be underestimated. The parties debate issues which are of serious concern to them...The process in the courtroom also serves to foster public understanding and public discussions on the subject of the

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[533] *Ibid.* at 175.
[534] *Ibid.*
[535] *Ibid.*
[536] *Ibid.* at 175-6.

accommodation of the relationship."[537] Des Rosiers also commented on the type of decision that should be rendered by the Court in constitutional minority-majority conflicts. She opined that "language that undermines a sense of identity in the minority is damaging" and that "in the context of minority-majority relationships, it is always dangerous to declare a clear winner, particularly the majority."[538] She also warned that "to assert that the majority has won and that the problem is solved is always misleading."[539] On the role of the Court as listener in constitutional minority-majority disputes, Des Rosiers concluded that "the listening function of a tribunal is more than procedural. It requires that courts develop tests that facilitate the exchange between the parties, and truly represent their voice and interests. It also requires that courts avoid the language of clear victories, where one party comes out misrepresented, silenced or humiliated."[540] As for the Court's role as educator in these cases, Des Rosiers noted that "conflicts in constitutional law have high recurrence levels. The conflict is never 'solved' by the court battle" and therefore, it is "important to value the continuity of relationships."[541] To this end, Des Rosiers advocated a more 'process-oriented' approach by the Court in constitutional law cases. She argued, "a process-driven answer allows for the parties to continue their discussions outside of the courtroom to refine the resolution to the problem. This possibility of refining or fine-tuning the judicial pronouncement makes for a better outcome, concretely linked with all the preoccupations of the parties."[542]

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[537] *Ibid.* at 176.
[538] *Ibid.* at 176-7.
[539] *Ibid.* at 177.
[540] *Ibid.*
[541] *Ibid.*
[542] *Ibid.*

Des Rosiers' 'therapeutic jurisprudence' model for majority-minority conflicts includes some interesting suggestions regarding the role of the Court in these constitutional cases. One positive suggestion made by Des Rosiers is to refocus the role of the Court from a 'finality' to a 'process'. In complex constitutional cases, and especially in reference cases in which the parties have come to the Court for an opinion rather than a decision, looking at the Court as a process-oriented institution might prove to be helpful. In reference cases, the Court does not dictate a particular course of action; rather it advises on the questions posed to it and leaves the implementation of its opinion to the parties themselves. In fact, because reference decisions are to be 'advisory only' and not binding on the parties to the case, the parties may indeed decide not to implement the Court's opinion at all. In this sense, the involvement of the Court is very much a part of the decision-making 'process', but cannot be seen as an institution of 'finality'. Some concern arises, however, in the context of constitutional cases which have reached the Court through ordinary litigation. In these cases, the Court might be seen as the 'end of the line' in terms of process, as the parties seek a final determination of their dispute. A ruling of the Court in such cases normally decides the question once and for all. Political actors may react to the Court's decisions in constitutional cases by amending legislation or otherwise changing the facts on which such decisions were based. But, on the particular facts and legislative provisions before the Court in each case, the Court's decision is very much a 'finality' and not a 'process'.[543] But even in these cases, the Court should strive to give the parties as much flexibility as possible in

[543] The only exception to the 'finality' of such decisions might be the invocation of the *Charter*'s override clause by an elected assembly. Given the sparse use of this provision, its use now seems more theoretical than practical.

implementing the Court's decision. Constitutional cases involve disputes over the limits of permissible governmental activity. Therefore, while the Court's decisions might be 'final', they should be restricted to determining these limits of activity, and give elected representatives the flexibility to make political choices within these constitutional boundaries. When looked at in these terms, the Court's decisions in constitutional cases might well be seen as a 'process' rather than a 'finality'.

Another suggestion made by Des Rosiers gives more cause for concern. Des Rosiers believed that it was dangerous to declare a 'winner' and a 'loser' in constitutional matters, especially those involving majority-minority conflicts. One has to query how this can be helped. While the Court can strive to recognise the views of both parties, it should not refrain from recognising the legal validity or strength of one argument over another merely because doing so might involve 'taking sides'. For instance, should the constitutional text support the 'majority' view over that proposed by the 'minority', surely the Court has a responsibility to declare that the majority view is more strongly supported by the Constitution's written provisions. While the language of decisions may be softened to provide recognition and support for alternative arguments, it may sometimes be the case that one party is indeed the 'winner' in that its argument is most in line with the dictates of the Constitution. In such cases, it is incumbent upon the Court to recognise this fact, even if it means declaring a 'winner' by giving preference to one party's position over the other.

Open-textured Minimalism

Paul Horwitz has advocated an 'open-textured minimalism' approach to judicial opinion writing.[544] Horwitz explained that "[e]ssentially, this approach urges courts to answer constitutional questions narrowly, while opening avenues for future discussion of the values implicated in a given case."[545] He also noted that "just as constitutions must be written so as to allow them to survive and flourish over time, so too must judicial opinions leave some room for the creative development of constitutional doctrine over time."[546]

Horwitz began his argument with a discussion of the functions of judicial opinions. He noted that opinions serve a number of different functions and affect different audiences in various ways. For instance, for the parties involved in the case, the first function of a judicial opinion is to decide the issue in dispute and to justify the court's decision in the case.[547] For the general public, judicial opinions seek "to guarantee a measure of consistency, stability, and predictability in the legal system. It does so both to satisfy the litigants, and to ensure a measure of public confidence in the integrity of the legal system."[548] Horwitz noted that another important function of judicial opinions is persuasion: "it has often been noted that one of the opinion's chief purposes is to convince readers that the result and the reasons used to get there are just and fair."[549] Finally, Horwitz noted that judicial opinions also serve a guidance function: "through their opinions, courts – especially

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[544] P. Horwitz, "Law's Expression: The Promise and Perils of Judicial Opinion Writing in Canadian Constitutional Law" (2000) 38:1 Osgoode Hall Law Journal 101 at 105.
[545] *Ibid.*
[546] *Ibid.*
[547] *Ibid.* at 106-7.
[548] *Ibid.* at 107.
[549] *Ibid.*

appellate courts – help inform and supervise the other players in this system. For high courts such as the Supreme Court, the guidance function may be primary, while the dispute-resolution function is secondary."[550]

Horwitz then added two less invoked functions of judicial opinions, those of the democratic and inter-generational functions. He argued that

> in a deliberative democracy which values widespread societal dialogue, judges can encourage a dialogue between citizens about constitutional matters. Their position makes them particularly well-suited to contribute to any public dialogue on constitutional values...the democratic function of judicial opinions also recognizes the important role courts play as educators about our constitutional values.[551]

As for the inter-generational function, Horwitz argued that this stemmed from the long-term nature of constitutions;

> It recognizes that the breadth and vagueness of constitutions, the difficulty of enacting or amending them, and the temporally extended nature of the affairs they govern makes it foolish to think of constitutions' legitimacy only in terms of the consent of the present generation to be bound by them. Instead, it recognizes that constitutions commit us to certain fundamental values over an extended period of time, while accepting that our understanding of a constitution and its underlying values may change over time. Though [constitutional documents]...precommit us to certain general governing values,...they are not the end, but the beginning of a temporally extended effort to understand what these values mean and how they should govern us.[552]

Horwitz concluded that "judicial opinions dealing with questions of constitutional law must therefore, in a sense, speak across generations. They must attempt to speak meaningfully to future generations of readers who will be bound by the same

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[550] *Ibid.* at 108.
[551] *Ibid.* at 109.
[552] *Ibid.* at 110.

constitutional text, while leaving some room for evolving interpretation of that text."[553]

After discussing these functions of judicial opinions, particularly in the area of constitutional law, Horwitz suggested an approach to opinion writing that he called 'open-textured minimalism'. Horwitz explained that open-textured minimalism "respects the primary function of the judicial process: to decide cases" but that

> open-textured minimalist judges are also aware of their own limitations, of the presence of substantial and reasonable disagreement regarding the values underpinning the Charter [and, one could assume, other aspects of the constitution], and the potential cost of errors if they seek to resolve a complicated issue definitively.[554]

In order to achieve open-textured minimalism, and invite 'a full and open conversation' about constitutional values, Horwitz offered the following advice:

> Judges should discuss fundamental principles and values, but avoid enshrining these principles in broad and binding rules of conduct. Instead, they should use dicta to float ideas about the legal principles involved, inviting debate over these ideas without attempting to resolve all of their implications. In addition, judges should seek to employ memorable but open-textured language in discussing constitutional principles, offering phrases whose meaning may be filled in, debated, and revised over time.[555]

Horwitz concluded, "the open-textured minimalist recognizes that there is some wisdom in not laying down too much law at once, and an equal measure of wisdom in encouraging future conversations about constitutional and Charter values."[556]

Horwitz's 'open-textured minimalist' theory makes a number of positive suggestions regarding the role of the Court. Horwitz suggests that the Court should

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[553] *Ibid.* at 110-1.
[554] *Ibid.* at 121-2.
[555] *Ibid.* at 123.
[556] *Ibid.* at 125.

'answer constitutional questions narrowly' while 'opening avenues for future discussion'. This is probably a more realistic approach than Des Rosiers' 'no winner/no loser' approach. Horwitz recognises that there may indeed be a 'more correct' answer in a particular case and allows for such a determination to be made by the Court. Horwitz merely cautions that this determination should be limited so as to allow the parties in each case as much flexibility as possible in filling out the political details. In order to prevent the stark 'winner/loser' scenario that Des Rosiers' found distasteful, Horwitz suggests that the Court could discuss constitutional principles to give context to its decision, and to promote further discussion of the issues among the parties, outside of the courtroom. In these discussions, the Court could find support for 'minority' views, or for the alternative arguments presented to the Court, and would therefore achieve recognition of the validity of competing arguments without sacrificing the ultimate determination of the case.

Horwitz also suggests that, while constitutional principles should be discussed, the Court should refrain from enshrining them in binding rules of conduct. Here, Horwitz seems to recognise the important distinction between constitutional law and constitutional legitimacy. While it might be beneficial to discuss constitutional principles, as they provide context for legal determinations, it is dangerous to use such discussions to create and enforce new rules of conduct. If these new rules are represented as legal requirements of the Constitution, the distinction between law and legitimacy is blurred, and concerns arise regarding judicial additions to the Constitution. By encouraging their discussion, but warning

against finding such principles to be binding rules of conduct, Horwitz maintains the distinction between constitutional law and the broader considerations of constitutional legitimacy.

Structural Argumentation

Robin Elliot has outlined a form of argumentation found in a number of significant constitutional reference cases.[557] Elliot called it 'structural argumentation' and explained that such argumentation "proceeds by way of the drawing of implications from the structures of government created by our Constitution, and the application of the principles generated by those implications – which can be termed foundational or organizing principles of the Constitution – to the particular constitutional issue at hand."[558] Upon a review of Privy Council and Supreme Court of Canada cases, Elliot found that structural argumentation was used more often in reference cases than in cases reaching the courts through ordinary litigation.[559] Elliot offered two possible explanations for this finding. One was that the issues posed in reference cases were likely to require the Court to think more broadly about the Constitution, and when courts thought more broadly about the Constitution, they were more inclined to think in terms of underlying constitutional principles.[560] The second explanation offered by Elliot was that

> many of the questions referred to the courts are referred precisely because there is nothing in the text of the Constitution that speaks directly to them. They are questions, in other words, on which the drafters of the constitution

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[557] R. Elliot, "References, Structural Argumentation and the Organizing Principles of Canada's Constitution" (2001) 80 Canadian Bar Review 67.
[558] *Ibid.* at 68.
[559] *Ibid.* at 69.
[560] *Ibid.* at 139.

> provided no clear textual guidance, no doubt because, in most instances, they were questions that the drafters did not anticipate might ever arise.[561]

Elliot concluded that, in such cases, "the absence of any clear guidance in the text of the Constitution in respect of the questions posed...means, of course, that the court is compelled to look elsewhere – including the principles underlying the Constitution that are the product of structural argumentation – for answers."[562]

Elliot's observation that consideration of unwritten constitutional principles is more prevalent in reference cases might suggest that future consideration of such principles should be limited to similar cases. Cases for which guidance exists in the constitutional text should be determined on this textual basis; it seems more difficult to justify resort to unwritten principles when the written text sufficiently addresses the question before the Court. However, in reference cases, the Court is being asked for an advisory opinion, and this is likely because no 'clear' guidance can be found in the text alone. As Elliot noted, in such cases the Court is 'compelled' to look elsewhere. Elliot's observations might provide support for the proposition that perhaps future consideration of unwritten principles should be limited to those specific instances in which textual guidance is insufficient or non-existent.

Extra-ordinary Interpretation

Like Elliot's structural argumentation, Sujit Choudhry and Robert Howse have similarly discussed specific instances in which the consideration of unwritten constitutional principles would be appropriate.[563] For instance, while Choudhry and Howse recognised that ordinary interpretation involves interpretation of

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[561] *Ibid.* at 140.
[562] *Ibid.*
[563] S. Choudhry & R. Howse, "Constitutional Theory and The Quebec Secession Reference" (2000) 13:2 Canadian Journal of Law and Jurisprudence 143.

constitutional texts, they noted that "at exceptional moments, a court may engage in extra-ordinary interpretation, in which the text assumes secondary importance. Here, the Constitution is comprehended as a scheme of principle organized around unwritten norms that explain, and are implemented by, the constitutional text."[564] Choudhry and Howse called this the 'dualist interpretation', and explained that "instead of imagining the Constitution as bounded or as containing gaps, that must be added to by constitutional amendment, dualist interpretation views the Constitution as a dynamic entity that aspires to exhaustiveness."[565] The writers then also noted, as did Elliot, that written constitutional provisions might not adequately dispose of issues coming before the courts for determination. They argued that,

> in one narrow sense, the written Constitution does 'run out' because the textual provisions may not address a particular scenario. But in a more fundamental sense, it does not, because the internal logic of the constitutional document is capable of governing those situations. The extension of the internal logic of the Constitution occurs either through formal amendment or extra-ordinary interpretation.[566]

Choudhry and Howse also discussed what they called 'interpretive responsibility'; that is, a consideration of which institutions should have responsibility for interpreting the constitutional rules surrounding an issue before the Court. This matter is particularly important in cases which contain a political element and which, as a result, raise concerns regarding the Court's role in determining non-judicial issues. One model espoused by the authors is the 'joint constitutional responsibility' model. Choudhry and Howse explained that

> judicial decisions only demarcate the limits of its judicial enforcement, and reflect the practical limitations on the ability of courts to translate abstract

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[564] *Ibid.* at 156-7.
[565] *Ibid.* at 157.
[566] *Ibid.*

> constitutional ideals into judicially enforceable standards. Beyond the boundaries of judicial competence, then, it is for the political organs of the Constitution to frame their own interpretations of those norms and assess their own compliance with them.[567]

The joint constitutional responsibility model ensures an important role for political institutions in constitutional interpretation; "by denying democratic institutions any role in constitutional interpretation, those institutions may fail to examine constitutional considerations at all in the legislative process."[568] In fact, Choudhry and Howse noted that some judicial decisions might actually promote democracy;

> the Court may further a conception of deliberative democracy by deciding in such a way as to require democratic deliberation, or to improve its quality....By specifying some general rules or norms that can constitute legitimate common ground on which deliberation might occur, but by refusing to decide in such a way as to foreclose the possible outcomes of deliberation, the Court promotes democracy.[569]

One notable concern arises from the theory of 'extra-ordinary interpretation' as explained by Choudhry and Howse. They note that, in some 'exceptional' cases, extra-ordinary interpretation allows constitutional text to assume secondary importance; and in such cases, it would be the unwritten 'norms' which would take primary importance, while constitutional text would be seen merely as implementing these norms. This proposition is difficult to justify. As the 'supreme law' of the nation, the written text of the Constitution should not be seen as playing second fiddle to a series of unwritten principles in any instance. As was noted by Jeffrey Goldsworthy, if the written provisions of the Constitution are to be seen merely as 'inadequate expressions of more general principles', and can be 'exceeded whenever

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[567] *Ibid.* at 160.
[568] *Ibid.* at 161.
[569] *Ibid.* at 162-3.

the judges deem them unable to fulfill their underlying principles', then why bother with written constitutional text at all?[570]

Choudhry and Howse then suggested that, while written text might 'run out' in the sense that they might not address a particular situation, the internal logic of the Constitution can govern in those situations. This is a more reasonable position in that the written text of the Constitution will prevail when it addresses the matter at hand and, if not, unwritten principles might prove useful.

Suggested Role of 'Constitutional Advisor'

The theories just discussed identify a number of suggested roles for courts in constitutional cases. These theories also noted some instances in which a court may be justified in considering principles beyond those contemplated in the text of constitutional documents. From the above discussion, a number of common elements emerge. First, in the area of constitutional law, there are no easy answers. Questions posed to the Court are often vague, and their resolution not readily ascertainable. Second, those questions of fundamental importance are likely reaching higher level courts, like the Supreme Court of Canada, precisely because no 'easy' answer exists in the written text of the Constitution. It is when the constitutional text no longer adequately provides for a resolution to a dispute that the parties look to the Court for its determination of, and opinion on, the issues in question. Third, the role of the Court when deciding constitutional cases, particularly those involving novel issues and issues not contemplated by any written constitutional text, should be that of an 'educator' or 'facilitator' by ensuring that

[570] Goldsworthy, *supra* note 473 at 63.

each party is heard and understood by the others, and by providing the parties with guidance on the constitutional principles relating to their dispute, and how to resolve their dispute in accordance with such principles. While there are some concerns about the implementation of the above theories, their basic propositions seem to support the suggestion that there may be a broader role for the Court to fulfill, a role that might justify resort to the type of 'big principles' decision-making evidenced by the Supreme Court of Canada's decisions in the *Patriation* and *Secession References*.

Role of 'Constitutional Advisor'

A combination of these theories might result in a revised role for the Court in constitutional cases that will be referred to for the remainder of this discussion as 'constitutional advisor'. The role of constitutional advisor would involve functions beyond the determination of matters of constitutional law; the constitutional advisor would also acknowledge those constitutional considerations beyond 'law' – those practices, principles and conventions which are not enforceable by courts, but which provide guidance on matters of constitutional legitimacy. The constitutional advisor would be responsible for educating the parties to a constitutional dispute on considerations which impact on the matter at hand, facilitating discussion and inviting debate about the requirements of constitutional law and legitimacy, providing guidance on how best to resolve constitutional disputes in those cases for which little or no assistance is provided in the Constitution's written text. The Court would fulfill this role as it writes and renders its judgments. Only when a matter of constitutional interest found its way to the Court would the Court then be in a

position to render not only its legal judgment, but also its guidance on the broader constitutional significance of the matter at hand.

The role of constitutional advisor is, admittedly, not vastly different from the role the Court already fulfills in constitutional cases. However, the role outlined in this thesis adds a number of important limitations on the use of constitutional principles. In this sense, the constitutional advisor role proposed here would indeed involve a change in the way the Court currently deals with constitutional cases. First, under the revised advisor role, in no circumstance would unwritten constitutional considerations take precedence over written constitutional text. The Court must maintain its primary function of adjudicator of legal disputes, and must continue to interpret and apply constitutional provisions when and where they address the matter before the Court. The role of constitutional advisor merely involves the consideration of unwritten principles in *addition* to the constitutional text, in order to provide guidance on not merely who has what legal power, but how exercise of that power has come to be accepted by parties to the dispute. While the provision of advice on such matters of constitutional legitimacy is useful, they should serve only to enhance, not replace, the Constitution's written text. In order to make this clear, the Court should state clearly the distinction between its opinion on the law of the Constitution (i.e., that part of its opinion that would be binding and enforceable) and its guidance on matters of constitutional legitimacy (i.e., which would be for advisory purposes only). This limit on the role of constitutional advisor would ease concerns regarding the irrelevancy of the written text, or the adherence to unwritten principles in the face of contradictory written provisions.

Second, the Court should consider limiting its exercise of this 'constitutional advisor' function to those cases in which consideration of the written constitutional text alone might inadequately address the matter before the Court. An example of such 'inadequacy' can be found in both the *Patriation* and *Secession References*. In each case, the arguments proposed by the federal government were found by the Court to better represent the law of the Constitution; that is, unilateral amendment was 'legal', and unilateral secession was 'illegal', under constitutional law. Therefore, in each case, the Court could merely have found in favour of the federal government, provided the appropriate 'answer', and left it at that. However, such a simplistic disposition would have severely underestimated the significance of the matters before the Court, and the impact that these two decisions would have on constitutional relations in the future. In these cases, while the 'legal' answer was discernible without reference to unwritten principles, it would have been misleading to imply that the answer was simple. Neither secession of a province, nor the patriation of the Constitution, were explicitly addressed in the Constitution's written text. Therefore, while the Court adapted the written text to apply to the novel issues before it, discussion of the unwritten principles relevant in each case provided the broader context needed to fully understand how the Constitution might govern political behaviour in these instances. Where the written text was not intended to deal with a particular, peculiar situation, disposition of the matter on the basis of that written text alone would make the matter appear deceptively simple.

One criticism of the suggested role of constitutional advisor, and indeed of the Court's use of unwritten principles in general, is the wide discretion it would give

to judges to 'create' principles when and where they deemed necessary or desirable. The concern is that there is an element of dishonesty in giving the opinions of judges on non-legal matters some sort of constitutional status. How will we be able to tell the difference between the discussion of a true constitutional 'principle' and the creative manipulation of constitutional history by judges intent on reaching a particular outcome? To a certain extent, there is no absolute protection from an unwarranted exercise of judicial discretion. Judges are constantly asked to use their discretion in discerning facts, applying sentences, and interpreting legislative provisions. Given the vague nature of the Constitution's written provisions, the Court has always had ample discretion to interpret the meaning and extent of constitutional rights and limitations. The discretion bestowed upon judges to reflect on unwritten constitutional considerations is therefore not unique. As well, the role of constitutional advisor suggested here contains safeguards against the use of judicial discretion to 'amend' the Constitution. As explained above, the Court would be required to maintain the supremacy of written constitutional provisions, and could provide guidance on matters of constitutional convention or on past constitutional practice in an advisory capacity only. As in all judicial opinions, the Court would be expected to explain how it reached various conclusions. Those reading the Court's opinions could therefore decide for themselves whether the Court had accurately reflected constitutional practice or convention. At worst, the Court's opinion would be a contrived attempt to influence a political outcome, not binding on the parties to which it is directed. At best, it would be a thoughtful review of constitutional

practice, providing parties with guidance on how political conduct might best adhere to constitutional expectations.

In short, the revised role of constitutional advisor is just that - a revision of the current role, not the creation of an entirely new role for the Court. The Court would continue to hear constitutional cases coming before it either through ordinary litigation, or through the Court's reference procedure. In those novel cases, not explicitly addressed in the Constitution's written text, for which a simple 'legal' answer might be misleading, the Court could opt to provide guidance also on unwritten considerations which might impact on the political disposition of a constitutional matter. In all cases, the Court should clearly indicate that the written provisions of the Constitution take precedence over the unwritten dictates of constitutional legitimacy.

Before going much further, two questions should be asked regarding the role of the Court suggested above. First, is 'constitutional advisor' a role that should be, or needs to be, fulfilled in Canada? Second, if this role needs to be performed, why is the Supreme Court of Canada the most appropriate institution to do this?

i) Is performance of the role of 'constitutional advisor' necessary?

The first matter to be determined is whether performance of the role of 'constitutional advisor' as described above would be useful or necessary in Canada's constitutional democracy. It would seem difficult to argue that the provision of guidance on the functioning of Canada's Constitution would not be useful. For parties involved in a constitutional dispute, and indeed all Canadian citizens, a discussion of, or 'lesson' on, the requirements of the Constitution would surely be a

beneficial exercise. This, however, is different than declaring that the exercise is necessary. Do the citizens of Canada *need* an institution to perform the role of advisor on the Constitution? What necessary purpose could this role fulfill? It is argued here that the role of advisor is necessary in the area of constitutional disputes for two reasons: i) the nature of constitutional law in general, and ii) the unique nature of Canada's Constitution.

The nature of constitutional law in general is unlike other areas of law because its provisions are purposely vague, in order to provide continued relevance for an indefinite period of time. Indeed, while constitutional provisions are obligatory, there may be more than one way of complying with such obligations. In addition, constitutional law is also unique because it serves as a 'rulebook' of sorts for political activity. Therefore, judges must ensure that they don't cross the fine line between enunciating constitutional requirements and dictating political behaviour. What the parties involved in a dispute require, in constitutional cases, is guidance on where the limits of permissible activity lie. These limits may not always be obvious or easily discernible. Instead of providing an answer to the dispute, the constitutional advisor would provide the parties with a better understating of how the Constitution affects the matter at hand. This not only assists the parties in the resolution of their own dispute, but also provides guidance for similar disputes in the future, or for different disputes between the same parties. This guidance could include not only an interpretation of the relevant constitutional provisions, but also an education about the origin of those provisions and how they interrelate with other parts of the Constitution. This is especially important with

respect to the Constitution, as noted earlier, because of its enduring nature and the necessity of its continued relevance to unanticipated disputes in the future. As well, by providing guidance on constitutional considerations instead of providing 'answers', the constitutional advisor also respects the role of political actors to decide which course of action to follow within the options permissible by constitutional standards.

Perhaps the strongest argument in favour of the role of constitutional advisor stems from Canada's unique constitutional structure. With the addition of conventions, and other non-legal elements, to written constitutional provisions, Canada's Constitution involves elements of both law and legitimacy, and in some instances, these elements do not necessarily overlap. A particular constitutional behaviour will likely not be legitimate without also being in accordance with the strict law of the Constitution. Legality, in most instances, is a necessary condition of legitimacy. However, the opposite is not always true. That is, some activities may be constitutionally legal without being constitutionally legitimate. Take this example provided by Peter Hogg:

> The Constitution Act, 1867 makes the Queen, or Governor General, an essential party to all federal legislation (s.17), and it expressly confers upon the Queen and the Governor General the power to withhold the royal assent from a bill that has been enacted by the two Houses of Parliament (s.55), but a convention stipulates that the royal assent shall never be withheld....If the Governor General withheld his assent to a bill enacted by both Houses of Parliament, the courts would deny the force of law to the bill, and they would not issue an injunction or other legal remedy to force the Governor General to give his assent.[571]

Hogg pointed out that, if a legal rule of the Constitution is disobeyed, a remedy is available in the courts. However, if some governmental action were to breach a

[571] Hogg, *supra* note 16 at 19.

convention, no legal remedy is available as no breach of the law has occurred.[572] In the above example, the refusal of the Governor General to give royal assent to a bill remains constitutionally legal even though it is in breach of a convention and may therefore be considered constitutionally illegitimate.

The sometimes divergent elements of law and legitimacy in Canada's constitutional structure provide substantial support for the suggested role of constitutional advisor. While not enforceable in a court of law, elements of constitutional legitimacy play an important role in the functioning of the Constitution and should be seriously considered in the context of a constitutional dispute. As well, while disputes in areas of law may be sufficiently resolved with the provision of an 'answer', disputes on constitutional legitimacy may have no 'answer' and will therefore require for their ultimate resolution a discussion and guidance on the constitutional limits of activity, and on which course of action might best adhere to dictates of both law and legitimacy. This is where the role of constitutional advisor would come into play. While the proper, or legitimate, course of conduct could not be mandated or legally enforced by the Court, the relevant constitutional principles, conventions and other considerations could be canvassed and interpreted in a manner that would give guidance on how best to resolve a constitutional dispute, and how other disputes might be handled in the future.

A contrary argument might be that there is no need for 'guidance' on matters beyond constitutional law. What parties to constitutional disputes require is a legal determination of the issue at hand; an interpretation of the relevant constitutional provisions. Proponents of this argument might query why constitutional legitimacy

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[572] *Ibid.*

is important. Should it not be sufficient for parties to a constitutional dispute to receive a determination of legal questions from a court of law? Why is guidance on elements of constitutional legitimacy beneficial, especially when they have no bearing on the legality of particular actions? The answer to this question stems from the unique nature of Canada's Constitution. While written constitutional provisions dictate the legal powers available to governments, unwritten rules of practice – perhaps the best example being constitutional conventions – have developed over time to modify how such legal power is exercised in reality. In the example above regarding the Governor General's withholding of royal assent, the written provisions of the Constitution dictate that the Governor General retains the legal power to withhold assent. However, a convention has developed regarding the exercise of that power, the convention being that royal assent will not be withheld from a bill passed by Parliament. The exercise of the legal power in accordance with constitutional convention, while not legally necessary, is in accordance with political realities. A Governor General may indeed withhold royal assent in the future, but the likelihood of such an occurrence is slim. Therefore, the legal provisions of the Constitution do not necessarily reflect the political realities of the exercise of constitutional powers. This is why guidance on constitutional conventions, and other elements of constitutional legitimacy, is important; elements of constitutional legitimacy may often more accurately reflect reality than strict legal provisions that have fallen into disuse. In this sense, a legal determination of a constitutional issue, while technically accurate, might not be of much utility to parties who must function within political realities. An opinion on matters of constitutional legitimacy,

however, would better equip parties to handle constitutional disputes in light of the realties of the exercise of constitutionally legal powers. This, it is argued, is much more useful to parties who must perform constitutional duties, and resolve constitutional disputes, in the 'real' world.

In summary, given the unique qualities of constitutional adjudication, namely the interpretation of vague provisions, the requirement that constitutional jurisprudence maintain relevance to new and uncontemplated disputes, and the sometimes divergent elements of 'legality' and 'legitimacy' in Canada's constitutional structure, the role of constitutional advisor is not only useful but indeed necessary in order to provide some assurance of the legitimacy of governmental activity. Government actors require guidance on when and where their activities may exceed constitutional limits and on how to resolve constitutional disputes without jeopardizing constitutional legitimacy.

ii) Is the Supreme Court of Canada the institution best suited to perform the role of constitutional advisor?

Even if it is accepted that the role of constitutional advisor is one that needs to be fulfilled, it must still be queried whether the Supreme Court of Canada is the appropriate institution to perform this function. What characteristics does the Court possess that make it the institution best suited to perform this role?

First, the Supreme Court of Canada is an independent institution; that is, its judges are non-elected and are therefore protected, to a certain extent, from political reprisal for their decisions. Why is this factor significant? Compare the Supreme Court of Canada to the federal House of Commons in this respect. Some might argue that an elected institution would be a more appropriate constitutional advisor

because its decisions might better represent the interests and preferences of a majority of Canadians. However, elected representatives must, ultimately, compete for their jobs on a regular basis. Therefore, political popularity may indeed be a significant, if not the ultimate, influence on their decisions. This would result in two negative consequences if the House of Commons were the institution entrusted with the role of constitutional advisor. First, politicians might interpret constitutional principles in the manner most conducive to their own ends, and this may not always be most desirable, or accurate, in terms of constitutional legitimacy. For instance, many constitutional provisions have been entrenched in order to protect the interests of minorities against the will of a simple majority. If an elected institution were to be responsible for the provision of guidance on the exercise of such constitutional provisions, a simple majority might be sufficient to hinder the fulfillment of minority rights. This would defeat the very purpose of constitutionally entrenched rights. Second, elected officials might also use the role of constitutional advisor to influence or further particular political interests. Surely, it is not in the best interest of Canadians to have the dictates of constitutional legitimacy interpreted differently with every change in government. At best, this is distasteful, as our nation's Constitution, and those unwritten principles which guide its exercise, should be, and be perceived to be, beyond partisan manipulation. The political independence of the Supreme Court of Canada would protect against this possibility if the Court fulfilled the role of constitutional advisor. The Court is not subject to the whim of political popularity, and ensures a consistency in its decisions that is not likely to be paralleled by an elected institution.

A second reason why the Supreme Court of Canada is best suited to fulfill the role of constitutional advisor is that this role can be seen as an expansion of the role the Court already plays as final arbiter of disputes regarding constitutional law. The Court's enabling statute, the *Supreme Court Act*, indicates that the Court is to function as "a general court of appeal for Canada, and as an additional court for the better administration of the laws of Canada"[573], and that the Court has exclusive ultimate appellate jurisdiction and its decisions in all cases are final and conclusive.[574] As for constitutional matters in particular, the *Canadian Charter of Rights and Freedoms* indicates that "[a]nyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances."[575] In fact, long before the *Charter* was included in Canada's Constitution, the Supreme Court of Canada provided determinations on the constitutionality of federal and provincial legislation; that is, whether such legislation was appropriately aimed at matters within the particular government's jurisdiction under either Section 91 or 92 of the *Constitution Act, 1867*. In *Language Rights*, the Court itself noted that it was the judiciary's duty to uphold the Constitution, and rejected the suggestion that someone other than the Court could perform the role of guarantor of the Constitution.[576]

The Supreme Court of Canada also considers constitutional matters pursuant to Section 53 of the *Supreme Court Act*, which indicates that the Court has

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[573] *Supreme Court Act*, R.S.C. 1985, c. S-26 at section 3.
[574] *Ibid.* at section 52.
[575] *Charter, supra* note 403 at section 24(1).
[576] *Language Reference, supra* note 308 at 753-4.

jurisdiction to hear references on questions concerning the interpretation of the *Constitution Acts*, the constitutionality or interpretation of any federal or provincial legislation, and the exercise of powers of Parliament or the legislatures.[577] The reference procedure provides a mechanism through which the federal government can pose questions to the Supreme Court of Canada for an advisory opinion. This reference jurisdiction of the Court is similar to the role the Court would perform as constitutional advisor in at least two respects. First, judgments of the Court pursuant to its reference jurisdiction are not binding legal decisions. This was reiterated by both the Supreme Court of Canada and the Judicial Committee of the Privy Council in *Reference Re References by the Governor General in Council*.[578] Justice Davies' concurring opinion noted that opinions provided by the Court in reference cases "are simply to aid the Governor in Council in reaching conclusions for which they must be held entirely responsible. The answers do not bind the Governor in Council. He may act in accordance with them or not, as he pleases....They are advisory only."[579] Second, in giving advisory opinions, the Court has acknowledged the benefit of considering principles beyond the Constitution's written text, noting that "a constitutional reference is not a barren exercise in statutory interpretation. What is involved is an attempt to determine and give effect to the broad objectives and purpose of the Constitution...".[580] On the benefit of having the Supreme Court of Canada perform its advisory function through the reference procedure, it has been

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[577] *Supreme Court Act, supra* note 573 at section 53(1)(a), (b) and (d).
[578] [1910] S.C.R. 536; aff'd [1912] 2 A.C. 89 (P.C.).
[579] *Ibid.* (S.C.C.) at 561; similar comments in Privy Council decision, *ibid.* (P.C.) at 115.
[580] *Reference Re Residential Tenancies Act* [1981] 1 S.C.R. 714 at 723.

noted that "on questions of constitutionality, there can be no better legal advisor than the court ultimately responsible for interpreting the Constitution."[581]

The above indicates that the Supreme Court of Canada has, for some time, enjoyed jurisdiction over the determination of constitutional disputes and the provision of advisory opinions on constitutional matters. This is a compelling reason why the Court is the institution best suited to perform the role of constitutional advisor;

> judges are, after all, charged with the functions of declaring and clarifying those [fundamental constitutional] values every time they engage in judicial review. That institutional role makes them uniquely qualified to catalyze debate about constitutional values, and provide important contributions to that debate, even if the debate is ultimately resolved by democratic deliberation and not by judicial fiat.[582]

For decades, the Court has interpreted the Constitution's provisions and has participated in the resolution of disputes between different levels of government regarding the proper use of legislative power. In doing so, the Court has surely obtained a level of knowledge and understanding about the functioning of Canada's Constitution that is quite probably unparalleled. As well, Canadian citizens have grown accustomed to looking to the Court for pronouncements on constitutional matters. Therefore, it would seem only natural that, if the role of constitutional advisor must be fulfilled, the role is best fulfilled by the Supreme Court of Canada.

One possible drawback from having a court of law perform the role of constitutional advisor is that it will give opinions on non-legal matters the appearance of legal decisions. How is the public to differentiate between non-

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[581] J. Huffman & M. Saathoff, "Advisory Opinions and Canadian Constitutional Development: The Supreme Court's Reference Jurisdiction" (1990) 74 Minnesota Law Review 1251 at 1316.
[582] Horwitz, *supra* note 544 at 127.

enforceable opinions on matters of legitimacy and legally binding decisions on matters of constitutional law? Isn't it misleading to have a legal institution pass off its opinions as advisory only? This is a reasonable concern. Having the Supreme Court of Canada render opinions on the constitutional appropriateness of political behaviour might lead some to believe that these opinions are really legal rulings on the constitutional validity of such behaviour. In fact, while the Court has been providing governments with advisory opinions pursuant to its reference procedure for some time, there is little doubt that its decisions in reference cases are taken as seriously as its decisions in ordinary cases, and it is arguably true that governments view compliance with the Court's rulings in reference cases as obligatory. Should the Court perform the role of constitutional advisor, it might avoid confusion regarding the nature of its opinions if it makes the distinction between 'legal rulings' and 'constitutional advice' clear in the judgments themselves. This could involve a separation within the judgment itself between decisions on 'law' and opinions on other matters, much like the way the *Patriation Reference* decision was separated into judgments on law and convention.

Aside from the Court's independence and its intimate knowledge of the Constitution, a third factor in favour of the Court's fulfillment of the role of constitutional advisor is the level of public confidence in the Supreme Court of Canada as an institution. A study by Joseph Fletcher and Paul Howe, which reported the results of a public opinion poll conducted in March 1999, indicated substantial public approval for the Court as an institution, and for the role of the

courts as final arbiter of constitutional disputes.[583] Regarding the final arbiter of constitutional issues, respondents to the poll were asked "when the legislature passes a law but the courts say it is unconstitutional...who should have the final say, the legislature or the courts?"[584] Nearly 62% of respondents said that the courts should have the final say on the constitutionality of statutes, a number that has remained steady since an earlier poll posed the identical question in 1987.[585] Approximately two-thirds of Canadians would prefer to have constitutional questions resolved by the courts instead of an elected institution. Fletcher and Howe also noted that preference for courts over legislatures was seen right across the country; a majority of respondents in each of five regions (Atlantic, Quebec, Ontario, Prairies and B.C.) preferred the courts as the final arbiter of constitutional issues as opposed to legislatures.[586] Fletcher and Howe also noted that support for the Supreme Court of Canada in particular was also positive. When respondents were asked how satisfied they were with the way the Court had been working, over 76% of those polled responded that they were somewhat or very satisfied with the job the Court had been doing.[587] Respondents were then asked whether "the Supreme Court can usually be trusted to make decisions that are right for the country as a whole."[588] On this question, 73% of respondents answered affirmatively.[589] Fletcher and Howe later indicated that the courts in general still found support with respondents who did not necessarily agree with some of the Supreme Court of Canada's more controversial

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[583] J. Fletcher & P. Howe, "Public Opinion and the Courts" (2000) 6:3 Choices 1.
[584] *Ibid.* at 11.
[585] *Ibid.*
[586] *Ibid.* at 13.
[587] *Ibid.* at 16.
[588] *Ibid.* at 15.
[589] *Ibid.* at 18.

decisions.[590] It was concluded that, "[e]ven consistent opponents of Supreme Court rulings are modestly favourable in their assessments of Canada's judicial institutions, while those more positive about the Court's recent work are stalwart supporters."[591]

Public confidence in the courts in general, and the Supreme Court of Canada in particular, supports the proposition that the Court is best suited to fulfill the role of constitutional advisor. As noted earlier, the Court already functions as final arbiter of legal disputes, including matters of constitutional law. But the role of constitutional advisor would involve the provision of guidance on matters beyond constitutional law to matters of constitutional legitimacy. It would seem nonsensical to seek guidance on matters of legitimacy from an institution that lacked legitimacy with the Canadian public. In this sense, the public's notable support of the functioning of the Supreme Court of Canada, and its preference, in some instances, for the Court over elected institutions, makes the Court the most logical candidate to fulfill the role of constitutional advisor. Should public confidence in the Court ever shift so as to indicate a lack of support for the Court's pronouncements, elected officials might see a greater demand to ignore the Court's guidance on matters of legitimacy, or even to resort to enacting override provisions to insulate political action from judicial review. Because the Court's guidance on constitutional legitimacy would not be binding, parties would have the option to ignore the Court's opinion on these matters without legal reprisal. Should negative public opinion

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[590] The poll asked a series of questions regarding three more controversial decisions of the Supreme Court of Canada, namely *R.* v. *Feeney* [1997] 2 S.C.R. 13, which dealt with freedom from unreasonable search and seizure, *Vriend* v. *Alberta, supra* note 515, which dealt with equality rights for homosexuals, and the *Secession Reference, supra* note 6.

[591] Fletcher & Howe, *supra* note 583 at 52.

about the Court's role or guidance in constitutional matters persist, it could signal a willingness on the part of Canadians to break from traditional constitutional relations, and support for constitutional reform, in which case it would be within the power of elected officials to gather the support required to implement such changes. Until that time, however, it appears as though Canadians are presently content to have the Court determine matters of constitutional significance.

The Supreme Court of Canada's Role as 'Constitutional Advisor' in the *Patriation* and *Secession References*

The Supreme Court of Canada's decisions in the *Patriation* and *Secession References* might serve as two examples of how the Court might fulfill the revised role of constitutional advisor. In each case, the Court confronted questions aimed at the very heart of Canada's constitutional structure. The Court was not asked merely to interpret a particular provision, or to 'fill in gaps' where the written provisions contained an anomaly. In these cases, the Court was asked to explain the very nature of the Constitution itself. In the *Secession Reference*, the Court noted that "this reference requires us to consider momentous questions that go to the heart of our system of constitutional government"[592] and that the questions posed to the Court "raise issues of fundamental public importance."[593] Similar statements equally applied to the issues under consideration in the *Patriation Reference*;

> [i]n grappling with this controversy, the Court was confronted with a fascinating array of basic issues in constitutional doctrine: the relationship between law and convention, the nature of Canadian federalism, and the

[592] *Secession Reference, supra* note 6 at 227.
[593] *Ibid.* at 239.

> proper role of the courts in the political life of the nation. Seldom has a single case raised such an imposing set of theoretical issues.[594]

Together, the *Patriation* and *Secession Reference* decisions formed integral parts of Canada's constitutional jurisprudence. The Supreme Court of Canada provided some guidance on significant questions regarding the nature and functioning of the Constitution, and it prompted parties involved to continue discussions on the values and principles concerning constitutional amendment and secession.

Did the Supreme Court of Canada successfully fulfill the role of Constitutional Advisor in the *Patriation* and *Secession References*?

While implementing the revised role of constitutional advisor cannot serve to retroactively 'justify' the Court's consideration of unwritten principles in the *Patriation* and *Secession References*, aspects of these two decisions illustrate how the role of constitutional advisor might work in future instances. An assessment of the cases on this basis might include a consideration of the purposes behind the role of constitutional advisor, and a determination of whether the Court's decisions achieved these purposes. For instance, Des Rosiers advocated the 'educator' and 'listener' functions of the Court, and noted that the purposes behind these roles included the avoidance of declaring a winner and loser to a constitutional dispute, and the provision of 'process-oriented' guidance on the dispute's resolution. Horwitz suggested that judicial opinions on constitutional matters should serve 'democratic' and 'inter-generational' functions, and should "encourage a dialogue between citizens about constitutional matters".[595] It was also suggested earlier that

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[594] Banting & Simeon, *supra* note 23 at 16.
[595] Horwitz, *supra* note 544 at 109.

the role of constitutional advisor was necessary to provide guidance on matters beyond law and including constitutional legitimacy, as constitutionally legitimate conduct was more reflective of how constitutionally legal powers were exercised in reality. In order to determine the success of the Court's decisions in terms of the role of constitutional advisor, one must look at whether the decisions fulfilled these various purposes. It might also be interesting to look beyond the decisions themselves to the impact the decisions had on the parties involved, and to implementation of the decisions in the 'real world' of political negotiations and constitutional amendment. While the Court could successfully fulfill the role of constitutional advisor independently of positive practical results, such positive results might reinforce the success of the role played by the Court, especially in terms of encouraging on-going dialogue and providing guidance on the resolution of complex constitutional disputes. If the role of constitutional advisor is to benefit parties by providing them with guidance on how constitutional considerations can be applied to practical political situations, then perhaps the decisions should be assessed to determine whether they were indeed of practical utility. The aftermath of both the *Patriation* and *Secession References* might be assessed in order to determine whether the Court was successful in this regard. Ultimately, the question is whether the practical utility of each decision can 'justify' the decisions themselves. In a sense, the question calls for an 'ends justify the means' argument, or what Peter Russell termed 'result-oriented jurisprudence'. While not the most palatable method of assessing judicial opinions, this method may be most reflective of the reality of

constitutional adjudication; "[c]onstitutional history tends to remember the results, not the means; and there is a natural tendency to sanctify those results."[596]

Aftermath of the *Patriation Reference* Decision

The Supreme Court of Canada's decision in the *Patriation Reference* was handed down on 28 September 1981. It would be just over one month until the political impact of the Court's decision would be evident to all involved in the constitutional amendment negotiations that had taken place in the years leading up to the reference decision. Upon the decision's release, both the federal government and the provincial governments who had challenged Parliament's resolution declared that support for their respective positions could be found in the Court's decision. Robert Sheppard reported the day after the Court's decision: "The legal verdict 'is all we need', a federal lawyer said, clutching his bulky copy of the judgment on the way out of the courtroom. A provincial counsel shot back: 'It's a messy win for the provinces'."[597] As many commentators have noted, the Court's decision gave both sides of the debate the impetus required to return to the negotiating table and hammer out an agreement on a domestic amending formula, and other questions of constitutional amendment; "by giving both sides exactly half a loaf, the Court...forced Ottawa and the provinces to negotiate a compromise settlement of their constitutional differences."[598] And as constitutional scholar Peter Russell explained:

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[596] B. Schwartz, *Fathoming Meech Lake* (Winnipeg: Legal Research Institution of the University of Manitoba, 1987) [hereinafter *Fathoming Meech Lake*] at 214.
[597] R. Sheppard, "Both sides speak of reopening talks after split ruling on BNA plan" *Globe and Mail* (29 September 1981) 1 at 2.
[598] Russell, *The Judiciary in Canada, supra* note 394 at 355.

> While the decision gave Ottawa a legal green light to proceed unilaterally with its constitutional plans, it cast a heavy mantle of political illegitimacy over the constitutional changes that would result from such a procedure. On the other hand, while the decision confirmed the provinces' claim that their participation in fundamental constitutional change was a constitutional requirement, it warned the provinces that if they failed to work out an agreement with Ottawa, Ottawa could go ahead without them and the courts would do nothing to enforce the provinces' right of participation.[599]

The Prime Minister and the ten provincial premiers met in November 1981 for another round of constitutional negotiations, this time with the additional bargaining chips provided to each side by the Court. Also changed by the Court's decision was the perception that unanimous consent of the provinces was necessary for any proposal to succeed. Former Saskatchewan Attorney General, Roy Romanow, has noted that "the single most important new element in the situation was that the Supreme Court had abolished the rule of unanimity under which past constitutional conferences laboured and ultimately floundered."[600]

With the new stage set, the first ministers convened in Ottawa on 2 November 1981. Romanow explained the mood on the first day of the conference as a mix of "grudging necessity, persistent mistrust, and modest hope."[601] In the end, this modest hope was not misplaced. On 5 November, nine of the ten provincial Premiers and the Prime Minister announced that they had reached agreement on a number of significant changes to Canada's Constitution, including inclusion of the *Charter of Rights and Freedoms*, and the domestic amending formula that would finally enable Canada to 'patriate' its Constitution and take control over all future

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[599] Russell, "Bold Statescraft", *supra* note 174 at 1.
[600] Romanow, *supra* note 35 at 83. The Premier of Quebec did not support the agreement reached among the other ten governments. This matter will be discussed in more detail below.
[601] *Ibid.*

constitutional amendments in this country.[602] These changes, the most significant amendments to Canada's Constitution since its creation in 1867, came into effect on 17 April 1982 and were contained in the *Constitution Act, 1982*.

The agreement reached in November 1981 was one indication of the success of the Supreme Court of Canada's role of constitutional advisor in the *Patriation Reference* decision; "[t]he Supreme Court's decision was the decisive event in paving the way for a federal-provincial accommodation that would enable the Canadian constitution to be patriated in a manner acceptable to the federal government and nine provinces".[603] Prior to the *Patriation Reference*, Canada's federal and provincial governments had endured years of stalemate regarding constitutional amendment. By providing both a legal determination of the matter of unilateral federal amendment, as well as a broader understanding of the conventions surrounding 'legitimate' constitutional amendment, the Court facilitated democratic discussion among political actors, increased awareness (among political actors and the public in general) about the historical practice of constitutional amendment in Canada, and ultimately provided the impetus for the constitutional compromise that had eluded Canadian governments for decades. Regarding the Court's role in the *Patriation Reference,* Lederman noted that,

> while the Supreme Court had not by any means settled all the constitutional issues confronting Canadians, it had nevertheless moved us much closer to their resolution by settling some important questions of method concerning the right way of doing things in the realm of basic constitutional change, as only the court of final authority for Canada could have done.[604]

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[602] McMurtry, *supra* note 15 at 63.
[603] Russell, "Bold Statescraft", *supra* note 174 at 1.
[604] Lederman, *supra* note 20 at 176.

The success of the Court's *Patriation Reference* decision might also be assessed by not only the fact that a political compromise was reached, but also by the content of that political compromise. The domestic amending formula agreed to by the Prime Minister and nine provincial premiers demanded different levels of provincial support for different types of constitutional amendments. Amendments to the Constitution affecting certain enumerated matters, including the office of the Queen, the number of provincial representatives in the House of Commons, composition of the Supreme Court of Canada, and use of the English or French language, required unanimous consent, that is, the agreement of the Senate, House of Commons, and the legislative assemblies of each province.[605] Amendments concerning matters which affected one or more, but not all, provinces required agreement of the Senate, House of Commons, and the legislative assembly of each province to which the amendment would apply.[606] Most of the remaining matters that could be the subject of constitutional amendment were to be handled by the general amending formula which required the support of the Senate and House of Commons, along with the legislative assemblies of at least two-thirds of the provinces (which translated into seven of the ten provinces) that, combined, contained at least fifty percent of the population of the provinces.[607] Under this general amending formula, provinces also obtained the option of opting out of amendments that would derogate from the powers, rights or privileges of the province;[608] and a province could receive compensation from the federal government

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[605] *Constitution Act, 1982, supra* note 303 at Section 41.
[606] *Ibid.* at Section 43.
[607] *Ibid.* at Section 38(1).
[608] *Ibid.* at Section 38(3).

where amendments transferring provincial powers relating to education or cultural matters to Parliament did not apply to the province in question.[609]

The general amending formula, perhaps through no accident, captured the essence of the constitutional convention regarding provincial consent, as articulated by the Court in the *Patriation Reference*. Recall that the Court found that a convention existed which required a 'substantial measure of provincial consent' for amendments altering the nature of federal-provincial relationships or the powers, rights and privileges of the provinces. In essence, what the Court found was that more than two, but less than ten provinces were to agree to an amendment in order to adhere to the convention. It can also be assumed that the phrase 'substantial measure' of provincial consent, and not merely 'majority' of the provinces, suggested that the agreement of five of the ten provinces might also have been insufficient. In any event, the ultimate agreement on the amending formula, requiring seven of the ten provinces with fifty percent of the population, adhered to the Court's articulation of the constitutional convention on this matter.

It is uncertain whether political actors agreed with the Court's articulation of conventional requirements because they thought these requirements were correct, or whether they thought these requirements were correct merely because they were articulated by the Court. In the final result, the motivation for adherence to the Court's opinion might be irrelevant. The Court's opinion on the constitutional convention gave a sense of legitimacy to arguments in favour of provincial participation in amendments. This led not only to renewed negotiations between the parties, but also to an agreement which entrenched in the Constitution a permanent

[609] *Ibid.* at Section 40.

role for the provinces in future constitutional amendments. The political compromise benefited both the provinces and the federal government, and the question of provincial participation in constitutional amendments was resolved once and for all. This was surely a success, and one made possible by the Court's guidance in the *Patriation Reference*.

One of the most significant results of the political compromise reached in November 1981 was the inclusion of the *Charter of Rights and Freedoms* in Canada's Constitution. Roy Romanow explained that "[t]he Charter was designed to articulate those ideals and goals which are common to nationhood and to serve as a protective shield for Canadian citizens against arbitrary legislative and executive actions of all governments."[610] The *Charter* guaranteed certain individual rights and freedoms to all Canadian citizens, including fundamental freedoms like freedom of religion and expression,[611] democratic rights including the right to vote,[612] legal rights,[613] equality rights,[614] and language rights including guarantees of minority language education and the entrenchment of both English and French as Canada's official languages.[615] Also included in the *Charter* was Section 33, the 'notwithstanding clause', a provision granting to the federal parliament or a provincial legislature "the power to enact legislation for a period of five years overriding those sections of the Constitution dealing with fundamental freedoms, legal rights and equality rights."[616] This provision was inserted at the insistence of

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[610] Romanow, *supra* note 35 at 90.
[611] *Charter, supra* note 403 at section 2.
[612] *Ibid.* at section 4.
[613] *Ibid.* at sections 7 – 14.
[614] *Ibid.* at section 15.
[615] *Ibid.* at sections 16 – 23.
[616] Romanow, *supra* note 35 at 93.

many provincial premiers who feared that the entrenched rights and freedoms in the *Charter* would "subordinate the supremacy of Parliament."[617] In the end, the *Charter* represented "a code of conduct for the protection of rights to which all governments are expected to adhere, but, with section 33, the efficacy of the parliamentary form of government as an arbitrator of competing values and rights has been maintained."[618]

Whether inclusion of the *Charter* in Canada's Constitution was a beneficial outcome of the patriation negotiations might be debatable. But what seems clear is the popular support for the *Charter* among Canadian citizens, as evidenced by public opinion polls. Earlier in this chapter, some of the results of a 1999 poll conducted by Joseph Fletcher and Paul Howe were discussed. That same poll posed questions on general awareness of, and support for, the *Charter*. The poll indicated that, when asked whether or not they had heard of the *Charter*, over 87% of respondents answered yes.[619] Then, respondents were asked: "[i]n general, do you think the Charter is a good thing or a bad thing for Canada?"[620] In response, just over 82% of those polled indicated that they believed the *Charter* was a good thing for Canada.[621] The poll's authors noted that "[t]he results...make it clear that the Charter...remains to most Canadians not only familiar but also much admired" and concluded that "[m]ost Canadians know about the Charter and they like what they see."[622] It is not a stretch, then, to conclude that the general public viewed inclusion of the *Charter* in

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[617] *Ibid.* at 92.
[618] *Ibid.* at 93.
[619] Fletcher & Howe, *supra* note 583 at 6.
[620] *Ibid.*
[621] *Ibid.*
[622] *Ibid.*

the Constitution in 1982 to be a beneficial outcome of the political compromise reached following the *Patriation Reference*.

There was one particular aspect of the agreement reached in November 1981 that few, if any, observers or participants would deny was most unfortunate. The agreement reached by the Prime Minister and nine provincial premiers was not supported by the Premier of Quebec;

> In the last hours of that November conference, everyone finally acknowledged that no proposal on minority language education rights and the amending formula would be accepted by both Ottawa and Quebec. In the end, Quebec was left out.[623]

In 1983, Romanow stated that "Quebec's angry denunciation of the compromises and the process remains a source of grave anxiety" but continued "as serious as it is, failure to have reached any consensus on the basic questions of patriation and renewal would have had devastating consequences for Canada as a whole."[624] The participants at the November conference were one voice shy of reaching unanimous consent – something they had not been able to achieve during decades of attempts. Certainly, unanimous consent on the patriation package would have given the amendments unparalleled 'legitimacy'; unanimous consent of parties on all sides of the issue would have signalled agreement not only on the content of the amendments but also on the process by which those amendments were implemented. However, unanimous consent was not achieved, and the abstinence of Quebec raised new issues of constitutional legitimacy. While the dictates of constitutional legitimacy urged by the Court in the *Patriation Reference*, namely a 'substantial measure' of provincial consent, were arguably fulfilled by the agreement of the federal and nine

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[623] Romanow, *supra* note 35 at 96.
[624] *Ibid.*

provincial governments, the implementation of the amendments without its consent caused Quebec to question whether it's consent, specifically, was required to ensure the constitutional legitimacy of amendments affecting its rights, powers and privileges.

As was reviewed in Chapter Two, the government of Quebec placed a set of reference questions before its Court of Appeal regarding whether the consent of Quebec was constitutionally required, by convention, for the adoption of the resolution for amendment of the Constitution.[625] Both the Quebec Court of Appeal and the Supreme Court of Canada unanimously answered the reference questions in the negative.[626]

The Supreme Court of Canada's decision in the *Quebec Veto Reference* might have eased concerns generally about the legitimacy of the 1982 constitutional amendments, but the concerns of Quebeckers may not have been calmed so easily. Did a sense of 'illegitimacy' linger in Quebec, or in Canada generally, after 1982? Was this sense the impetus for increased discussion of Quebec sovereignty, referenda, and continued constitutional amendment attempts, including the Meech Lake and Charlottetown Accords? Following implementation of the 1982 changes,

> the government of Quebec thereafter refused to participate in constitutional changes that involved the new amending procedures. And the government 'opted out' of the new Charter of Rights to the maximum extent possible under s. 33 by introducing a 'notwithstanding clause' into each of its existing statutes, and into every newly-enacted statute.[627]

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[625] *Quebec Veto Reference, supra* note 193.
[626] *Ibid.* at 794. See Chapter Two for review of case.
[627] Hogg, *supra* note 16 at 68.

As Hogg has noted, "[i]n these ways, the point was made that the Constitution Act, 1982 lacked political legitimacy in the province of Quebec."[628] Much of what took place following 1982 was reviewed at the start of Chapter Two as the history of the *Secession Reference*. This history included a number of failed attempts at achieving 'reconciliation with Quebec',[629] most notably the Meech Lake Accord in 1987, and the Charlottetown Accord in 1992.

One might conclude from the failed attempts at reconciliation that the Supreme Court of Canada's decision in the *Patriation Reference* was not a complete success; it provided for the real possibility of constitutional amendment against the wishes of one or more provincial governments. And due to its particular concerns and demands, perhaps it should not have come as a surprise to any of the participants that, if one province was to be 'left out' of the agreement, that province was going to be Quebec. Perhaps the Court should have better considered this possibility and provided some guidance on Quebec's position in anticipation of the outcome that indeed became an eventuality.

But some have argued that there was really no sense of illegitimacy in Quebec following the 1982 amendments, or that, if that sense existed, it was unfounded. For instance, Bryan Schwartz has noted the following:

> Without living in Quebec, it is difficult to make a true assessment of popular reaction. According to Prime Minister Trudeau, however, the response of the Quebec public to Patriation was to yawn and get on with their business. The political editor of Le Devoir was interviewed on Canada AM just before the Meech Lake meeting; as I recall, his assessment was that, in Quebec, 'nobody cared' about whether Quebec had signed the Constitution....[630]

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[628] *Ibid.*
[629] *Ibid.*
[630] Schwartz, *Fathoming Meech Lake*, *supra* note 596 at 211.

Perhaps the feeling of resentment in Quebec was not as pervasive as some might have believed. Even if there was a general negative sentiment in Quebec regarding the constitutional compromise, it can be argued that this sentiment was misplaced. Schwartz suggested that it cannot be claimed that the patriation package was imposed or forced upon the people of Quebec. He explained that

> the group of 6.5 million people who live within [Quebec's] boundaries did not say 'no' to patriation. The National Assembly said 'no'. The Prime Minister of Canada, who was elected by Quebeckers, said 'yes'. The Minister of Justice, who was elected by Quebeckers, said 'yes'. So did another dozen or so cabinet ministers from Quebec. The Liberal Party of Prime Minister Trudeau included every single Member of Parliament from Quebec but one. Only two of the Liberals said 'no'; one because Quebec did not consent, but another because of the discriminatory treatment of Anglophones in Quebec. The lone Progressive Conservative MP made the third dissenter out of all the elected Members from Quebec.[631]

Schwartz queried, "[w]ould all of these federal representatives have voted for the measure if it truly had been oppressive to their own constituents?"[632] Schwartz made the important point that, while the provincial government of Quebec did not approve the patriation package, it might be misleading, in fact inaccurate, to say that 'Quebeckers' rejected the package. Indeed, many representatives from Quebec supported the 1982 constitutional amendments.

It should also be noted that the benefits obtained by the provinces pursuant to the 1982 amendments applied equally to Quebec. Such benefits included an extension of provincial powers over natural resources, the right to equalisation payments, the right to veto some constitutional amendments, and the right to opt out, in some cases with compensation, from other amendments.[633] Indeed, "the

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[631] *Ibid.* at 210.
[632] Schwartz, *Last Best Hope*, *supra* note 367 at 17.
[633] Schwartz, *Fathoming Meech Lake*, *supra* note 596 at 213.

patriation package did give Quebec safeguards it had not previously enjoyed."[634] As noted earlier, one of the most fundamental elements of the 1982 amendment package was inclusion of the *Charter*, and in both 1987 and 1999, public opinion polls indicated overwhelming support for the impact of the *Charter* in Canada.[635] Interestingly, when support for the *Charter,* as indicated in these polls, was assessed along regional lines, the results were that "irrespective of time period, the Charter is regarded as a good thing by strong majorities in every part of the country"[636] including Quebec. The poll indicated that, in 1987, over 63% of Quebecers saw the *Charter* as a good thing for Canada, and when polled in 1999, support for the *Charter* increased among Quebecers to over 70%.[637] The poll's authors concluded that the *Charter* is "as highly regarded in Quebec as it is elsewhere in Canada."[638] Therefore, one could conclude that any sense of illegitimacy that might have existed in Quebec following the 1982 amendments was either unfounded or has all but evaporated in the past twenty years. If so, the practical effect of the Supreme Court of Canada's decision in the *Patriation Reference* may not have been so negative after all.

The changes made to Canada's constitution following the Supreme Court of Canada's decision in the *Patriation Reference* were significant, and they marked definite shifts in Canada's constitutional progress. Having finally reached agreement on a domestic amending formula, Canada would no longer have to go to the U. K. to affect constitutional changes; and the inclusion of the *Charter* marked a

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[634] *Ibid.* at 207.
[635] Fletcher & Howe, *supra* note 583 at 6.
[636] *Ibid.* at 7.
[637] *Ibid.* at 8.
[638] *Ibid.* at 7.

new era in the protection of basic rights and freedoms in Canada. In this sense, the practical effects of the *Patriation Reference* decision seem to have been predominantly positive for the political actors involved and for the Canadian people in general. After years of attempts, agreement on constitutional amendment was only made possible after the Supreme Court of Canada provided the parties with a greater understanding of what was required by constitutional law and what was expected in terms of constitutional legitimacy. While the absence of Quebec's consent cast an unfortunate shadow on the Patriation agreement, and detracts from what could have been an even greater success, this should not detract from the Court's success in terms of advising the parties of the broader considerations regarding constitutional amendment. In fact, it might be argued that in this particular case, perhaps more consideration of unwritten principles would have been of greater benefit. Specifically, discussion of the 'dualist' nature of Canada and the significance of Quebec's unique language and culture, similar to the 'protection of minorities' principle discussed in the *Secession Reference*, might have given greater consideration to Quebec's concerns or any possible role Quebec might play in constitutional amendment.

Compare this to what might have occurred had the Court insisted on answering only the strictly legal question posed to it in the *Patriation Reference*, that is, whether provincial consent was constitutionally required before the federal government requested amendment from the U. K. With the green light to proceed unilaterally, and without benefit of the Court's comments on the role of provincial consent, the federal government likely would have proceeded to push through its

proposed amendments to the Constitution with the support of only two provinces. While the result would have been legally enforceable changes to Canada's supreme law, the spectre of having implemented these changes against the wishes of a vast majority of provincial governments would have surely resulted in prolonged tensions between the provinces and the federal government. As commented by Peter Russell,

> [t]he circumstances surrounding [the Patriation Reference] certainly were unusual. The country was caught in a very difficult constitutional impasse. There was a widely shared assumption by the people and the politicians that a Supreme Court decision was the next essential step in resolving the crisis. A refusal to deal with a major dimension of the reference questions might reasonably have been regarded as threatening greater damage to the constitutional fabric of the country than would stretching the notion of justiciability to embrace what the Court regarded as a constitutional question of a non-legal kind.[639]

Unilateral amendment by the federal government in this instance would also have set a precedent for future amendment attempts, possibly precipitating more unilateral changes and fewer negotiated compromises. Some might argue that there would be nothing wrong with this result, and that the Court should have refrained from influencing political negotiations. However, it is important to note that the Court's decision in the *Patriation Reference* did not preclude this result. The Court merely noted that history indicated a preference for provincial consent, and made the uncontroversial statement that a negotiated settlement was better than unilateral imposition.

Aftermath of the *Secession Reference* Decision

The aftermath of the *Secession Reference* has not been as involved as the political events following the *Patriation Reference*, simply because, in relative terms, the *Secession Reference* is a new addition to the Supreme Court of Canada's

[639] Russell, "Bold Statescraft", *supra* note 174 at 6.

constitutional jurisprudence. In the six years since its release, the decision has sparked less political aftermath than was sparked by the *Patriation Reference* in the twenty-two years since the release of that decision. However, even in the relatively short time since the *Secession Reference* decision, a number of beneficial political effects are notable. First, as was true with the *Patriation Reference* decision, the first sign of success following the Court's release of the *Secession Reference* decision was that it was hailed as a victory by both sides of the secession debate; "in the immediate wake of the Court's judgment, both separatist and federalist forces were claiming vindication. Commentators were almost universally taking the position that there was something in the judgment for both sides of the struggle."[640] The immediate political effects were positive; "there seems to be a consensus that the judgment was a success. It has been widely accepted by political actors across the political spectrum."[641]

The political reaction within the province of Quebec, in particular, was one of the most beneficial outcomes of the *Secession Reference* decision. As Patrick Monahan explained, "one cannot help but notice the fact that the political rhetoric in Quebec on the sovereignty issue appears to have muted considerably in the year since the Court's opinion was released" and he concluded, "the fact that [Quebec] Premier Bouchard has bestowed praise on a federal political institution has served to rehabilitate the reputation of the Court within Quebec, which is not only a positive development for Canadian federalism but also for the principle of the rule of law

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[640] D. Mullan, "Quebec Unilateral Secession Reference: A Ruling That Will Stand the Test of Time" (1998) 9 Public Law Review 231 at 231.
[641] Choudhry & Howse, *supra* note 563 at 144.

itself."[642] Mullan also commented that "there was not the immediate political or populist backlash in the province of Quebec that was feared would result from a federalist victory, a backlash that many saw as the greatest risk in taking the matter to the Court in the first place."[643] The significance of this 'effect' of the *Secession Reference* decision should not be underestimated. As noted in Chapter Two, many Quebec politicians questioned the independence of the Supreme Court of Canada prior to the *Secession Reference*, suggesting that the Court was biased against Quebec, and asserting that the judgment of the Court in the reference would have no bearing on Quebec's plans for sovereignty.[644] Comments made by Quebec's Premier and other Quebeckers following the Court's decision in the *Secession Reference*, asserting that the Court vindicated their position on Quebec's status within Canada, could only improve the position of the Court in that province, which, as Monahan stated above, was beneficial for Canadian federalism in general. One commentator concluded that the Court's opinion on secession "may have ensured that the forces of separation did not gain support from popular dismay at a judgment utterly dismissive of Quebec's claims rendered by a Court regarded by Quebec separatists and other as fundamentally federalist by both inclination and design."[645] This is surely one of the most positive indicators of the success of the *Secession Reference* decision, and it would not have been possible had the Court restricted its opinion to the determination of the strict legal question of whether the Constitution allowed Quebec to secede from Canada unilaterally. It was the Court's discussion of

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[642] P. Monahan, "The Public Policy Role of the Supreme Court of Canada in the Secession Reference" (1999) 11 N.J.C.L. 65 at 67.
[643] Mullan, *supra* note 640 at 231.
[644] Seguin & Delacourt, *supra* note 239 at A6.
[645] Mullan, *supra* note 640 at 234.

the broader, underlying principles that allowed it to educate Quebec, the federal government, and the rest of Canada about how the dictates of constitutional legitimacy would impact on secession negotiations. Indeed, a strict legal determination that unilateral secession by Quebec was contrary to constitutional law might very likely have had the feared result of strengthening the resolve within Quebec to remove itself from the union and its institutions, which Quebec believed were biased against its interests. Instead, the Court's handling of the secession question seemed to have quieted the matter, at least for now. In 1999, Mary Dawson commented,

> we are in a period of relative calm on the constitutional front. We continue to see polls in the newspapers that show clearly what they have shown for some time – that Quebecers do not want a referendum in the immediate future. Recent polls within Quebec on how individuals would vote in a referendum are less clear, but consistently favour staying in Canada....There are some calls for constitutional renewal, but these voices are infrequent and muted. People are tired of these issues.[646]

While Dawson's comments were made in 1999, her views might still be applicable today. We hear little, if anything, about referendum campaigns in Quebec or attempts at negotiating amendments to the Constitution in terms of powers, rights and privileges for Quebec. But as mentioned earlier, we are only a few years into post-*Secession Reference* politics and might be faced with a new referendum attempt at some point in the future. It is at this point that the utility of the *Secession Reference* would be put to its ultimate test. While the Court discussed the 'foundational principles' that should guide future negotiations on secession, it refused any role in monitoring such negotiations for compliance with the foundational principles, or in enforcing the duty to negotiate. The Court instead left

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[646] Dawson, *supra* note 203 at 48.

these matters to be handled by political actors. Similarly, the Court advised that future referenda on secession will only give rise to the duty to negotiate if the results showed a 'clear majority' in favour of secession, and if these results were elicited in response to a 'clear question'. However, left to the political arena were determinations of whether a 'clear majority' on a 'clear question' would be found to have existed in a particular circumstance.

In response to this part of the Court's judgment, the federal Parliament enacted the *Clarity Act*.[647] The Act's preamble stated:

> in light of the finding by the Supreme Court of Canada that it would be for elected representatives to determine what constitutes a clear question and what constitutes a clear majority in a referendum held in a province on secession, the House of Commons, as the only political institution elected to represent all Canadians, has an important role in identifying what constitutes a clear question and a clear majority sufficient for the Government of Canada to enter into negotiations in relation to the secession of a province from Canada;[648]

and it was noted that

> it is incumbent on the Government of Canada not to enter into negotiations that might lead to the secession of a province from Canada, and that could consequently entail the termination of citizenship and other rights that Canadian citizens resident in the province enjoy as full participants in Canada, unless the population of that province has clearly expressed its democratic will that the province secede from Canada.[649]

After the rather lengthy preamble, the remainder of the *Clarity Act* contained just three sections. Section 1 stated that, when a provincial government drafted a referendum question regarding the secession of that province from Canada, the House of Commons would have thirty days to study the question and determine

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[647] *An Act to give effect to the requirement for clarity as set out in the opinion of the Supreme Court of Canada in the Quebec Secession Reference*, S.C. 2000, c. 26 [hereinafter *Clarity Act*].
[648] *Ibid.*
[649] *Ibid.*

whether it was 'clear'.[650] In determining whether the question was clear, the House would consider "whether the question would result in a clear expression of the will of the population of a province on whether the province should cease to be part of Canada and become an independent state."[651] The *Clarity Act* also indicated that a 'clear' question was not one that merely focused on a mandate to negotiate without seeking a direct expression of the will to separate from the rest of Canada; nor would a 'clear' question be one that envisaged other possibilities in addition to the secession of the province, such as economic or political partnership with Canada.[652] If the House of Commons determined that the proposed question was not clear, and therefore would not result in a clear expression of the will of the population of the province to cease to be part of Canada, then the Government of Canada would not be obliged to enter into negotiations regarding secession as a result of a referendum on that question.[653] As Peter Hogg noted, these provisions of the *Clarity Act* could not prohibit a province from holding a referendum on an 'unclear' question; however, the obligation of the federal government to negotiate with a province regarding secession would not arise unless the House of Commons had approved the question under Section 1 of the *Clarity Act*.[654]

Section 2 of the *Clarity Act* stated that, when a province sought to enter into negotiations with the federal government, after holding a referendum on secession, and if the House of Commons had previously found the referendum question to be clear, the House of Commons would determine whether the results of the

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[650] *Ibid.* at Section 1(1).
[651] *Ibid.* at Section 1(3).
[652] *Ibid.* at Section 1(4).
[653] *Ibid.* at Section 1(6).
[654] Hogg, *supra* note 16 at 138.

referendum indicated a clear expression of the will of a 'clear majority' of the population of the province to cease to be part of Canada.[655] In considering whether there was a clear expression of will by a clear majority of the population, the House of Commons would consider the size of the majority, the percentage of eligible voters voting in the referendum, and "any other matters or circumstances it considers to be relevant."[656] The factors to be considered in the determination of the 'clear majority' certainly left much room for debate; "[a] definite rule as to the required size of the majority would have been clearer, for example, a requirement of a two-thirds majority of those voting or a majority of all those eligible to vote."[657] But as Hogg explained,

> [t]he theory of the Act, no doubt, is that a definite rule would be too crude an instrument, and it is better for the House of Commons to make a judgement in all the circumstances of a particular referendum as to whether the majority was large enough and sufficiently inclusive of minorities to form a stable basis for a new state.[658]

In any event, Section 2 of the *Clarity Act* concluded that the Government of Canada would not enter into secession negotiations pursuant to a referendum result that was not determined by the House of Commons to be a clear expression by a clear majority of the will to secede from Canada.[659]

The third and final section of the *Clarity Act* expressed a 'recognition' that "there is no right under the Constitution of Canada to effect the secession of a province from Canada unilaterally" and that

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[655] *Clarity Act, supra* note 647 at Section 2(1).
[656] *Ibid.* at Section 2(2).
[657] Hogg, *supra* note 16 at 139.
[658] *Ibid.*
[659] *Clarity Act, supra* note 647 at Section 2(4).

> therefore an amendment to the Constitution of Canada would be required for any province to secede from Canada, which in turn would require negotiations involving at least the governments of all of the provinces and the Government of Canada.[660]

The *Clarity Act* concluded by stating that no constitutional amendment effecting the secession of a province from Canada would be proposed unless the federal government had addressed certain terms of secession "including the division of assets and liabilities, any changes to the borders of the province, the rights, interests and territorial claims of the Aboriginal peoples of Canada, and the protection of minority rights."[661]

While only a few pages in length, the *Clarity Act* addressed many of the questions left unanswered in the Supreme Court of Canada's decision in the *Secession Reference*. The Court left the determination of 'clear majority' and 'clear question' to political actors, and while the *Clarity Act* fell short of providing a definite formula for either, it did provide a process through which questions of clarity would be resolved in the future. Both the 'clear majority' and 'clear question' requirements were aimed at very real concerns. As for the 'clear majority' requirement, Schwartz has noted that "[r]adical constitutional reform is a choice made not only for the now, but for future generations. If a choice purports to have such durable effects, we should be confident that it has durable support."[662] Schwartz suggested that

> [t]he choice for separation should not prevail merely because the vote happens to be taken on a day when the oscillating support for it happens to

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[660] *Ibid.* at Section 3(1).
[661] *Ibid.* at Section 3(2).
[662] Schwartz, *Last Best Hope*, *supra* note 367 at 38.

> be at a high....The margin of voting support should also be high enough to be a reliable indicator of a true underlying majority in support of it.[663]

Schwartz also offered support for the 'clear question' requirement. He noted that the question posed to Quebecers in the 1995 referendum did not honestly ask whether they wanted an independent state. Rather, "[v]oters were invited to approve the proposition that Quebec should declare itself 'sovereign' after first offering the rest of Canada a new 'partnership'."[664] Emphasising the ambiguity in the 1995 question, Schwartz noted statistics released from the Centre for Research and Information on Canada which indicated that while "49% of Quebeckers would vote 'yes' in another referendum on the same question as in 1995...44% of those who would vote 'yes' thought that Quebec would still be a part of Canada."[665] These numbers indicate that the 1995 referendum question was anything but clear; it had the potential to mislead voters into believing a 'yes' vote would result in consequences much less severe than what actually might have taken place. Surely, if a province is looking for a mandate from its citizens to separate entirely from the rest of Canada, this should be clearly indicated in the referendum question, in order to ensure that voters know exactly how their votes will translate into political action.

There is one aspect of the *Secession Reference* decision that does not fit neatly into the constitutional advisor role being advocated here. The Court's articulation of the new duty to negotiate defies explanation and justification under this role, predominantly because it blurs the distinction between law and legitimacy, between those elements legally required by the Constitution and those arising more

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[663] *Ibid.*
[664] *Ibid.*
[665] *Ibid.*

from political prudence. The emergence of the duty to negotiate also comes dangerously close to threatening the supremacy of the written constitutional text. The duty to negotiate constitutes new obligations on political actors in terms of the conduct of constitutional amendment negotiations. These obligations are not contained anywhere in the Constitution's written text. And yet, the Court stated that these obligations are 'binding' and their breach would result in 'serious legal repercussions'. While the Court's description of the duty to negotiate was not entirely clear, in terms of its 'legal' status, the mere discussion of new obligations might cross the line between the provision of guidance on constitutional legitimacy, and the determination of law. The role of constitutional advisor would not bestow upon the Court any authority to create new legal obligations not already contained in the Constitution's written text.

The Supreme Court of Canada's decision in the *Secession Reference* did more than clarify the illegality of unilateral secession of Quebec from Canada. Its comments on the broader aspects of constitutional legitimacy – the fundamental principles, the duty to negotiate, and the requirements of 'clear majority' and 'clear question' – served as guidelines for the parties involved to reach agreement on what was a contentious constitutional, and political, issue;

> the Court's decision served both to defuse a climate of constitutional uncertainty and to put a little order into ensuing discussions and debates concerning Quebec's right to secede from the federal union. In many respects, it was a model of how the reference procedure can work to defuse important, contentious constitutional disputes.[666]

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[666] Frederick Vaughan, "Judicial Politics in Canada: Patterns and Trends" in Paul Howe & Peter Russell (eds.), *Judicial Power and Canadian Democracy* (Montreal & Kingston: McGill-Queen's University Press, 2001) at 9.

Any future referendum for the purpose of measuring popular will to secede from Canada will be governed by provisions of the *Clarity Act,* and it was the Court's guidance on matters of constitutional legitimacy which led to the political 'rules' contained in the *Clarity Act*, regarding when the duty to negotiate will arise, and how these determinations will be made. The passing of the *Clarity Act*, the improved image of the Court in Quebec, and perhaps most importantly, the reduced focus on sovereignty within Quebec and the relatively quiet constitutional scene, all provide support for the conclusion that the *Secession Reference* had beneficial practical effects due in large part to the Court's guidance on matters of constitutional legitimacy. It should be remembered, however, that the true test of the practical benefit of the *Secession Reference* decision will be in the handling of any future referendum on provincial secession. The *Clarity Act* was a product of the federal Parliament, not the Province of Quebec, and disagreements might very well ensue regarding how and what the *Clarity Act* intended to 'clarify'. An additional test will be the conduct of political actors following a positive referendum result. It is at this point that the Court's vague 'duty to negotiate' would enter the picture. Only time will tell whether this aspect of the Court's decision will benefit, or further complicate, political negotiations regarding secession.

Summary

From the above discussion, it can be concluded that the Supreme Court of Canada's decisions in both the *Patriation* and *Secession References* were instrumental in initiating and advancing political discussion and agreement on controversial constitutional matters. In each case, the Court avoided the clear

declaration of a 'winner' and a 'loser', and instead facilitated future negotiations by recognizing the legitimate arguments and interests of each party. In each case, the Court provided opinions that respected the role of political actors to determine political matters, and provided guidance on constitutional principles that would assist in the resolution of both current and future disputes. In each case, the Court recognised the unique nature of Canada's Constitution by distinguishing between constitutional law and legitimacy, and offered opinions on how each of these elements could be satisfied. And, in each case, the Court maintained the primacy of written constitutional provisions. These aspects of the Courts' decisions indicate that both the *Patriation* and *Secession Reference* decisions can be seen as useful examples of how the Court might fulfill the role of constitutional advisor in future cases.

What impact might the role of Constitutional Advisor have on future constitutional decision-making in Canada?

Since the written Constitution is not exhaustive, yet must stand the test of time, the Supreme Court of Canada's decisions on significant constitutional issues should not signal the end of discussion on those issues; rather, they should foster further conversation regarding those values and principles relevant to the issue at hand. The role of constitutional advisor would serve this very purpose. By opening the door to discussions surrounding constitutional values and principles, the Court can resolve some of the uncertainty regarding the applicability of particular constitutional principles to current disputes, educate the parties and the public at large on the nature of Canadian constitutionalism, and foster democracy by

providing political institutions with the knowledge and guidelines necessary to conduct political activities and negotiations within the confines of both constitutional law and constitutional legitimacy.

It is not being suggested that the role of constitutional advisor would 'justify' resort to unwritten constitutional principles in all constitutional cases. On the contrary, the role of constitutional advisor would be most important in cases, like the *Patriation* and *Secession References*, for which little assistance is provided by the Constitution's written text, and which question the constitutional legitimacy of political activity. In such cases, a determination of strictly legal issues might misrepresent the appropriateness of certain political activity, even where that activity may be constitutionally legal. And, given Canada's constitutional traditions, notably the influence on political activity of unwritten constitutional conventions, an opinion of the Court on matters of constitutional *legitimacy*, in addition to constitutional *law*, would be of greater practical utility to those who must implement the Court's decision in the political arena.

While the Constitution's text may be amended from time to time, it is unrealistic to presume that a written document could adequately address as-of-yet unanticipated events in the future. For instance, since its entrenchment in the Constitution, the *Charter* has been used to expand rights and freedoms guarantees in areas that might not have crossed the minds of the *Charter*'s drafters in November 1981, like, for example, the extension of protection from discrimination under Section 15 of the *Charter* to discrimination on the basis of sexual orientation.[667] This trend will surely continue as various groups of citizens look to the *Charter*, and

[667] *Egan* v. *Canada, supra* note 515; *Vriend* v. *Alberta, supra* note 515.

the courts, to ensure their full participation in Canadian society. Another example is the continued recognition and implementation of the constitutional entitlements of Canada's Aboriginal peoples. While some constitutional provisions guarantee Aboriginal rights, the courts will continue to play a role in defining these rights and ensuring their fulfillment. Other questions of constitutional significance will undoubtedly continue to arise, and the written provisions of the Constitution may only partially or inadequately address these issues. Or perhaps, as was the case in the *Patriation* and *Secession References*, these issues will cause the elements of constitutional law and constitutional legitimacy to diverge. In such cases, the role of constitutional advisor could be of great assistance in guiding parties toward a negotiated resolution, one respectful of both law and legitimacy, and reached in full awareness of the constitutional rights and interests of all parties.

The decisions and practical effects of the *Patriation* and *Secession References* indicate that the role of constitutional advisor can be successfully fulfilled by the Supreme Court of Canada and might provide an avenue through which constitutional matters can be examined and resolved. The need for guidance on constitutional matters, and for decisions that can be put to practical use in the political arena, indicate that the role of constitutional advisor is one that should be fulfilled by the Court in the future.

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