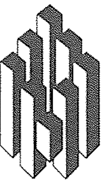
C.D. Howe Institute
Commentary
C.D. Howe Institute



No. 83, June 1996 *ISSN 0829-1810*

The Secession Papers

Coming to Terms with Plan B:

Ten Principles Governing Secession

by

Patrick J. Monahan and Michael J. Bryant
with Nancy C. Coté

The preferable solution to Canada's constitutional conundrum is for the federal and provincial governments to accommodate the needs and desires of Quebec within Confederation. In the event that approach fails, however, Ottawa should have a contingency plan ready to use if the next Quebec referendum ends in a "yes" vote. The goal of such a plan must be to set clear ground rules for Quebec secession in advance to ensure that it respects the rule of law.

Secession of a province is legally possible under Canadian law, but it must be achieved through a constitutional amendment and supported by a consultative, province-wide referendum on a clear question conducted fairly and transparently. A "yes" vote by a simple majority (50 percent plus one) would trigger secession negotiations. In them, Canada should be represented by a special negotiating authority comprising federal and provincial appointees plus representatives of aboriginal peoples. Any negotiated agreement must respect the fiduciary obligation of the Crown to the aboriginal peoples and should allow for the possibility of a democratic partition of Quebec.

A negotiated agreement would then require ratification by a definitive referendum in Quebec and acceptance in a constitutional amendment in the rest of Canada.

The legal questions about the secession process should be put to the Supreme Court of Canada as soon as possible. These include whether a majority vote in a referendum in Quebec would entitle it to secede under either domestic or international law, which constitutional amending formula would apply (provincial unanimity or seven provinces containing at least 50 percent of the population), whether aboriginal peoples would have to provide consent or meaningful consultation, and so on. The federal government should then enact contingency legislation defining the framework for a secession process.

Main Findings of the Commentary

- The silence of the federal government during two Quebec referendums has left the Parti Québécois free to describe how it would achieve secession. Maintaining this silence is irresponsible and will lead to chaos if Quebec tries to declare independence unilaterally.
- The Parti Québécois's claim that Canadians outside Quebec have no right to participate in establishing ground rules for the next referendum finds no support in the laws and practices of other states that have dealt with secession.
- A sensible approach to the situation is for the federal government to take a leadership role in setting clear ground rules in advance of any future referendum. These rules should be based on the following (condensed) principles:

  - Secession is possible under Canadian law if it is done so as to respect the rule of law.
  - Secession can occur only if it is supported by the province's electorate in a consultative referendum on a clear question conducted transparently and fairly. A majority of 50 percent plus one is sufficient to trigger secession negotiations. Any negotiated agreement should be ratified by the relevant provincial population in a second referendum.
  - Partition is legally and logically compatible with secession and should be possible if residents in a defined area express a desire to remain part of Canada.
  - The fiduciary obligation of the Crown to the aboriginal peoples of Canada must be respected. They should be directly represented in any secession negotiations and entitled to remain within Canada if they desire.
  - A secession would necessitate some immediate constitutional changes, but otherwise the existing Constitution should remain intact. (In other words, reorganization of the country's institutions should not be attempted simultaneously.)

- The federal government has several options for ensuring the application of these principles, including:

  - Referring the issue of secession and its process to the Supreme Court of Canada for a ruling on constitutionality.
  - Asking Parliament to enact contingency legislation setting out ground rules for a secession process. This legislation should, among other things, establish who would negotiate on behalf of Canada. A special negotiating authority could be set up comprising, say, 21 persons, nine appointed by the federal government, nine by the provinces, and three by the aboriginal peoples. To avoid chopping up the complex tradeoffs of a negotiated settlement, Parliament and the provinces could agree ahead of time to consider it without amendment.
  - Asking a blue-ribbon panel of Canadians and non-Canadians to draft this legislation.
  - Obtaining a mandate for its actions from the Canadian people, preferably through an election (rather than a national referendum or a constituent assembly).

- All of these recommendations offer pitfalls. But to make no plan would leave Quebecers with no clear idea of the consequences of a "yes" vote in a sovereignty referendum and the Canadian government without a strategy or a mandate for responding to a majority "yes" vote.

The debate over Quebec's place in Canada assumed a new urgency on the evening of October 30, 1995. Before that date, it was plausible for the prime minister to refuse to answer "hypothetical" questions about how Ottawa would respond if a majority of Quebecers voted to secede from Canada. According to Jean Chrétien, no matter how many referendums[1] the Quebec government held on the issue, Quebecers would always choose to remain in Canada.

The events of October 30 shattered that strategy of studied indifference, at least for the foreseeable future. The razor thin majority secured by the "no" forces and subsequent opinion polls indicating that a majority of decided Quebec voters support sovereignty have made it impossible for the prime minister to continue to claim that a "yes" vote is purely hypothetical and therefore unworthy of his consideration. Canadians recognize that their country survived a near-death experience on October 30 thanks more to happenstance than to a coherent strategy. Increasingly, voices in all parts of the country are calling for the federal government to begin planning now for the next referendum.[2] Part of that strategy must be a contingency plan to use if the referendum is lost and a majority of Quebecers vote to secede from the federation.

This *Commentary* is an attempt to set out the main elements of such a contingency plan — sometimes referred to as Plan B (see Box 1). The key assumption underlying our analysis is that it is imperative that Canada attempt to set down the ground rules governing secession of a province well in advance of the next referendum. We describe what these ground rules might contain and suggest how the federal government might go about implementing them.

Why Ground Rules?

The existing Constitution says nothing about how — or whether — a province can secede from the federation. This silence should be no comfort to federalists (who might mistakenly imagine that the absence of a constitutional procedure for secession makes such an outcome "impossible"). Rather, it is a cause for deep concern. Canada is a democracy whose ultimate legal and political foundation is the consent of Canadians to be governed under the Canadian Constitution and Canadian law. If a sufficiently large and determined majority of Canadians in a particular province withdraw that consent, then the absence of appropriate legal wording to achieve secession will not prevent them from realizing their goal.

Thus, the absence of an agreed procedure to govern secession will lead to confusion and conflict over the legitimacy of any proposed secession. This confusion will, at a minimum, produce political and economic uncertainty. Accordingly, this *Commentary* proceeds on the premise that it is in the interest of all Canadians, including Quebecers, that such an outcome be avoided to the extent possible.

Many thoughtful and responsible Canadians recognize the dangers inherent in a situation in which there is no consensus over the ground rules that would apply in the event of an attempt by a province to secede. Yet they continue to resist any initiative designed to bring clarity to the situation, thinking that any attempt by the government of Canada to define the rules of the game would be seen in Quebec as unduly provocative; such provocation could boost support for sovereignty and thus, paradoxically, serve to reinforce the very outcome that federalists wish to avoid. Others argue that federalists should avoid venturing onto this terrain since to do so would be unduly defeatist, amounting to giving sovereigntists a blueprint for achieving the dismemberment of Canada. Needless to say, federalists should be wary of Trojan horses of their own making.

Doubtless, any open discussion of the process governing secession could backfire easily. Yet the question is not whether such a discussion is risky but, rather, whether any alternative strategy appears more attractive. The main alternative — a continuing refusal to contemplate the possibility of secession — was the centerpiece of the referendum campaigns in 1980 and 1995. The results on October 30

Box 1: *Plan A and Plan B*

The terms *Plan A* and *Plan B* are fairly new to the Canadian constitutional debate. An early appearance seems to have been in February 1996, when the *Globe and Mail* reported:

> "There is no Plan A or Plan B," Mr. Chrétien said...."You formulate the plan as being Plan A and Plan B," he said, less than 24 hours after...Stéphane Dion identified Plan A as reconciliation terms and Plan B as the terms of secession.*

Somewhat earlier usage had been *Track 1* for a conciliatory approach to Quebec and *Track 2* for a hard line.

* Susan Delacourt, "Chrêtien steps back from unity issue," *Globe and Mail* (Toronto), February 3, 1996, p. A1.

conclusively demonstrated that this strategy no longer makes sense. Its main byproducts have been confusion and disorder in the federalist camp. while giving sovereigntists a free hand in defining the rules of the game to their advantage.

The danger in further waffling is obvious. The longer the federal government waits before beginning to systematically contradict misleading sovereigntist claims the more it appears to be giving tacit approval to them. To take but one example: the fact that the federal government has participated in two campaigns conducted on the premise that there were no special requirements, such as a qualified majority, to achieve an affirmative answer to the referendum questions makes it much more difficult to claim that a different rule should apply in any future referendum.

Some media commentators have dubbed any attempt to set down ground rules for secession as taking a "tough love" approach, casting the federal government in the role of a stern but loving parent and Quebec as a spoiled adolescent who must be brought back in line through the belated and reluctant application of strict disciplinary measures. In our view, however, this scenario totally misconceives the purpose and nature of the exercise we propose. The federal government must attempt to deal with the consequences of secession for the simple reason that failing to do so would be morally and politically irresponsible. Governments may wish for the best, but they have an obligation to prepare themselves and their citizens for the worst. The results of the October 30 referendum make it crystal clear that support for sovereignty in Quebec is sufficiently strong that Canadians elsewhere can continue to ignore it only at their peril.

In short, these unpleasant realities must be confronted for their own sake. This realization is distinctly liberating. If Canadians begin to discuss these issues for the simple reason that not doing so would be irresponsible (rather than as a strategy to win the next referendum), they can break the long-standing taboos that have stifled and sterilized this debate. It should finally be possible to initiate a frank and open dialogue on issues that have always remained just below the surface but have never been broached for fear of offending listeners in various parts of the country.

A Role for All Canadians

Some, no doubt, will denounce any attempt by Canada to participate in the process that will determine its own territorial integrity. In fact, it is entirely normal and appropriate in a democratic society for all citizens to have a say in the future of their country.

This point becomes obvious when one contemplates how the government of an independent Quebec would react if, following accession to sovereignty, it were faced with secessionist demands from minorities within its own population. Quebec would undoubtedly reject any claim that only the members of the dissentient minorities had a right to determine whether their secessionist claims should be recognized and assert, instead, that it and the entire Quebec population had a right to participate in decisions that affected Quebec's territorial integrity.

Aside from these considerations of democracy and fairness is a more pragmatic reason for recognizing the right of all Canadians to participate in this debate. Quebec sovereigntists have always argued that the costs of achieving sovereignty are minimal and have labeled suggestions that sovereignty will impose economic costs on Quebecers as economic terrorism. Yet the only possible way to minimize the transition costs is to permit Canadians from all parts of the country to discuss the issues openly. Out of this dialogue may come some measure of consensus on the ground rules that ought to govern any future secession referendum and the process leading out of a majority "yes" vote. It is therefore in the interest of everyone — even the sovereigntists themselves — to recognize the right of Canadians from across the country to participate in a process designed to establish ground rules for secession.

Of course, some Quebecers may not see it that way. But it is probably impossible to predict with any certainty precisely how Quebecers will react to an open and honest debate of the secession issue. For every voter who takes offense there may be another whose perspective and understanding are broadened. And surely the results of the last referendum have exposed the folly of trying to keep Canada together on the basis of timidity about the capacity of adult citizens in a democracy to debate their own futures maturely and intelligently. In short, Canada should enter the debate directly, rather than through hushed diplomacy and confusing innuendo.

Outline of the *Commentary*

Even if readers accept our initial premise — that the federal government and all Canadians have a role to play in this process — the question that immediately arises is what is the nature of that role? Moreover, on what should the federal government ground its Plan B — what principles should govern the secession process?

We believe that the answers to these questions can be found, at least in part, in the international experience with secession in the recent past. A comparative analysis is useful since it illuminates the practical advantages and disadvantages of different sets of decision rules. By examining the international experience with secession movements and identifying commonly accepted approaches that have produced peaceful and democratic outcomes, Canadians can move past rhetoric and begin to focus on approaches that will be in everyone's best interest.

We turn to this task in the first section of this *Commentary*, reviewing the extent to which the constitutions of various nation-states provide for the possibility of referendums on secession. One obvious point that emerges from this review is that such provisions are extremely rare; given the primordial character of the principle of territorial integrity in international relations, the vast majority of states do not explicitly contemplate their own dismemberment. Nevertheless, a number have made provision for secession, usually because of the existence of significant secessionist movements within their borders.

The second section builds on this comparative analysis, setting out ten principles that we believe ought to govern the secession of a province from the Canadian federation. The key principle, which underlies our entire analysis in this section, is that any secession should respect the principle of the rule of law — that is, it should be achieved through a duly authorized amendment to the Canadian Constitution, rather than through a unilateral declaration of independence (UDI) by the Quebec government. We also propose rules to deal with issues such as the majority that must be obtained in the referendum, the manner in which border questions should be resolved, and whether a referendum should be held nationally or only in the province of Quebec.

In the third section, we consider how the federal government might implement the principles we propose. After examining a number of possible options, we recommend combining elements of several, rather than pursuing one or another in isolation from the others.

The key principle, we suggest, is the need to build consensus and find common ground, rather than dictate outcomes. Indeed, we believe that any attempt to impose conditions

unilaterally would be certain to end in failure. The federal government's role must be to supply leadership and direction, and ultimately to facilitate a process whereby Canadians choose for themselves whether they wish to continue to live within a single state and on what terms.

Our analysis is limited to questions of process and does not deal with substantive issues such as debt division, citizenship, trade links, and so on. We have deliberately restricted our focus to process issues since we believe that agreement on a common set of ground rules is a precondition to any successful resolution of the substantive terms of secession.

Nor should the reader assume that we have concluded that secession is somehow inevitable. Canada has obviously seen better times, and its future unity remains uncertain. But Quebecers have flourished within the Canadian federation over the past 129 years, and there is every reason to hope that they will perceive remaining a part of Canada as in their continuing best interest. Thus, we offer the following analysis not because we regard secession as a foregone conclusion. Rather, like homeowners who purchase fire insurance even though they believe the risk of fire may be remote, prudent Canadians should contemplate the possibility of the dismemberment of their country in the hope of containing the calamity and rebuilding a new country if the worst should come to pass.

The International Experience

Before attempting to design a set of ground rules to govern secession in Canada, we believe it essential to review the manner in which other states have approached the issue (and in which Canada and some other states have approached other kinds of referendums).

A comparative analysis will indicate, for example, whether certain ground rules have tended to be accepted elsewhere. Of course, the fact that a particular set of principles has been widely accepted internationally does not mean that Canada should automatically import the same approach; the country's particular circumstances may well justify adopting a different approach. But in devising their own secession ground rules, Canadians should at least be aware of the comparative experience and be ready to justify any differences.

Our first task was to examine all constitutions that contain provisions dealing directly or indirectly with the issue of secession. We then studied the referendums of other nations and subnational groups considering secession or a similar infringement on a nation's sovereignty.

On the basis of this review, we offer the following generalizations about the international approach to secession and similar issues:

1. Secession is usually prohibited.
2. Unilateral secession is always prohibited.
3. The wording of the referendum question is the subject of negotiation and agreement between secessionist and national forces.
4. There is no uniform practice regarding the relevant population entitled to vote in a referendum on secession.
5. Referendums on sovereignty tend to be supervised by national and/or international institutions.
6. There is no uniformity in the majority required to support a successful sovereignty referendum.
7. The effect of the referendum depends on the existing constitutional system.
8. The boundaries of the seceding unit are not guaranteed to remain unchanged following independence.
9. The Swiss experience in creating the canton of Jura provides some model principles for resolving border disputes.
10. The Commonwealth experience suggests that referendums are consultative rather than binding.

Constitutional Provisions

Although a number of analysts have looked at referendums of all types,[3] the paucity of raw data often made it difficult to study the secession process itself. Nevertheless, we made efforts to discover the relevant details for several secession referendums.

Finding constitutions that contemplate succession was also a challenge. A 1992 study by Markku Suksi identifies 85 constitutions that include some form of referendum mechanism.[4] On the assumption that any modern constitution with a procedure for secession would involve a referendum or plebiscite, we reviewed each of the constitutions Suksi identified. We also updated his list by including constitutions that have incorporated some form of referendum procedure since 1992. In all, we reviewed the constitutions of 89 states. (See Box 2.)

From this data we drew the first eight points in the list above. Each demands some explanation.

Box 2: *Two Exceptional Situations*

Of the countries whose constitutional arrangements for secession we studied (and report in Table 1), two no longer exist. They are the USSR, where the process of disintegration started in the 1990–91 period, and the Czech and Slovak Federative Republic, which replaced the former Czechoslovakia after the end of the Cold War and was itself replaced by two separate republics in 1992.

We included these countries in our study because both had constitutions that contemplated separation, both actually experienced separations (the Czechs and Slovaks successfully, the USSR far less peacefully), and both are often cited as modern examples of secession.

Prohibition of Secession

The most obvious point that emerges from our review is that states are generally hostile to secession movements. Of the 89 constitutions we examined, 82 do not permit secession of a part of the state's territory under any circumstances. In most cases, the constitution is simply silent on the matter. A total of 22 of the constitutions examined, however, contain explicit affirmation of the primacy of the state's territorial integrity — it is not to be called into question under any circumstances. For example, the preamble to Australia's constitution speaks of its states having agreed to unite in one "indissoluble" federal commonwealth. Other constitutions refer to the territory of the state being "inalienable and irreducible" (Equatorial Guinea, article 3), "indivisible" (Cameroon, article 1(2); Guyana, article 1; Ivory Coast, article 2; France, article 2; Madagascar, article 1; and Romania, article 1(1)), or "inviolable" (Bulgaria, article 2(2); Mongolia, article 4(1)). Still others prohibit any amendment to the constitution that would impair the nation's territorial integrity (Cameroon, article 37; Cape Verde, article 313(1)(a); Comoros, article 82; Congo, article 8; Equatorial Guinea, article 104; Iran, article 78; Ivory Coast, article 73; Mali, article 76; Niger, article 124; Panama, article 3; Romania, article 148; and Rwanda, article 96), or prohibit the state from transferring rights to territory or sovereign rights that it exercises over that territory (Suriname, article 2(2)). In all, the overwhelming majority of the constitutions surveyed either implicitly or explicitly prohibit secession.

Referendums on secession were the rare exception to the presumed inviolability of a nation's sovereignty. In most cases in which a sovereign nation contemplated secession by a part of itself, the terms of the process placed onerous hurdles on the road to secession: the state controlled the registration, administration, drafting of the question, decision-rule, balloting, and scrutiny of the vote (as discussed below).

This general hostility toward secession is hardly surprising. Nothing is more fundamental to a state than its territorial integrity. The Charter of the United Nations and the principles of customary international law provide that no state shall interfere with another's territorial integrity.[5] Moreover, it is lawful for a state to use force to protect its territorial integrity from both domestic and foreign interference.

Although international law has also come to recognize the principle of self-determination

of peoples, this right applies only in limited circumstances involving colonialization or discrimination against identifiable minorities. The general rule in international law is that minorities or peoples within states have no right to secede, absent evidence of discrimination or colonialization.[6] Accordingly, the idea of a state's voluntarily forgoing part of its jurisdictional, economic, and territorial domain must be viewed as extraordinary, making any secession process a round peg in the square hole of the past and present statist system.[7]

We emphasize this generalized international hostility toward secessionist claims not because we believe that Canada should adopt a similar prohibitory attitude. (In fact, we later suggest that Canada explicitly recognize that secession is possible in certain circumstances.) Rather, the point is twofold. First, that Canada would be willing to recognize the legitimacy of secession under any circumstances is itself an extraordinary concession, one that only a few states are prepared to make.

Second, it is important to distinguish between a recognition that secession is possible only if certain conditions are met and a willingness to accept secession regardless of the circumstances in which it is attempted. Although a small minority of states adopt the former attitude, none adopts the latter. Even those states that recognize the possibility of secession are willing to do so only if the seceding unit meets certain key conditions or requirements. This principle ought to govern any future secession process in Canada.

Unilateral Secession

Quebec sovereigntists argue repeatedly that Quebec has a right under international law to unilaterally proclaim its sovereignty, regardless of whether Canada has agreed. This, indeed, is the position taken in Quebec's Bill 1, which authorizes its National Assembly to proclaim sovereignty after making Canada a formal offer of a political and economic partnership. The fact that Canada might reject the offer is relevant only in the sense that such a rejection would make it possible for Quebec to declare sovereignty more quickly. Bill 1 provides that, if an independent review committee concludes that negotiations with Canada are fruitless, the National Assembly may declare sovereignty immediately. In any event, Quebec need not obtain Canada's agreement before declaring sovereignty under Bill 1.

Of the 89 constitutions we surveyed, not one approaches secession in this fashion. Table 1 summarizes the relevant provisions in the seven constitutions that regard secession as permissible in certain circumstances. As the column headed "Legal Authority" indicates, the secession process is never governed by a statute or law passed by the seceding unit alone. Rather, secession is subject to requirements set at the national level, either in the national constitution or in national legislation. Failure to satisfy these requirements would lead the courts to declare that the secession was unlawful.

In short, Quebec's claim — that the terms and conditions governing secession are a matter for its National Assembly alone to decide — is simply unknown in the constitution of any other country.

Ignoring Legal Rules

Of course, the fact that a country's constitution sets certain terms and conditions for lawful secession does not necessarily mean that these requirements will always be followed in practice. For example, the Soviet law on secession required a series of referendums, with the first drawing two-thirds majority support for secession before the process could continue. Many Soviet republics made a UDI in the 1990–91 period, so their subsequent referendums amounted to formal rubber stamping of what was essentially a *fait accompli*. (In Georgia, Lithuania, and Ukraine, for example, a referendum was merely the final symbolic act of secession that had been preceded by more fundamental expressions of dissent by ballot and bullet alike.[8]) Conversely, the USSR-wide referendum of March 17, 1991, sponsored by President Mikhail Gorbachev, did not even leave open the possibility of secession for voters within the Soviet republics.[9]

In brief, that a state's constitution clearly spells out a procedure to govern secession is no guarantee that these requirements will always be honored. Secessionist politicians or governments may choose to act in an illegal fashion and attempt to declare their independence unilaterally, without regard to the requirements of their state's constitution or law. The point is simply that the Quebec government's claim that the seceding unit alone should determine the terms and conditions that govern secession is unknown in the constitutions of the world today.

A related point is that secessionist movements that choose to defy the requirements of the existing constitution and declare independence unilaterally usually provoke the host state to resist in a variety of forms, ranging from military intervention and the use of force (consider, for example, the attempts by the Soviet Union in early 1991 to prevent the secession of the Baltic republics, as well as the resistance of the Federal Republic of Yugoslavia to the secession of a number of republics in 1991[10]), to merely declaring the acts of the secessionist regime illegal and carrying on as if the secession had not occurred. (When the whites-only government of Rhodesia unilaterally declared its independence in 1965, the UK government passed legislation asserting the continued sovereignty of parliament. Even though this legislation was not accompanied by any military intervention, the British courts held that the Rhodesian declaration of independence was legally ineffective on the basis that it was not certain that Britain would be unable to reestablish effective control over Rhodesian territory[11].)

Thus, any secessionist movement that attempts to jump outside the rules of the existing constitutional order and declare sovereignty illegally should expect a challenge from the host government. The result is two rival governments, each contesting the legitimacy of the other's jurisdiction over the territory of the seceding unit.

Plainly, the costs that this kind of conflict would impose on the citizens of a modern state could be very significant. No responsible politician could contemplate asking the citizenry to shoulder this kind of risk without clearly acknowledging the magnitude of the sacrifices involved and providing the population with an opportunity to clearly demonstrate their willingness to bear them. Yet the leaders of Quebec sovereigntists have behaved in precisely the opposite fashion, alleging that the Quebec government could issue a UDI without any significant costs or consequences. Indeed, former premier Jacques Parizeau went so far as to label any attempt to identify the costs associated with a UDI as a form of economic terrorism.

This failure to explain clearly the consequences of a UDI raises questions as to the legitimacy and the wisdom of any attempt by the Quebec government to declare sovereignty other than in accordance with the requirements of the existing Canadian Constitution.

The Referendum Question

In both 1980 and 1995, the Quebec government asserted that the wording of the referendum question was the exclusive responsibility of the pro-sovereigntist forces. Under the *Quebec Referendum Act*, the question is determined by the premier and endorsed by the National Assembly. Assuming the government has a majority, neither the opposition parties in the National Assembly nor the federal government has a way to participate in setting the question.

No constitution anywhere in the world today provides for the referendum question to be formulated in this fashion. As Table 1 indicates, in five of the seven countries whose constitutions contemplate secession, the national authorities, not the secessionist forces, determine the question. In the remaining two instances, the national government or pronationalist forces have an opportunity to participate effectively in the wording.

Table 1: *Constitutional Provisions Governing Secession*

Country[a]	Legal Authority to Conduct and Supervise Secession Referendum	Referendum Question Formulated by	Relevant Population to Vote in Referendum	Decision Rule (Vote Required for Process to Continue)	Boundaries
Austria	national legislation	national authorities[b]	national population	majority of valid votes cast	changes must be approved by national and subnational governments
Ethiopia	national legislation[c]	national authorities	local population	majority of votes cast	absent agreement, federal council to decide borders based on settlement patterns of peoples and the wishes of the people or peoples concerned[d]
France	national legislation[e]	national and local government[f]	local population	majority of votes cast	assumption that former colonial borders would become borders of the independent state
Singapore	national legislation	national authorities	national population	two-thirds of total votes cast	changes require approval of two-thirds of all voters in national referendum
St. Christopher and Nevis	national legislation[g]	national constitution[h]	local population	two-thirds of total votes cast[i]	Nevis would automatically retain its current borders[j]
Soviet Union	national legislation or law of autonomous republic if the latter is not inconsistent with national law[k]	commission formed by supreme soviet of the seceding republic, including representatives of "all interested parties" within the republic	local population	two-thirds of eligible voters	specific provision for "autonomous regions" within a seceding republic to remain part of the Soviet Union[l]
Czech and Slovak Federative Republic	national legislation	national president and Czech and Slovak national councils; proposed questions are to be "unequivocal and understandable"; in the absence of agreement and after a waiting period, each republic can insist that its wording be posed[m]	national population	absolute majority of voters in each republic[n]	assumption that borders of existing republics would remain unchanged following secession

[a] Most of the constitutions referred to here are the texts found in A.P. Blaustein and G.H. Flanz, eds., *Constitutions of the Countries of the World*, looseleaf edition (New York: Oceana Publications): For Austria, *The Federal Constitutional Law*, issued December 1985 (hereafter cited as *Austria*); for Ethiopia, *The Constitution of the Federal Democratic Republic of Ethiopia*, issued December 1994 (hereafter cited as *Ethiopia*); for France, *The French Constitution*, issued June 1988 (hereafter cited as *France*); for Singapore, *The Constitution of the Republic of Singapore*, issued September 1995 (hereafter cited as *Singapore*); for St. Christopher and Nevis, *St. Christopher and Nevis Constitution Order*, issued April 1984 (hereafter cited as *St. Christopher and Nevis*); for the Czech and Slovak Federative Republic, *Constitutional Law of 18 July 1991*, issued September 1992 (hereafter cited as *Czech and Slovak*). The exception is the USSR, for which we used *Constitution (Basic Law) of the Union of Soviet Socialist Republics* and *On the Procedure for Deciding Questions Connected with the Secession of a Union Republic from the USSR* (law of the Soviet Union adopted April 3, 1990 (hereafter cited as *Soviet Secession Law*) reproduced in W.E. Butler, *Basic Documents of the Soviet Legal System*, 2nd ed. (New York: Oceana Publications, 1994).

[b] *Austria*, article 44(1), states that any constitutional change must be approved by a two-thirds vote of the house of representatives.

[c] Secession must first be approved by a two-thirds majority of the members of the legislative council of any "nation, nationality or people" (*Ethiopia*, article 39(4)); the federal government must organize a referendum on secession within three years of the request from the legislative council.

[d] *Ethiopia*, article 39(5), defines a "nation, nationality or people" as "a group of people who have or share a large measure of a common culture, or similar customs, mutual intelligibility of language, belief in a common or related identities, and who predominantly inhabit an identifiable, contiguous territory."

[e] But secession is possible only in respect of the overseas territories under *France*, article 86. Article 2 provides that the territory of the republic itself is "indivisible."

[f] "The procedures governing this change [in status] shall be determined by an agreement approved by the Parliament of the Republic and the legislative assembly concerned" (*France*, article 86).

[g] The referendum is conducted and supervised by the "supervisor of elections," appointed by the governor-general after consultations with the prime minister, the premier, and the leader of the opposition.

[h] *St. Christopher and Nevis*, article 113(2)(c), provides that "full and detailed proposals for the future constitution of the island of Nevis (whether as a separate state or as part of or in association with some other country) [shall] have been laid before the Assembly at least six months before the holding of the referendum." Moreover, the constitution sets out a number of changes that will automatically occur in the event of Nevis' secession, including that Nevis will not be entitled to representation in parliament and that parliament will have specific authority to deprive Nevis citizens of their citizenship in St. Christopher.

[i] The bill authorizing secession must also be approved by a two-thirds majority of the elected members of the Nevis Island assembly.

[j] *St. Christopher and Nevis*, schedule 3, section 1, sets out the territory of the new state of St. Christopher that would automatically come into existence following the secession of Nevis.

[k] Under *Soviet Secession Law*, articles 1, 2, and 4, the referendum is to be conducted and supervised by a commission formed by the supreme soviet of the seceding republic, and the commission is to include representatives of "all interested parties," including representatives of any autonomous regions or national areas within the seceding republic. Further, article 5 provides for the participation of outside observers, including authorized representatives of the USSR, of autonomous regions within the republic, and of the United Nations, in order to monitor the vote; the exact role is to be agreed on by the supreme soviets of the USSR and the seceding republic.

[l] Under *Soviet Secession Law*, article 3, "The right to autonomously decide the question of whether to stay in the USSR or the seceding union republic, as well as the question of its State-law status, shall be retained for the peoples of autonomous republics and autonomous formations." Border issues will ultimately be determined by the USSR congress of peoples' deputies, after preparation of proposals by the USSR council of ministers, with the participation of the government of the seceding republic (article 12).

[m] *Czech and Slovak*, article 3(3). It appears that, in the absence of an agreement, either of the republics may propose questions.

[n] However, if the proposal passes in only one republic, the federation ceases to exist within a year (article 6(2)), and a federal law must be passed dealing with division of assets and liabilities (*Czech and Slovak*, article 6(3)).

For example, the *Soviet Secession Law* provided for a commission formed by the seceding republic's supreme soviet with representation from all interested parties, including peoples of autonomous republics, autonomous regions, or autonomous national areas within the republic (article 4). The *Constitutional Law of 18 July 1991* of the Czech and Slovak Federative Republic contemplated a cooperative process whereby the president could reject a proposal calling for a referendum on the separation of the two republics if "the proposed questions, which are to be asked in the referendum, are not unequivocal or understandable" (article 3). The president could return the proposed questions with comments to the legislative body that proposed them. (If that body insisted on the original questions, the president had to call the referendum within 15 days of second receipt of the question proposal (article 3(3)). Also significant was that both the former Soviet Union and the former Czech and Slovak Federative Republic limited the frequency with which secession referendums could be held. The USSR imposed a ten-year period between secession referendums (article 10), while the Czech and Slovak law required a five-year waiting period (article 5(5)).

That the question is a matter of negotiation, not unilateral edict, is also reflected in the wording of referendum questions on secession, which tend to be straightforward and widely understood.[12] As the Helsinki Commission noted in its compendium of reports on independence referendums, all of the Soviet republics choosing to secede from the USSR posed simple questions along the lines of "Do you agree that ______ should be an independent, sovereign state?"[13] For the Western Australian referendum on secession of 1933, a lack of agreement over the wording of a question resulted in the electorate's facing two questions, one written by the nationalists and one by opponents of separation.[14] Even in the Newfoundland Confederation referendums of 1948, where the wording generated some controversy,[15] the ballot offered straightforward alternatives (see Box 3). By the second referendum, Newfoundland voters faced two unmistakable choices: "Confederation with Canada" or "Responsible Government as it existed in 1933."

Thus, the international experience suggests that, at minimum, the referendum question should not be determined unilaterally by the government of the seceding unit. Political leaders from parties or groups opposed to secession should have some opportunity to participate in wording the question.

The Population Entitled to Vote

If a referendum on secession is to be held, is the vote conducted only among the population of the territory that is proposing to secede or among the entire national population? As Table 1 indicates, this question has no uniform answer. In Austria, Ethiopia, and Singapore, the entire national population is entitled to participate in any secession referendum; the same was true in the Czech and Slovak Federative Republic. In contrast, in St. Christopher and Nevis, the former Soviet Union, and France, the referendum is held only in the territory that is proposing to secede.

We conclude that either approach is consistent with existing international practice.

Supervision by National and/or International Institutions

The need for supervision obviously is connected with whether the population that is to vote is the subnational group or the national electorate. Where the referendum process is carried out by the potentially seceding unit, the national unit and/or international observers tend to supply some form of supervision or scrutiny. This view is supported by the eminent publicist Yves Beigbeder in his work on monitoring votes.[16] Another scholar bluntly states the rationale for outside supervision:

> Those who are responsible for the operation of a plebiscite can influence its outcome by setting rules in relation to the registration of voters, campaigning, symbols, location of polling stations, and by setting the timing of the plebiscite. Most importantly, the supervisory authority has an opportunity to rig the ballot. Therefore, the supervising authority should not have any interest in the outcome of the plebiscite in order to ensure the plebiscite's fairness.[17]

Presumably, legitimacy can be obtained by permitting supervision by a combination of interests, including local, national, and international observers.

We conclude that some checks and balances over the registration and scrutiny of ballots are normally instituted in circumstances involving a secession referendum.

The Majority Required

The majority required to attain a mandate for sovereignty emerged as a significant issue in the campaign before the last Quebec referendum. The Quebec government has consistently said that all that should be required is 50 percent plus one of the total valid ballots cast. But federalists (including Prime Minister Chrétien and Intergovernmental Affairs Minister Stéphane Dion) have suggested that a greater threshold should be required.[18]

As Table 1 indicates, existing international practice provides support for both approaches. Three of the constitutions reviewed require that a supermajority of two-thirds of the ballots cast favor independence. Note, moreover, that, in these three cases, the referendum is to be held among the entire national population, making this threshold extremely difficult to achieve. The remaining five constitutions require only a majority of 50 percent of valid votes cast (although the Czech and Slovak Federative Republic required a majority favoring independence in each republic, if the separation proposal passed in only one of them the federation would cease to exist a year after the referendum results were announced [article 6(2)]).

We conclude that either of the approaches suggested is consistent with international practice.

If we look beyond the terms of the constitutions we studied and examine actual secession referendums that have taken place in the recent past, a similar conclusion emerges. In the breakup of the former Soviet Union, for example, some independence votes were not preceded by any statement as to the majority

Box 3: *The Newfoundland Confederation Referendums*

Newfoundland had achieved responsible government and full status as a self-governing British colony in the 1850s, but when the bottom fell out of its economy during the 1930s, bankruptcy forced it to turn to the United Kingdom and accept dependant status under a UK-appointed commission of government.

After World War II, an elected constituent assembly considered the future, and recommended putting two choices to the people in a referendum. It tried to keep the option of confederation with Canada off the ballot, but was overruled by London. London also insisted the course taken must receive a majority of the votes cast.

In a first referendum, held June 3, 1948, the ballot asked voters to choose among the following three options:

1. Commission of Government for a period of five years.
2. Confederation with Canada.
3. Responsible government as it existed in 1933.

Responsible government was the most favored choice, but it had drawn only about 45 percent of the vote. So the electorate returned to the polls on July 23, 1948, for a second referendum that dropped the first option, which had received only 14 percent support in the first referendum. Confederation won about 52 percent of the vote, enough to trigger the opening of negotiations.*

* Canada, Canadian Unity Information Office, *Understanding Referenda: Six Histories* (Ottawa: Supply and Services Canada, 1978), ch. 1; and Frank Cramm and Garfield Fizzard, *Our Province: Newfoundland and Labrador* (Markham, Ont.): Breakwater Books/ Fitzhenry & Whiteside, 1983), pp. 124–127.

required.[19] In at least a number of those instances, this silence may have been a product of the fact that the outcome was a foregone conclusion: that Latvia or Ukraine made no reference to the majority required may be explained by the fact that less than 10 percent of Latvians and Ukrainians had any intention of remaining in the USSR.[20] On the other hand, Armenia, where support for independence made a referendum essentially a *fait accompli*, the Armenian Central Commission on the Referendum announced that it would comply with the 66 percent threshold required under Soviet law.[21]

Outside the context of a rubber-stamp referendum, experts take various approaches to the decision rule. For those advocating a requirement of *more* than a bare majority of unspoiled ballots, the rationale appears to rest primarily on experience and international legitimacy. As one commentator puts it:

> Creating a new state, with all the complexities and sensitivities of redrawing boundaries, is an extremely significant change. It would be unduly disruptive of the international order to legitimize independence where only a bare majority supports it.[22]

And another recalls

> A technical majority may not be enough. The Belgians voted in 1949 on whether Leopold III should resume his throne. On the strength of a 58 percent yes he came back to Brussels and then found it was not possible to function as king in a democratic society when 42 percent of the people had declared their opposition.[23]

On the other hand, it would be misleading to suggest that a qualified majority is the norm for secession referendums. The Commonwealth experience (discussed below) may have required a certain percentage of eligible voters to have supported a particular option in order for it to proceed, but there is little precedent for a supermajority requirement of more than 50 percent plus one. The Soviet republican referendums generally operated in the absence of any explicit majority requirement, and most of them did not align themselves with Gorbachev's requirement of 66 percent. Nor did past Canadian referendums or the Newfoundland Confederation referendums of 1948 require a supermajority.

Although it is important to keep in mind all the distinctions between a future Quebec referendum on secession and the comparative examples discussed, the international and national experience with referendums does not provide overwhelming evidence, one way or another, in regard to the majority required.

The Effect of the Referendum

Another important aspect of a referendum's decision rule is the legal effect of the vote. If the answer to a secession vote is in the affirmative and a UDI is illegal, what then is the effect of the referendum?

The short answer is that the effect of a referendum depends on the constitutional system in operation. Some nations, such as Denmark, have a qualified majority requirement to bring about constitutional change, but the corollary is that a referendum is binding. The United Kingdom also has some experience with qualified majorities, yet a binding referendum is an impossibility there since parliament cannot bind itself. Thus, as one commentator concludes about Western European nations, although popular sovereignty is their *raison d'etre*, the practice is different.[24]

Indeed, it is impossible to generalize about the effect of a secession referendum without resort to a nation's constitution. Basically, if it is silent on the subject, a referendum is consultative, if only because there is no legal basis for making it binding. Thus, most referendums are consultative in the sense that the legal status quo remains until a resulting negotiation and eventual legislative measure addresses the referendum result. As one study concludes, "[b]inding referendums are rare in parliamentary democracies, and are best suited to countries with a tradition of direct democracy, such as Switzerland."[25]

For example, following the "yes" vote for independence by the people of Western Australia, the prime minister of Australia proposed a secession convention to all states of the federation. The premier of Western Australia eventually petitioned the imperial parliament in Westminster, pursuant to the *Secession Act* of 1934. When Westminster refused to act on the petition, no further actions were taken to achieve secession directly.[26] Similarly, when Newfoundland voted in favor of joining Canada, the result triggered only the initiation of formal negotiations between Newfoundland and a Canadian delegation (which ended, of course, in the terms of union later approved by the Parliament of Canada, the government of Newfoundland, and finally the UK parliament[27]).

In both these circumstances, like those in the former Soviet Union, the referendum result was only consultative, representing an expression of democratic input, not the output itself. Moreover, it is unclear whether a binding referendum, particularly one involving the amendment of a constitution, would be constitutional in a parliamentary system.

In sum, the international experience suggests that parliamentary systems do not permit binding referendums.[28]

The Boundaries of the Seceding Unit

Whether the borders of an independent Quebec would be identical to the borders of the existing province has also emerged as significant, particularly in the period since the October 1995 referendum.

The Quebec government has always maintained that the borders of an independent Quebec would remain unchanged following sovereignty and would not be the subject of negotiations between the Canadian and Quebec governments. It claims that international law supports this conclusion, pointing in particular to a 1992 legal opinion rendered by five international law experts to a Quebec National Assembly committee studying this question.[29] Some federalists say, however, that the borders of an independent Quebec would necessarily be subject to negotiation and agreement between the Canadian and Quebec governments. According to them, no rule of international law would preclude Canada from raising this issue, nor does international law guarantee or even support Quebec's claim to all of its existing territory in the absence of agreement with the government of Canada.[30]

Legal disputes aside, existing international practice, as reflected in the constitutions that we surveyed, directly contradicts Quebec's claim that existing provincial borders would be guaranteed upon independence. Simply put, there is no uniform or general rule supporting the claim that the borders of the seceding unit cannot be changed upon independence.

For example, the *Soviet Secession Law* (article 12) provided a transition period during which the USSR council of ministers was to prepare, along with the government of the seceding republic, "proposals" regarding questions affecting the state boundary of the USSR. The proposals were to be considered ultimately by the USSR congress of people's deputies; although it might confirm the existing republican borders as the borders of the new state, there was no requirement or even presumption favoring this result.

Similarly, the Ethiopian constitution (article 48) provides that border disputes between or among states be settled by agreement of the concerned states; if they are unable to agree, the federal council, which is composed of representatives of Ethiopia's nations, nationalities, and peoples, is instructed to decide the issue on the basis of the settlement patterns of peoples and the wishes of the people or peoples concerned. Again, there is no presumption that existing borders will remain unchanged.

A similar result obtains in both Singapore and Austria, although no explicit provisions are directed to the resolution of border questions. In Singapore, the terms of secession must be approved in a national referendum; in Austria, they are a matter of agreement to be reached between the federal authority and the local authority. Thus, the seceding unit would

have to resolve any border disputes in a satisfactory manner.

Of course, borders are sometimes not an issue. In St. Christopher and Nevis, for example, the state's existing territory comprises two islands; the secession of Nevis, were it to occur, would naturally include all the territory of that island. In France, the constitution contemplates the secession of colonial territories that are not contiguous to the French mainland; in the case of the Czech and Slovak republics, neither side questioned the existing borders. (Note, however, that the borders of these two states were altered slightly in early 1996.)

The point is simply that no generalized practice favors guaranteeing or protecting existing local or provincial borders at the time of secession. Indeed, it is commonplace to contemplate border adjustments as part of the negotiations between the host state and the seceding unit.

The Jura Precedent

The constitutions described in Table 1 offer no detailed mechanisms for resolving any border disputes that might arise. It is worthwhile, therefore, describing the constitutional provisions that were used to draw the borders of the Swiss canton of Jura when it was created out of the existing canton of Berne in the 1970s. Although this change involved internal reorganization of Switzerland as opposed to outright secession of a part of its territory, the issues that arose were similar to those that would arise in a secession scenario in which boundaries were at issue.

In 1970, the canton of Berne amended its constitution to provide for a referendum among French-speaking districts that had historically expressed a desire to establish a new canton.[31] On June 23, 1974, a majority of the voters in these districts voted "yes" to the question, "Do you want to form a new canton?".[32]

Although 52 percent of the voters voted "yes," particular regions or districts within the area voted against the creation of the new canton. The distinctive feature of the Berne constitutional provisions was the possibility for these dissenting districts to require a second referendum in which they could elect to remain within Berne (article 3(1)).[33] Similarly, districts or communes within Berne that had not participated in the first referendum but directly abutted districts that had earlier voted to form the new canton could petition to hold a referendum in which citizens would be asked whether they wished to join Jura (article 4(2)). In effect, local populations determined the borders of the new canton through a series of cascading referendums.

Finally, Switzerland held a national referendum on amending the national constitution to form the new canton according to the borders determined by the results of the earlier local referendums results. The amendment was approved by 82.3 percent of Swiss voters on September 24, 1978.

This process was noteworthy for two reasons. First, the operative principle for resolving border disputes was democracy: rather than officials' drawing lines on a map, the matter was put directly to the people themselves. Second, although existing borders were not automatically guaranteed, neither were they completely up for grabs.

Two limiting principles together enabled the resolution of border issues in an democratic, orderly, and transparent fashion. First, a referendum could be held only within certain geographic units — districts or communes — that had some recognized or pre-existing legal status. It was not possible for simply any group of citizens living in a particular territory to petition to hold a referendum. Second, the cascading referendums were structured so as to ensure that the two cantons would be territorially contiguous. What was desired — and achieved — was a single boundary dividing Berne from Jura, not parts of Berne completely surrounded by Jurassien territory or vice versa.

We have described the Berne-Jura example in some detail because we regard it as having established a model set of principles for resolving border disputes. Such a process furthers democracy by ensuring that border disputes are resolved by reference to the wishes of the people directly concerned. At the same time, the limits mean that the process will not collapse in on itself as smaller and smaller units within a state demand a never-ending series of referendums.

The fact that the procedure has been used successfully is an indication that it is a practical as well as a principled way to resolve border disputes. As we will suggest later, we believe that it represents a useful set of principles for resolving border disputes that could arise between Canada and Quebec.

The Commonwealth Experience

Also worth examining in this survey of recent history are referendums closer to home. We looked at the Canadian experience with referendums in general and also at referendums in the United Kingdom on possible devolutions of parliamentary sovereignty.

The UK Experience

The UK experience is especially important to Canada with its like conventions and institutions. Of course, today British influence over Canadian affairs is primarily nostalgic; whatever constitutional ties that remained after the Statute of Westminster were formally severed by the patriation of Canada's Constitution in 1982. Nevertheless, the preamble to the *Constitution Act, 1867* states that the Canadian Constitution is "similar in Principle to that of the United Kingdom," which is true at least in regard to the retention of the parliamentary system and common law.

The UK referendums pertinent here are:

- The 1973 "border poll" in which parliament asked the people of Northern Ireland whether or not they wished to remain part of the United Kingdom. It drew a 98 percent affirmative vote (although the results were tainted by the refusal of many Catholics to participate).[34]
- The 1979 devolution referendums in which the people of Scotland and Wales participated in advisory referendums on proposed regional assemblies. Of the Scots who voted, 51.6 percent said "yes," but the participation rate was so low that only 32.9 percent of the total electorate had chosen the affirmative. In Wales, devolution was rejected by a decisive 80 percent of voters (representing 47 percent of the total eligible electorate).[35]
- The 1975 UK referendum on membership in the European Economic Community (EEC) in which all citizens were asked about ceding to the EEC parliament UK sovereignty over certain jurisdictional matters.[36]

In all these referendums, the central government controlled the process. Granted, the UK parliamentary system provides little choice in the matter, but it is noteworthy that, during the devolution referendums, Westminster firmly rejected efforts by Scottish and Welsh elected representatives to alter the process.

The decision rule in these referendums varied, although one expert on referendums categorizes UK referendums as requiring a qualified majority without any binding effect.[37] The referendum on EEC membership relied on a decision rule of a simple majority.

No decision rule was announced for Northern Ireland in 1973, though that referendum contained no suspense as to the outcome. As one commentator puts it:

> It was hardly needed to discover the opinion of the majority in Northern Ireland; as long as the majority was Protestant, it was inconceivable that the province would opt to join the [Irish] Republic and the result of the plebiscite was predetermined by the way in which the boundary was drawn between the North and the South in 1920.[38]

The Scottish and Welsh devolution votes used a more sophisticated decision rule to ensure that such a significant alteration of the UK parliamentary system would result only if approval of devolution was truly representative. Particularly, Labour MP George Cunningham introduced an amendment in 1978 (which became known as the Cunningham amendment)

providing that devolution would result only if a simple majority of those voting in the referendum voted "yes" *and* if no fewer than 40 percent of those entitled to vote in fact voted "yes."

In the event, although the "yes" side in Scotland garnered a majority of the votes cast, the 40 percent threshold was not met: 32.9 percent of the total electorate voted "yes" and 30.8 percent "no." The 40 percent minimum may seem low to Canadians, since secession referendums in Quebec have drawn incredibly high voter turnouts of 80 to 90 percent. The rule was, however, hotly contested by Scottish and Welsh separatists; given the expected low turnout in those regions, they realized that 40 percent would be difficult to achieve.[39]

The important lesson from the devolution votes may lie in the parliamentary approach reflected in the 40 percent rule. It indicated to the electorate "how Parliament intended to use its discretion," says one commentator, "and gave a warning that a bare majority of votes cast would not be sufficient to ensure the setting up of the Scottish Assembly."[40] At the same time, the Cunningham amendment, by its very nature, emphasized the consultative nature of the referendum and the fact that decisions on sovereignty in the end rested with the legislature. It

> gave to Parliament the discretion to decide whether a "Yes" majority which failed to meet the 40 per cent requirement was sufficient to allow devolution to be implemented. Parliament would decide for itself whether the Act should be repealed; and no doubt such a decision would be based to a large extent on the balance between the "Yes" and "No" votes. The advisory nature of the referendum made it a flexible instrument enabling Parliament to make the final decision if the 40 per cent requirement was not met.[41]

Moreover, by virtue of the doctrine of parliamentary sovereignty, UK referendums cannot be binding: "[T]hey did not commit the government in any formal sense to act on the results, nor could they have bound Parliament to do so."[42]

The Canadian Experience

The Canadian experience with referendums confirms our observations about the UK experience. Canadian history has seen only three nationwide referendums: on prohibition of alcoholic beverages in 1898, on conscription in 1942, and on the Charlottetown Accord in 1992.

The prohibition vote saw a 44 percent turnout and a simple majority of 51.3 percent voting "yes" to prohibition, but a majority of Quebec voters rejected the proposal. Given the divisions on the issue, the Laurier government decided not to proceed with prohibition, despite the slim majority in favor. The military conscription plebiscite also split the nation, with a huge majority in Quebec rejecting conscription while 63.7 percent of the total ballots cast were in the affirmative.

Both these referendums were governed by federal statutes that included the precise wording of the question and form of the ballot. Again, the referendums were not legally binding but consultative only.[43]

The 1992 referendum on the Charlottetown Accord had a number of innovations, including an arrangement for any province to hold its own referendum rather than participate in the federal one. British Columbia and Alberta delayed their decisions as to whether they would participate in the federal referendum, both eventually opted to do so; only Quebec chose to conduct its own event under provincial legislation.[46] It follows, arguably, that Quebec's holding of its own referendum was thus at the discretion of Parliament.

Regardless, the question to be put to the electorate was approved by the House of Commons and by the Senate, with the same question being used on the same date in Quebec. The voter turnout was 72 percent for the federal referendum: 54.3 percent voted "no" and 45.7 percent "yes." Quebecers also voted in the negative.

In considering Canadian experience with sovereignty referendums, people are sometimes tempted to refer to the Newfoundland Confederation referendums. Yet they were not a national Canadian process but one conducted by the Dominion of Newfoundland. Moreover, although René Lévesque cited them as a precedent for a series of referendums on Quebec secession,[45] the question in Newfoundland did not involve infringement of a nation's sovereignty. Rather, the process was one of decolonization — both the imperial parliament (Westminster) and the local colony (Newfoundland) agreed that the status quo was not an alternative. Thus, to lump future Quebec referendums with Newfoundland's Confederation process is misleading in that the cessation of sovereign rights was not at issue in the latter. After all, the similarities between marriage and divorce end at the altar.

Ten Principles Governing Secession

Guided and informed by international experience, we believe it is possible to identify a set of workable and fair principles to govern any future sovereignty referendum and its aftermath. They are as follows:

1. Clear ground rules governing secession should be set down in advance of any future referendum.
2. Secession of part or all of a province is legally possible under Canadian law.
3. Secession of a province must respect the principle of the rule of law.
4. Secession of part or all of a province can occur only if it is supported in a consultative, province-wide referendum on a clear question conducted according to a transparent and fair procedure.
5. A majority of 50 percent plus one in favor of sovereignty in a referendum conducted in accordance with Principle 4 should be sufficient to trigger secession negotiations.
6. Certainty and the rule of law require advance clarification of the fundamental ground rules governing secession negotiations.
7. Any negotiated secession agreement must be ratified by a definitive Quebec referendum but need not be ratified by the national electorate.
8. Democracy requires that partition is legally and logically compatible with secession.
9. The fiduciary obligation of the Crown in relation to the aboriginal peoples of Canada must be respected.
10. Upon secession of a province, the existing Canadian Constitution would remain intact with only those changes necessary to accommodate the fact of secession being implemented immediately.

Notice that, in the following discussion of these principles, we do not recommend that Canada follow the most frequent international approach in all respects. Indeed, we believe that it should openly accept the possibility that secession can occur under Canadian law, a policy that departs from overwhelming international sentiment on this issue. Our objective is to identify a set of transparent and balanced ground rules that would be in the long-term interest of all citizens and governments in Canada, regardless of whether they are profederalist or sovereigntist in political orientation.

Principle 1: Clear Ground Rules in Advance

Principle 1 was, to a large extent, anticipated in the first pages of this *Commentary*, where we argue that it is essential for the federal government to attempt to establish ground rules for secession in advance of the next referendum.

The international experience with secession confirms the validity and importance of this first principle. When secession or territorial reorganization has occurred peacefully, democratically, and with a minimum of economic disruption and dislocation, it has generally been preceded by a consensus over the rules governing the process. Conversely, instances in which the process was marred by

violence, infringements of fundamental rights, and severe economic, political, and social dislocation have tended to be those in which such a consensus was lacking.

Two examples of the former scenario are the Czech-Slovak secession in 1992 and the creation of the canton of Jura in Switzerland in the 1970s. In both cases, the ground rules were agreed on in advance and clearly understood by the political elites and the population at large. This prior consensus on process meant that the secession or territorial reorganization could occur in an orderly, fair, and democratic manner.

Examples of the alternative include the breakup of the former Federal Republic of Yugoslavia and the secession of various republics from the former Soviet Union. In neither instance could the relevant political elites agree on the ground rules governing the process. The absence of such a consensus meant that none of the governments involved was willing to accept the legitimacy of the tactics or decisions of its political competitors. The result was violence, civil disorder, and, in the case of Yugoslavia, a protracted and bloody civil war.

We do not suggest that prior agreement on the process of secession would necessarily have avoided these consequences. We do believe, however, that the absence of such a consensus made some form of impasse virtually unavoidable. In short, we believe that prior agreement on the ground rules increases the likelihood of achieving a peaceful and democratic secession process.

Principle 2: Secession Is Legally Possible

We believe that the Canadian government should recognize that secession of part or all of a province is legally possible. Such a recognition could take the form of a resolution passed by the House of Commons or a statement to this effect by the prime minister.[46] It could also define the secession process, including the level of consent required, whether a referendum ratifying the terms of secession would be necessary in part or all of the country, and how negotiations on secession would be conducted.

Possible Objections

A possible objection to Principle 2 is that it is inconsistent with the policy of the vast majority of countries around the world. Few of them recognize the possibility of secession. Most explicitly or implicitly place the issue of territorial integrity outside the realm of permissible political debate and deny the legitimacy of secessionist claims under any circumstances.

Nevertheless, we believe that Canada should formally recognize that secession is legally possible under Canadian law. Three considerations lead us to this conclusion. First, without such recognition, the whole exercise of attempting to achieve consensus on ground rules governing secession becomes futile. Any such consensus must begin from the premise that secession is an option under some conceivable set of circumstances. Anyone who refuses to accept this premise need not bother trying to go further than the advice locals sometimes offer lost visitors: "You can't get there from here." Since we believe that it is essential to attempt to define a set of ground rules to govern the process, we obviously reject the suggestion that secession is impossible under any circumstances.

In other words, the first step in the process must be the open acknowledgment that secession is a legal and political possibility. Once this premise is accepted, the issue becomes a matter of attempting to define in a more precise fashion the exact circumstances in which secession should be permitted and recognized.

A related consideration is the fact that the international experience with secession confirms that the host or predecessor state's recognition of the legal possibility of secession is a precondition to peaceful and democratic resolution of the secession process. This insight is one of the keys offered by Robert Young in his admirable study of the politics of secession. Peaceful secessions, he argues, have all been

characterized by an acceptance on the part of the political leadership of the predecessor state that secession could occur. This "bitter and very difficult decision...marks the fundamental difference between peaceful secessions and those that are violent."[47]

Moreover, the only alternative to Principle 2 is to argue that the national government will resist secession under any and all circumstances, even to the point of using military force. In effect, Canada would be taking the position that it would not agree to secession, no matter how strongly Quebecers favored this option.

Yet there is no evidence that Canadians as a whole would support the use of force to keep Quebec in Confederation under any circumstances. Rather, the consensus appears to support the proposition that, assuming a significant majority of Quebecers clearly wish to secede and assuming Canada and Quebec can reach agreement on the appropriate terms, secession should be permitted.[48] Nor is there any evidence that Canada would have the resources to suppress Quebec secession that enjoyed the support of a significant majority of the Quebec population.

Although the Canadian Constitution is silent on the ability of a province to secede from the federation, legal commentators agree that secession is possible under the terms of the existing amending formula because all parts of the Constitution are subject to amendment (assuming the appropriate formula is used), including those provisions that refer to the province of Quebec. The relevant legal question, therefore, is not *whether* Quebec can legally secede but *how* secession can be accomplished.[49]

Another Objection

If the secession of a province is already permitted, is it not unnecessary to recognize explicitly that secession is legally possible?

We believe, however, that recognizing the right of part or all of a province to secede would be far from superfluous. First, although the Constitution may implicitly permit secession, this fact is not widely understood or appreciated outside legal circles; even Prime Minister Chrétien has, on occasion, suggested that secession is impossible since the Constitution makes no express provision for it.[50] Thus, it is important to recognize the possibility of secession explicitly so as to remove any confusion on the point.

Second, recognizing this principle would force Canada to go one step further and clarify the precise manner in which secession could be achieved. Since we believe that this kind of debate is essential, we advance Principle 2 as a means of ensuring that it will occur in advance of the next sovereignty referendum.

Principle 3: The Rule of Law

Acceptance of the principle that secession is legally possible leads directly to the question of the requirements that would have to be satisfied before it could proceed. In very general terms, a part or all of a province could secede from Canada by means of a constitutional amendment or by a UDI.

The first method would involve an amendment authorized by the amending formula in part V of the *Constitution Act, 1982*, a scenario consistent with the maintenance of the principle of the rule of law. Such a secession would bring no break in legal continuity. The new legal reality, involving the creation of a separate Quebec state, would be based on and draw its authority from the existing Canadian Constitution.

The alternative scenario is secession achieved through a UDI issued by Quebec, with or without the agreement of Parliament or the provincial legislatures. The existing Canadian Constitution makes no provision for a province to secede on the basis of a unilateral issuance of a declaration to that effect (see Box 4). Thus, this scenario would involve a legal revolution, a break in legal continuity, and the establishment of a new constitutional order based on a new legal foundation. If successful, the seceding province would have

Box 4: *The* Bertrand *Cases*

One private Canadian has already turned to the courts for judicial review of the constitutionality of the Quebec referendum process of October 1995. In August 1995, Guy Bertrand petitioned the Quebec Superior Court to rule on whether a unilateral declaration of independence by the government of Quebec would be unconstitutional if enacted. Mr. Justice Lesage confirmed the manifest illegality of such a declaration* (although he refused to issue an injunction blocking the vote, as Bertrand had requested).

This year, Bertrand has returned to the courts, applying for a permanent injunction prohibiting any future referendum. The argument commenced in Quebec Superior Court on May 13, 1996, and continues at the time of writing.

The Canadian government refused to participate in the first *Bertrand* case, failing to unequivocally condemn the legitimacy of a UDI prior to the October 1995 referendum. It has, however, intervened in the second case on the narrow question of whether domestic law governs and whether a future referendum would be binding, or merely consultative. It also disputes the Quebec government's claim that the province has a right to secede under the principles of international law.

* *Bertrand v. Quebec* (1995) 127 DLR (4th) 408.

jumped outside the rules of the existing Canadian Constitution and come into existence in accordance with international legal principles, under which a state is said to exist when it has achieved, "the maintenance of a stable and effective government over a reasonably well defined territory, to the exclusion of the metropolitan State, in such circumstances that independence is either in fact undisputed, or manifestly indisputable."[51]

We believe that provincial secession should be permissible under the first scenario, but not the second. Although Canadian law should explicitly recognize that secession is possible, it should also affirm that it can occur only in accordance with the requirements of the existing Canadian legal order. Moreover, we believe that the federal government should clearly and unequivocally state that it stands behind this rule-of-law principle and is prepared to defend it.

Consequences

Acceptance of the principle that secession is permissible only if undertaken in accordance with the requirements of the Canadian constitution has a number of significant practical consequences. Most important of these is the fact that secession would require the consent of the House of Commons and Senate and at least seven provinces representing more than 50 per cent of the combined populations of the provinces. (Although legal commentators are divided on the precise amending formula that would govern a provincial secession, there is general agreement that either section 38 — the "seven-fifty" formula — or section 41 — unanimous consent — would apply.[52] A little later, we deal with the implications of that uncertainty.)

The practical significance of this requirement is highlighted by considering the provisions of Bill 1, *An Act Respecting the Future of Quebec*, introduced in the Quebec National Assembly by Premier Jacques Parizeau on September 7, 1995.[53] The legislation authorizes the National Assembly to proclaim the sovereignty of Quebec, the only precondition being that such a proclamation be preceded by a "formal offer of economic and political partnership with Canada" (section 1). The National Assembly is authorized to proclaim sovereignty as soon as it has approved a "partnership treaty" with Canada or as soon as it has concluded, on the advice of an independent "orientation and supervision committee," that the negotiations with Canada have proven fruitless (section 26).

The declaration of sovereignty authorized by Bill 1 would claim to sweep away the entire Canadian Constitution and abolish the jurisdiction of all Canadian institutions over Quebec territory, including that of the Parliament

and government of Canada, the Queen, the governor general, and the Supreme Court of Canada (see Box 5). In effect, the act tries to confer on the Quebec National Assembly power to issue a UDI in direct contravention of the requirements of the Canadian Constitution.

In our view, it is in the interests of the government of Canada *and* the government of Quebec to agree in advance that secession can be achieved only through a duly authorized constitutional amendment, and not through a UDI such as was contemplated by Bill 1. The Canadian government would obviously favor acceptance of this rule-of-law principle, given its legal obligation to act in accordance with the terms of the Canadian Constitution.

Because the Quebec government has always maintained that sovereignty can be achieved with a minimal degree of economic and political disruption, we believe that it is equally in its interest to accept the validity of Principle 3.

Box 5: *Quebec's Bill 1*

Section 2 of Quebec's Bill 1 states that, on the date fixed in the proclamation of the National Assembly, Quebec shall become a sovereign country and "shall acquire the exclusive power to pass all its law, levy all its taxes and conclude all its treaties." This claim of absolute constituent power is reinforced by later sections of the bill, which provide that, on the declaration of sovereignty, federal laws will continue to apply in Quebec only so long as they are not repealed by the National Assembly (section 18), that the National Assembly has the power to adopt an interim constitution in place of the Canadian Constitution (section 24), and that the jurisdiction of the Supreme Court of Canada over Quebec territory will be extinguished and the new Quebec constitution will provide for a supreme court (section 22).

The Problem with a UDI

The problem with a UDI is precisely that it would make a smooth transition to sovereignty virtually impossible. A UDI would be an attempt to secede from Canada without coming to an agreement on any of the important issues that would require resolution, including the sharing of the Canadian debt, borders, trade relations, and currency. We believe that Canada would have no choice but to challenge the validity of a Quebec UDI, if only to protect its interests on these fundamental questions. In making that challenge, Canada would not be claiming that secession was legally or politically impossible. It would merely be insisting that Quebec come to an agreement on the terms and conditions of secession prior to its being implemented.

So the UDI scenario is a recipe for confrontation and conflict between the governments of Quebec and Canada. Each would maintain that it alone possessed sovereign authority over Quebec territory. The outcome of this contest for supremacy would depend on which proved able to exercise effective control over that territory. The outcome is difficult to forecast, but it is doubtful that Quebec would be able to effectively exclude Canadian authority from its territory. Canada controls the airports, seaports, key federal buildings, and all the international entry points into Quebec; absent voluntary agreement from Canada to depart, it is not clear how the Quebec government could oust Canadian officials and Canadian control of these strategic locations.

Whether or not Quebec would be able to achieve effective control over its own territory is really beside the point. The mere hint that such a contest for supremacy could occur would unleash a political and economic whirlwind that would engulf both Canada and Quebec. Quebec's ability to borrow on international markets would be severely constrained, if not eliminated entirely. Private investors — including citizens of Quebec itself — would immediately attempt to remove all of their liquid assets from the province. The Quebec state would be faced with an immediate political and economic crisis of unprecedented proportions. Of course, it goes without saying that a UDI would provoke bitterness and acrimony in other parts of Canada, making it highly likely

that Canada would refuse to enter into any kind of economic or political partnership such as Bill 1 implicitly promised.

No Quebec government — particularly a sovereigntist one — has any interest in imposing these kinds of enormous and unprecedented risks on itself or its population. This is not to deny the international examples of countries whose citizens have demonstrated a willingness to endure enormous hardships in order to achieve independence. But Quebecers have been assured that they will face no such hardships on the road to independence. By issuing a UDI, the Quebec government would guarantee that its rosy assurances of a calm transition to sovereignty would be proven wrong.

It is in everyone's clear interest, therefore, to agree in advance that the rule of law would continue to apply throughout any secession process.

A Possible Objection

A possible objection to Principle 3 is that Quebec cannot afford to agree to such a limitation in advance because doing so would mean holding the achievement of sovereignty hostage to the whims of recalcitrant premiers and to the anti-Quebec sentiments of some Canadians in the rest of Canada (ROC). According to this reasoning, Quebec must retain the threat of a UDI (even if it never intends to use it) in order to induce reasonable behavior on the part of the rest of the country.

Yet surely the answer to this objection is for the Quebec government to settle in advance a series of fair and reasonable ground rules that would govern any secession process. It is manifestly in its interest to agree to be bound by such rules (assuming that they are fair and balanced) since by doing so it would obtain the binding agreement of the Canadian government and of the other provinces to the same rules. Such a set of ground rules would mandate a reasoned response from the ROC, rather than one driven by spite or vengeance.

To secure the binding commitment of other governments to such rules, the Quebec government itself would have to agree to be bound in like fashion, precluding the possibility of declaring sovereignty through a UDI. But if, we have argued, a UDI is not a viable option in any event, then the Quebec government would merely have acknowledged reality by accepting the primacy of the rule of law. Moreover, it would have demonstrated its desire to take into account Canadian interests in reaching a negotiated solution. This show of good faith would legitimize the moderate voices within the ROC and increase the possibility that the rest of the country would respond in a similarly reasoned and balanced fashion.

Another Objection

Another possible objection to Principle 3 is that it is somehow undemocratic since it requires the Canadian government to declare in advance that it would not recognize the legitimacy of a UDI issued by the Quebec government. A related objection is that, if Quebec proceeded to issue a UDI despite Canada's stated position, Canada might have to resort to the use of force to ensure the continuity of the rule of law.

These objections, in our view, are unpersuasive. The Quebec government has never sought a mandate from the Quebec people to declare sovereignty in a manner designed to undermine the rule of law. Rather, it has insisted that sovereignty would be achieved on an orderly and consensual basis, even claiming that it would seek a negotiated partnership with Canada before declaring sovereignty. What would be antidemocratic would be the Quebec government's issuance of a UDI without an adequate democratic mandate, not the attempt by the Canadian government to protect the rule of law.

As for the possibility that Canada might be required to employ force in order to preserve the integrity of the rule of law, it would merely be responding to the illegal use of force by those seeking to overthrow the authority of Canadian law through unlawful means. The *Criminal Code of Canada* currently makes it an

offense to "use force or violence for the purpose of overthrowing the government of Canada" (section 46(2). We suggested earlier that Canadians would accept secession if a clear majority of Quebecers favored this option and if an agreement on terms had been negotiated with Canada. It is quite another matter to suggest that the federal government should stand idly by if the Quebec government resorted to the illegal use of force and violence in defiance of the principle of the rule of law. For Canada to fail to respond to what would amount to an unconstitutional *coup d'etat* would be an abdication of its own responsibilities as a sovereign nation. Of course, it would not be denying the possibility that Quebec could secede in appropriate circumstances. It would simply be refusing to recognize the validity of any attempt to subvert Canadian law through violent and illegal means and insisting that it would continue to enforce Canadian law in Quebec until such time as an appropriate constitutional amendment had been agreed to.

Amending the Constitution

If this rule-of-law principle is accepted, two subsidiary questions immediately arise. The first is the precise legal requirements that would have to be met for secession to occur. Legal scholars are divided as to whether sovereignty would require the unanimous consent of the provinces and both of the federal Houses or whether the general amending formula in section 38 of the *Constitution Act, 1982* would be applicable.[54] The only way that this uncertainty could be resolved in an authoritative manner is for the Supreme Court of Canada to pronounce on the issue. As we argue in a later section of this paper, the best way to obtain a ruling is for the federal government to refer this issue (along with other legal issues potentially in dispute) directly to the Court.

The second subsidiary question is how to ensure that the applicable constitutional amending formula does not become a straitjacket preventing the implementation of a fairly bargained agreement between Canada and Quebec over the terms of secession. As experience over the past decade has indicated, the amending formula in the 1982 Constitution is extremely cumbersome and unwieldy. The inability of Canadian governments to implement the Meech Lake Accord over the 1987–90 period is a clear illustration of the difficulty. Despite the fact that all governments had agreed on the terms of a constitutional amendment on two separate occasions (in 1987 and again in 1990), it proved impossible to obtain legislative ratification. Moreover, the two provinces that refused to ratify the accord represented less than 10 percent of the total Canadian population.

Thus, if the existing amending formula is to govern the secession of Quebec, it will obviously be necessary to devise some mechanism to ensure that this kind of paralysis is avoided. The approach we suggest is to develop a negotiating body to represent the collective "Canadian" interest in any negotiations, thus ensuring that Canada speaks with a single voice. All governments and legislatures should commit themselves in advance to voting on any agreement recommended by this negotiating body as a single package, without any amendments.

As we explain in more detail below, we believe that this kind of mechanism would ensure that any agreement reached between the parties could be successfully implemented. It would also avoid the possibility of small minorities in certain provinces attempting to exercise a veto over the process without regard to the large costs that such a veto would have on other Canadians.

Principle 4: The Referendum

The existing amending formula does not require a referendum as a precondition to a constitutional amendment. Nevertheless, we believe that it is now clearly established, as a matter of political practice, that secession is appropriate and legitimate only if it has been endorsed in a referendum. In fact, given the criteria for identifying a constitutional conven-

Box 6: *A Constitutional Convention Requiring a Referendum for Secession?*

A *constitutional convention* is a constitutional rule that is not in the formal constitution but that has come to be accepted by the relevant political actors. In order to establish the existence of a constitutional convention, three factors must be present: (a) the political practice or precedents must be consistent with the rule; (b) the relevant political actors must regard the rule as binding in a political sense; and (c) there must be a reason for the rule.

A constitutional convention may now exist in Canada requiring the government of a province that wants to secede to use a referendum to obtain a mandate from its electors. All three prerequisites of such a convention are satisfied. The 1980 and 1995 referendum campaigns in Quebec represent political precedents in favor of this rule. There is a consensus amongst political leaders to the effect that a referendum is required prior to the commencement of the process leading to secession. And the reason underlying the rule is simply that secession is such a fundamental and momentous political event as to require a popular mandate.

Although conventions are not legally binding, constitutional scholars have an ongoing argument as to their status. At most, they are obligatory in the political (rather than legally enforceable) sense.*

* Geoffrey Marshall, Constitutional Conventions: The Rules and Forms of Political Accountability (Oxford: Clarendon, 1993).

tion articulated by the Supreme Court of Canada in the *Patriation Reference* case,[55] we believe that a constitutional convention has likely now crystallized in favor of this proposition (see Box 6).

A Consultative Referendum

The fact that there may well be a constitutional convention mandating a referendum should not be taken to mean that a majority "yes" vote would automatically trigger secession. As we made clear in discussing Principle 3, secession requires a constitutional amendment in accordance with either section 38 or 41 of the *Constitution Act, 1982*. The fact that a majority of voters in a particular province vote in favor of secession does not obviate the requirement of obtaining an appropriate constitutional amendment. In other words, any referendum should be regarded as consultative only; a majority "yes" vote would not, in itself, alter the legal status quo or provide a basis for the government of the province wishing to secede to do so unilaterally through a UDI. This conclusion is consistent with parliamentary traditions and international experience, as already discussed.

The practical importance of this principle can be seen by contrasting it with the terms of the draft version of Quebec's Bill 1, which was tabled in the National Assembly on December 6, 1994. This early version of Bill 1 declared that Quebec was a sovereign country and that legislation to that effect would come into force within a year of a positive vote in a referendum. Thus, the referendum result would directly trigger the legal achievement of sovereignty. In contrast, we are suggesting that any referendum be regarded as consultative only and that changes in legal status require a duly authorized constitutional amendment.

The issue that arises is why the Quebec government would agree to this principle, given that it contradicts the terms of Bill 1. We have already explained why we believe it is in Quebec's interest to agree that secession can be accomplished only through a duly authorized constitutional amendment.

An additional observation worth mentioning here relates to the threshold of support that should be required in a sovereignty referendum. We argue below for a majority of 50 percent plus one. One of the main factors leading us to support this minimal threshold is the fact that a referendum in a parliamentary democracy is consultative only. If a referendum could provide a legal basis for a declaration of sovereignty, we would argue for a much higher threshold. Thus, an indirect benefit for Quebec of agreeing that a referendum is merely consultative may be Canada's acceptance of a threshold of 50 percent plus one as a trigger for secession negotiations.

Moreover, if the referendum were to have a binding legal effect, we would argue that the entire referendum procedure would have to be entrenched in the Constitution. (That is, if Canada were to make an exception to the principle of parliamentary sovereignty, as it does with the Charter of Rights and Freedoms, it would have to be constitutionally entrenched.) Such a constitutional amendment would clarify the manner in which the referendum was to be conducted, provide for the legal effect of a referendum vote, and determine the threshold of support required. Since such an amendment would be a change to the amending formula, it would clearly require the unanimous consent of the federal government and all provinces. These additional complications would be avoided if all parties agreed that any secession referendum would be consultative and that a majority "yes" vote would not have any determining legal consequences.

Transparency

The other condition suggested in Principle 4 is transparency: that the referendum be on a clear question and that the voting procedures be transparent and fair. Arguably, the most recent referendum in Quebec failed to satisfy these criteria. The question referred to a political and economic partnership with Canada, which was actually an extremely remote possibility, so the wording was misleading in that it gave a false view of the conditions that were likely to prevail following the achievement of sovereignty. And in the voting itself, large numbers of ballots were rejected as spoiled in certain ridings with a large pro-federalist vote.

In our view, it is demonstrably in the interests of all Canadians that voters in any secession referendum be asked a clear and unambiguous question and that the votes be tabulated in a fair and transparent manner. The entire legitimacy of the referendum process depends on its accurately reflecting the will of the residents of the province. If the question is ambiguous or if the votes are tabulated improperly, this legitimacy is eroded, making the entire process suspect.

The difficulty is in determining how best to ensure that pitfalls are avoided. As noted earlier, some countries' constitutions provide for the participation of the national government or of international observers in the conduct of a sovereignty referendum, including the formulation of the question and the tabulation of the ballots. It would clearly be both appropriate and desirable for the Quebec government to permit the Canadian government to take this role. It is highly unlikely, however, that the Quebec government would accept this kind of federal participation, given its generalized hostility to federal "intrusions" in areas that it regards as falling under exclusive provincial jurisdiction.

An alternative that might avoid this problem would be the participation of a representative group of Quebecers in setting any future referendum question. Under existing Quebec law, a premier who leads a majority government has exclusive control over the wording of the referendum question and has the opportunity to exert influence over those responsible for tabulating the ballots.

This unilateral and undemocratic method of setting the referendum question is quite extraordinary in comparison to the manner in which other constitutions deal with this matter. We believe that it is inappropriate for the Quebec premier, who represents only one side in the debate, to have exclusive authority to set the referendum question. Far more appropriate, in our view, would be the Quebec government's permitting the federalist forces within the province some meaningful opportunity to participate in the process of determining the referendum question. Give such an approach, all parties within Quebec would be more likely to regard the question-setting process as legitimate, increasing the likelihood

that the result would be accepted. Moreover, such an approach is consistent with the parliamentary traditions of accountability — both to the legislature directly and to the populace at large.

What the Federal Government Can Do

Whether the Quebec government under Premier Lucien Bouchard will accept these democratic prerequisites is unclear. Further, there appears to be very little that the Canadian government can do in practice to prevent the government of Quebec from holding a referendum on any question and in any manner it desires. Granted that the prime minister suggested immediately after the October 30 referendum that the federal government could and would ensure that any future referendums in Quebec were conducted on a clear question:

> Mr. Chrêtien told a CBC town-hall program...that he is prepared to use a sweeping but seldom-used power to maintain peace, order and good government to disallow a future Quebec referendum if the question is not clear...."I'm saying we have powers and we have to use the powers to make sure that the question will be fair to Quebecers and will be fair to the rest of the country," Chrêtien said.[56]

It is unclear to us, however, how the federal government could prevent Quebec from proceeding with a referendum on a question that Ottawa regarded as ambiguous. Even if Parliament were to pass legislation to prohibit the holding of such a referendum or seek judicial review of Quebec's jurisdiction in this regard, the Quebec government would likely proceed anyway. Moreover, the political confrontation that would ensue would itself become an issue that would be used against federalists in any referendum campaign.

Rather than attempt to prohibit the holding of a referendum that was ambiguous or unfair, the preferable approach, we believe, is for the federal government to state clearly in advance the circumstances under which it would recognize the legitimacy of a majority "yes" vote.

As the international experience with secession referendums indicates, there is no precise formula or form of words that must be employed. What is required is a question that gives the voters of the area involved an opportunity to clearly express their opinion of the intention of forming a separate and independent country. (For example, the wording of the question in the December 1994 draft of Bill 1, "Are you in favor of the Act passed by the National Assembly declaring the sovereignty of Quebec," would likely be regarded as sufficiently clear.)

Once the question has been set and well in advance of the referendum date, the federal government should state whether it would regard a majority "yes" on that particular question as a sufficient mandate to commence sovereignty negotiations. If it regards the question as ambiguous, it should indicate the nature of the modifications that might make the wording more acceptable. Further, it should make plain that the votes would have to be tabulated in accordance with a transparent and fair procedure for the outcome to be regarded as legitimate.

Possible Objections

Objections can, of course, be raised against the approach we recommend. One is that the wording of the question is irrelevant since, sovereigntists claim, Quebecers clearly understood in both campaigns what was really at stake. Yet, if the wording is truly irrelevant, then the Quebec government should have no objection to any question that might be proposed by the government of Canada or by Quebec federalists. Sovereigntists cannot have it both ways — insisting that the wording of the question is irrelevant but then refusing to permit federalists to participate in setting it.

In any event, it is now evident that large numbers of Quebecers failed to appreciate the real consequences of a vote for sovereignty. (For example, significant numbers believed that Quebec would remain a province of Canada and would continue to send MPs to the federal House of Commons after sovereignty.[57]) In the face of this kind of confusion, it is essential that any referendum question clearly set out the political options being presented.

Another potential objection is that the Canadian government would be acting undemocratically in challenging the validity of a referendum outcome, even if the question was vaguely worded. In fact, precisely the opposite is the case. There is nothing democratic about granting the Quebec premier absolute and unreviewable power to set the wording of the question without regard to whether it is fair and clear. Canada would be abandoning democratic principles if it were prepared to accept a "yes" vote on a misleading or vague question as a legitimate mandate for secession.

Principle 5: A Majority of 50 Percent plus One

Some constitutions that contemplate secession require a qualified majority (a vote other than 50 percent plus one) for secession to occur. Moreover, the prime minister of Canada hinted in the days before the October 1995 referendum that he might not recognize the legitimacy of a bare majority in favor of secession.[58] Polls taken in Quebec and in Canada generally indicate that most voters favor a higher threshold for secession to occur (see Box 7).

Despite these considerations, we conclude, on balance, that a simple majority of 50 percent plus one is appropriate for triggering negotiations on the terms and conditions of secession. Two kinds of arguments lead us to this conclusion.

Experience

International experience does not necessarily favor requiring a supermajority for a lawful secession. Although the constitutions of the vast majority of states do not contemplate secession under any circumstances, some permit it on the basis of a 50-percent-plus-one vote in the territory proposing to secede.[59]

Also to be considered is the Canadian government's equivocal response in the 1980 and 1995 referendum campaigns as to the majority required to trigger the secession process. In both campaigns, the Quebec government took the position that a simple majority in favor of sovereignty would constitute a mandate to begin secession negotiations. The federal government never clearly contradicted this claim, nor did it suggest any alternative majority it would find more appropriate. In fact, statements made by the prime minister in the final week of the 1995 campaign to the effect that Quebecers were voting decisively on whether to remain Canadians might reasonably have

Box 7: *Can a Referendum Authorize Quebec to Secede?*

The *CBC The National/SRC Le Point* poll released March 25, 1996 (conducted between March 11 and 17, 1996, by CROP in Quebec) indicates that approximately 90 percent of Canadians recognize that, with an appropriate majority in a referendum, the Quebec government should be authorized to secede from Canada.

What is that majority? In response to the question, "In the event of a referendum on Quebec sovereignty, what is the percentage of votes required, in your opinion, for the government of Quebec to obtain the mandate to proclaim Quebec's sovereignty?", the poll obtained the following answers:

	Total Canada	Quebec	Rest of Canada
		(percent)	
50%	5	4	5
50% + 1	11	27	6
50% + 1 to 55%	12	11	12
56% to 60%	13	12	13
More than 60%	49	40	53
Any percentage acceptable	1	1	1
Don't know/no response	9	6	10

Note: Totals may not add to 100 because of rounding.

been interpreted as an acceptance of the 50-percent-plus-one threshold advocated by the Quebec government.

Given that the federal government has never clearly contradicted the claim that a 50-percent-plus-one vote would represent a mandate to achieve secession, it would now have difficulty arguing that a higher threshold must be met. Moreover, if it did so argue, what principled way could it use to select which of the various possible thresholds was to be achieved? The choice of any number larger than 50 percent would appear to be entirely arbitrary. The Canadian government would seem to be raising the bar after having implicitly accepted the legitimacy of a 50-percent-plus-one vote because it now realized that it was possible that it would lose the next campaign.

Practical Considerations

A strong argument in favor of accepting the 50-percent-plus-one standard is the fact that any attempt to impose a higher threshold would undoubtedly provoke an intractable and highly risky confrontation with the Quebec government. Of course, the mere fact that the Quebec government favors something should not, in itself, force Canada to accept the same standard. On the other hand, in formulating its own position on these issues, it would be irresponsible for the Canadian government to ignore the Quebec government's likely reaction.

If Canada refused to entertain negotiations with Quebec despite a majority vote in favor of sovereignty on a clear question, the Quebec government would be faced with two options: it could back down and abandon its plans for sovereignty, or it could proceed to issue a UDI. Even contemplating the first option would be politically unimaginable for the Quebec government. Having fought a referendum campaign promising sovereignty on the basis of a 50-percent-plus-one vote, it could not back away from that commitment simply because Canada refused to go along. Thus, Canada's refusal to commence secession negotiations following a majority "yes" vote would greatly increase the likelihood that Quebec would resort to the only other alternative — issuing a UDI in defiance of the requirements of Canadian law.

For the federal government to play such a scenario of Russian roulette would leave it exposed to charges of hypocrisy. As we have already indicated, it is absolutely fundamental that all parties accept the principle that secession should occur only through a duly authorized constitutional amendment, rather than a UDI. Attempting to impose a threshold higher than 50-percent-plus-one would indirectly but unnecessarily undermine that principle by significantly increasing the possibility of unilateral action by Quebec.

Another practical consideration is that, assuming any referendum is to be consultative (Principle 4), its only effect would be to trigger negotiations with Canada on the terms of secession. The actual *achievement* of sovereignty would still require a negotiated agreement with Canada. Further, as we argue below, we believe that any such agreement should be submitted to the voters of the seceding province for ratification in a second referendum. If Quebec agrees to these additional safeguards, the Canadian government would find it difficult to refuse to even entertain negotiations on sovereignty following a majority "yes" vote in a referendum.

A final consideration is still more practical. Even if the federal government determined that a threshold greater than 50-percent-plus-one were desirable, how would it enforce this requirement? Merely issuing a statement favoring a supermajority would not necessarily mean that it would become widely accepted. In our view, the federal government would have to seek some form of popular ratification of its position, either through a referendum or an election. There is obviously no guarantee that the federal government's view as to the appropriate majority would prevail.

Even worse, Canadians inside and outside Quebec might take different views as to the majority that ought to be required, and the federal government would be in the invidious position of having to choose between the views of Quebecers and those of other Canadians on this fundamental issue. This would be a lose-lose proposition. No matter what Ottawa decided, its choice would be denounced in at least part of the country, deepening the conflict and making the likelihood of a consensual resolution of the issues even more remote.

Principle 6: Fundamental Rules for Secession Negotiations

We have argued that it is of fundamental importance that all governments in Canada accept the primacy of the rule of law in any secession scenario. That is, it should be generally agreed that secession can occur only in accordance with a duly authorized constitutional amendment. But achieving this objective would require some agreement as to the terms and conditions of any secession, which, in turn, would require an agreed-on process for negotiating the terms of such a settlement. The difficulty is that there is absolutely no consensus as to who should be the parties to these negotiations or how they should be conducted.

Negotiations: Parties and Conduct

As to the appropriate parties to the negotiations, many commentators assume that an entity they call the ROC — existing Canadian territory minus Quebec — would negotiate the terms and conditions of Quebec's departure from Canada. This suggestion presents two obvious difficulties. First, the ROC does not exist as an organized political entity. (The Canadian government, of course, is the representative of Canada as a whole, not of certain parts of the country.) Thus, there is, by definition, no one who could represent the ROC in any secession negotiations.

Second and more fundamentally, even if the ROC could be treated as an organized entity and political representatives appointed on its behalf, it is not at all clear that it would be the appropriate non-Quebec participant in the negotiations. The ROC includes only the part of Canada that is outside of the province of Quebec, so its representatives could not speak on behalf of the interests of Canadians living in the province of Quebec. Yet Quebecers would remain citizens of Canada throughout any secession negotiations. The government of Quebec might well be able to represent those who favored secession, but what of those who wished to remain within Canada? Given that the Quebec government has declared firmly that it will not agree to the partition of its territory, Canadians within Quebec who favored this option would be entirely unrepresented in any negotiations conducted between a sovereigntist Quebec government and representatives of the ROC.

If the ROC is not the appropriate party to negotiate with Quebec, what of the possibility that the federal government would be given a mandate to negotiate the terms of secession? This approach would certainly provide representation of the interests of federalist Canadians living in Quebec, but in solving that problem, it would create another. The prime minister and a significant proportion of the federal cabinet are Quebec residents, so both sides of the secession negotiations would be subject to the control and direction of Quebec-based politicians. Any outcome generated by this process — one necessarily involving trade-offs and compromises that would at least in part favor Quebec — would be difficult to justify in other parts of the country.[60]

What is left is a third alternative — the creation of a hybrid, special-purpose Canadian negotiating authority (CNA) jointly appointed by the federal government and the nine provinces outside Quebec plus representatives of the aboriginal peoples. Such a body could be created through federal legislation, which would define its mandate and authority. The CNA would be designed to represent and to aggregate all of the various "Canadian" interests (including the interests of Canadians resident in the province of Quebec) that would be at stake in the secession negotiations (see Box 8).

> **Box 8: *Representation and Aggregation***
>
> Effective participation in negotiations require a structure in which each party can perform two functions simultaneously. The first is *representation* — giving expression to all of the various interests and constituencies that are at stake in the negotiations. The second is *aggregation* — ensuring that there is a mechanism for achieving tradeoffs between the various interests at stake. Ultimately, each party must be able to speak with a single voice on the key issues in dispute.
>
> For a party as diverse as Canada, achieving both roles is difficult, but it is absolutely necessary for success in negotiations.

A Proposal for a CNA

A CNA could take a variety of forms. We propose the following structure as an example of the kind of organization that would be both workable and representative.

The decisionmaking body would be a governing board of 21 representatives, nine appointed by the federal government, nine by the nine provinces outside Quebec, and three by the aboriginal peoples of Canada. (The enabling legislation would require the appointing governments to consult among themselves and with their respective opposition parties to ensure that the overall membership of the governing board was representative in terms of political affiliation, gender, regional balance, and so on.)

The chief Canadian negotiator, who would chair the governing board and be the CNA's chief executive officer, would be nominated by the federal government and confirmed by a two-thirds vote of the board's membership. The governing board would be authorized to retain such experts and professional staff as it deemed appropriate for the efficient conduct of the negotiations.

The CNA's mandate would be to negotiate an agreement with Quebec on the terms and conditions of its secession from Canada. Any such agreement would require the approval of a special majority — perhaps two-thirds — of the members of the governing board. This special majority requirement is appropriate, in our view, given the fundamental nature of the interests involved in any secession negotiations. It would ensure that any agreement reflected a broad-based consensus and took into account the interests of all the different regions and communities in the country, but not make achievement of agreement impossible or unworkable.

A CNA would thus enable Canada to speak with a single voice on the important issues.

Constitutional Amendment

The CNA would not circumvent the existing constitutional amending formula. Even if the body negotiated and approved an agreement on the terms of secession, Parliament and the provincial legislatures would still need to provide the appropriate approvals for a constitutional amendment. Federal law could and should, however, provide that no amendment proposing the secession of a province could be introduced into the House of Commons by a member of the government in the absence of the agreement of the CNA.[61]

Conferring this kind of gatekeeper role on the CNA would ensure that the province of Quebec was not tempted to try to bypass the agreed procedure and attempt to cut separate deals with individual provinces or with the government of Canada.

One or more provinces with a relatively small proportion of the Canadian population might, however, fail to ratify an agreement (the situation that arose in relation to the Meech Lake Accord), leading to stalemate and even confrontation. To deal with this problem, we contemplated a proposal whereby all provinces would agree in advance to ratify automatically any agreement that the CNA reached. Such a commitment would not be legally binding (absent a constitutional amendment), but it could be reflected in a political accord signed by all governments and endorsed by legislatures.

We are doubtful, however, that governments or legislatures in the nine provinces outside Quebec would be prepared to commit themselves in advance to acting as a mere rubber stamp for the work of the CNA. It is also arguable that legislatures, which are the only bodies directly accountable to the electorate, should exercise some critical review of an agreement dealing with a matter as fundamental as the secession of a province. Moreover, at least three provinces are required by law to hold a referendum before ratifying any constitutional amendment,[62] and we doubt that they would be prepared to repeal this legislation.

A middle position — one that we believe might prove acceptable to governments and legislatures — is for the federal government and all the provinces to commit themselves to voting on any agreement reached by the CNA as a single package, without any amendments. The process would be similar to the fast-track procedure the US Congress employs in the ratification of some trade agreements, agreeing in advance that any treaty negotiated by the administration will be voted on "straight up", without amendments. This approach reflects the reality that any trade treaty is likely to be the product of a complex series of interconnected compromises and tradeoffs. Once they have been bargained for and agreed to by the administration, the only real question is whether the entire package is acceptable. If the answer is no, then the solution is to send the parties back to the negotiating table — not to permit one of the parties to cherry pick through the agreement by proposing one-sided amendments that fail to take account of the interests of the other party to the negotiations.

We believe that the same dynamic could and should obtain in the context of an agreement negotiated between the CNA and Quebec. Since any agreement would be a complicated series of tradeoffs, it would not make sense to allow individual provinces to reopen portions and make amendments that favor their particular interests or concerns. Thus, we propose that all provinces and the federal government sign a political accord committing themselves to placing any agreement approved by the CNA board before their legislatures for ratification without amendment.

We believe it is highly unlikely that any agreement that must be approved in this straight-up fashion would fail to achieve the necessary legislative ratification. The provinces would feel overwhelming pressure to proceed expeditiously to ratify an agreement that the CNA recommended because the only real alternative to legislative ratification would be unilateral action by the Quebec government, which, as we have explained at length, would impose significant costs on all parts of the country.

The only provinces with the ability to refuse to ratify an agreement in the face of these kinds of consequences would be Ontario, British Columbia, and Alberta, which together would dominate the new Canada that would emerge in the wake of Quebec's departure. Conversely, assuming these "big three" provinces all favored an agreement, the remaining provinces would have no option other than to go along and ratify.

We assume that the concerns of the "big three" would have been adequately taken into account in the deliberations of the CNA itself. In effect, therefore, it is likely that they would also ratify any agreement it endorsed.

We conclude that, assuming some sort of mechanism along the lines proposed were adopted, the existing amending formula would not pose a significant obstacle to ratification of an agreement permitting Quebec to secede. (Of course, an amendment could fail to achieve the necessary ratification. The result would be a major political crisis for Canada itself, calling into question whether the country would even continue to exist following secession or whether it would break up into a number of successor states.)

Principle 7: Ratification by Quebecers

In the 1980 referendum, the Quebec government committed itself to holding a second