The Amending Formula, Meech Lake, and the Quebec Secession Reference:

The Difficulties of Provincial Secession

A Thesis

Submitted to the Faculty of Graduate Studies and Research

In Partial Fulfillment of the Requirements

For the Degree of

Master of Arts

In

Political Science

University of Regina

By

Jeffery Lee Raymond

Regina, Saskatchewan

November, 2011

Copyright 2011: J. L. Raymond
Jeffery Lee Raymond, candidate for the degree of Master of Arts in Political Science, has presented a thesis titled, *The Amending Formula, Meech Lake, and the Quebec Secession Reference: The Difficulties of Provincial Secession*, in an oral examination held on September 13, 2011. The following committee members have found the thesis acceptable in form and content, and that the candidate demonstrated satisfactory knowledge of the subject material.

External Examiner: Dr. Raymond Blake, Department of History

Supervisor: Dr. Lee Ward, Department of Political Science

Committee Member: Dr. Yuchao Zhu, Department of Political Science

Chair of Defense: Dr. Robert Piercey, Department of Philosophy & Classics

*Not present at defense*
ABSTRACT

The Quebec Secession Reference, rendered by the Supreme Court of Canada, affirmed the position held by the Government of Canada, which claimed that a referendum on sovereignty is not a sufficient legal instrument, in of itself, to effect the removal of a province from the current constitutional order. The Reference also maintains that a constitutional amendment is necessary in order for the province to legally secede.

Moreover, it is the opinion of the Court that a referendum on sovereignty is the formal consultation of the people, by their government, with the purpose of determining the province’s democratic intent to remove itself from the Canadian Federation. However, a successful referendum on sovereignty does not constitutionally empower a province to amend the Constitution independent of the relevant institutions as defined in the amending formula. In fact, the Court informs us that while a referendum on sovereignty is the expression of the democratic will of the people within that given province, it does not allow for the exclusion of the extra-provincial stakeholders within the Canadian federation.

This thesis endeavours to understand, in detail and overall scope, the various legal options and limitations available to a province seeking to remove itself from the Canadian Federation. Central to this understanding is the assumption that provincial secession may only be achieved by way of a constitutional amendment, and that a unilateral declaration of independence is not within the jurisdictional power of any provincial legislature on its own. This thesis demonstrates the amending formula is the primary deterrent to any secessionist plan.
Therefore, in order to have a comprehensive understanding of the constitutional impediments to secession, and to legitimate the position that the amending formula is the primary secession deterrent, this paper will attempt to delineate the relevant jurisdictional capacities of both the provincial and federal governments during a potential secession process.

In order to determine why the question of secession was presented to the Supreme Court in the first place, it is necessary to provide a historical overview and a synoptic review of the Constitutional patriation process, the Meech Accord, the 1995 Quebec Referendum, and the Quebec Secession Reference. These events are critical to understanding why Quebec has demonstrated uneasiness with the idea of Canada as shared by the rest of the country.

After presenting the historical overview, an examination of the legal difficulties associated with provincial secession will follow. In addition, the actions and statements of the political actors during the Reference will be examined in order to comprehend the motives of both secessionists and federalists. Finally, we will determine that political action has forced Canada to discuss and examine the legality of this issue.

This paper will weigh the legal practicalities involving a referendum result that requires the governments of both Canada and the province of Quebec to negotiate terms regarding secession and whether a consensus would likely follow. Ultimately, the Canadian Constitution and its amending formula provides for the possibility of provincial secession, however, political consensus on the terms of secession would be extremely difficult to achieve. It is also possible the constitutional acceptance of Quebec as a distinct society would have avoided the threat of a secession process altogether.
ACKNOWLEDGEMENT

This thesis would not have been possible were it not for the support and guidance of Professor Yuchao Zhu and Professor Lee Ward. I am indebted to them for their patience, guidance and knowledge.
POST DEFENSE ACKNOWLEDGEMENT

I would like to thank the Faculty of Graduate Studies and Research for funding the teaching assistantship I received in 2008. I would also like to thank the members of the defense committee for their time and commitment.
DEDICATION

For Malika.
# TABLE OF CONTENTS

ABSTRACT..............................................................................................................i

ACKNOWLEDGEMENT..........................................................................................iii

POST DEFENSE ACKNOWLEDGEMENT.........................................................iv

DEDICATION...........................................................................................................v

TABLE OF CONTENTS............................................................................................vi

1. INTRODUCTION.................................................................................................1
   1.1 LITERATURE REVIEW..................................................................................5
   1.2 BACKGROUND..............................................................................................9
   1.3 CONSTITUTIONAL REJECTION AND QUEBEC SECESSION?...............17
   1.4 QUEBEC SOVEREIGNTY...............................................................................18

2. CONSTITUTIONAL AMENDING PROCEDURES..............................................20
   2.1 THE GENESIS OF THE AMENDING FORMULA........................................20
   2.2 AMENDING THE AMENDING FORMULA...............................................28
   2.3 MEECHLAKE ACCORD: AN EXAMPLE OF THE DIFFICULTIES OF
      CONSTITUTIONAL AMENDMENT IN CANADA.........................................30
   2.4 A DISTINCT QUEBEC AND THE CANADIAN CHARTER OF RIGHTS AND
      FREEDOMS.................................................................................................34
   2.5 SECESSION REFERENDUM ’95.................................................................39
   2.6 TOWARDS THE QUEBEC SECESSION REFERENCE...............................40
   2.7 POST-REFERENDUM IDENTITIES..............................................................42
   2.8 THE QUEBEC SECESSION REFERENCE....................................................44
2.9 PART V OF THE CONSTITUTION ACT, 1982 AND UNILATERAL DECLARATION OF INDEPENDENCE…………………………………………………………49
2.10 B. III: AN ACT REGARDING THE FUTURE OF QUÉBEC……….50
2.11 THE AMENDING FORMULA: ACCOMMODATING SINGLE PACKAGE SECESSION………………………………………………………………………52
2.12 LIKELY COMPONENTS OF A SOVEREIGN AGREEMENT…………..53
2.13 THE MINIMUM NECESSARY CHANGES…………………………53
2.14 QUEBEC CANNOT UNILATERALLY SECEDE…………………….54
2.15 THE RELEVANT AMENDING PROCEDURES…………………………60

3. RATIFICATION PROCESS…………………………………………………61

3.1 SEEKING FLEXIBILITY IN RATIFICATION………………………..61
3.2 THE 7/50 PROCEDURE…………………………………………………61
3.3 FURTHER 7/50 AMENDMENTS…………………………………….62
3.4 THE UNANIMITY PROCEDURE………………………………………63
3.5 THE BILATERAL AMENDING PROCEDURE………………………64
3.6 THE FEDERAL UNILATERAL PROCEDURE……………………….74
3.7 THE PROVINCIAL UNILATERAL PROCEDURE……………………75
3.8 THE RIGHT TO SELF DETERMINATION…………………………75
3.9 NEGOTIATIONS…………………………………………………………76
3.10 RATIFICATION ISSUES IN THE NEGOTIATIONS……………..68
3.11 THE NEED FOR GOOD FAITH……………………………………70
3.12 REMOVING QUEBEC FROM EXISTING CONSTITUTIONAL ARRANGEMENTS…………………………………………………………71
1. INTRODUCTION

This thesis analyzes a variety of legal options and boundaries available to a province seeking to remove itself from Canada. Fundamental to this view is the Supreme Court of Canada’s opinion that provincial secession may only happen through constitutional amendment, and that a unilateral declaration of independence is not within the jurisdictional power of any provincial legislature. While not crucial to the secession procedure, I suggest the amending formula it is the principal restriction.

In addition, Canadian regional differences make the use of the Amending Formula to effect secession very difficult. Despite the legal apparatus allowing secession of a province, the necessary consensus would be difficult to the point of not being a realistic outcome, particularly considering Canadian history. In fact, some attempts at mega-constitutional deals have been failures: The Meech Lake Accord illustrated the difficulty of achieving regional consensus in constitutional issues and illustrated the difficulties of large scale constitutional negotiations; perhaps one day involving provincial secession. Moreover, the distinct society clause in the failed Meech Lake Accord was itself the victim of the amending formula in the Constitution; the required consensus was not realized during the allocated period. A consensus on partition, given the complexity of division and allocation of wealth, land and materials, would represent an even more difficult task. However, in the end, as this thesis will show, the Canadian Constitution and its amending formula actually provides for the possibility of provincial secession.

Chapter 1 will address Quebec secessionist sentiment in general in order to give the reader a context as to why partition may present itself as an option in the future. This chapter will introduce the amending formula and its relationship to secession, while
highlighting aspects of the Canadian constitution necessary for any province, not just Quebec, to secede.

Based on Guy LaForest’s assertion that Pierre Trudeau’s patriation of the Canadian constitution was tantamount to the destruction of the dualistic concept of Canada, this chapter will discuss the bilingual conception of Canada and the difficulty having two founding peoples—French and English—has on Quebec identity and Canadian identity. Drawing conclusions on this dynamic will allow us to see the Amending Formula’s influence on provincial secession, particularly in a dualistic society.

Chapter 1 will end with a discussion of Quebec sovereignty in terms of its chances for success and previous Supreme Court rulings on the subject. Doing so will contextualize Quebec sovereignty in terms of provincial secession and aspects of the constitution such as The Clarity Act.

Chapter 2 examines patriation as it pertains to the Amending Formula of the Constitution. The purpose behind the content in this chapter is twofold. First, it examines the composition of the amending formula agreed upon by the federal government and the provinces save for Quebec. Second, the chapter reveals the difficulty Quebec would have in reaching a constitutional deal that is acceptable to Quebec and the other provinces. Clearly, Quebec was, and remains to this day, unsatisfied with the final version of the Constitution Act 1982, as no Quebec premier has officially endorsed it.

The attempts at consensus surrounding the Amending Formula during the patriation process also appear in Chapter 2. It also provides a detailed account of the difficulties surrounding the Meech Lake Accord, focusing specifically on the issue of distinct society, and how the passage of this clause might have extinguished the
sovereignty movement. The failure of Thee Meech Lake Accord also serves to demonstrate the need for a constitutional amendment in order to affect partition since its interpretation under the law could only be sourced in the constitution if it is to be achieved. Of course, the Meech Lake failure was also a major contributing factor to the ’95 Quebec referendum and the successful end of secession could, like the Meech Lake Accord, only be achieved by way of constitutional amendment.

The idea that a constitutional amendment is required to pursue a secessionist project is also examined in this chapter and rejects the notion that a unilateral declaration of independence is sufficient an option to meet secessionist wishes. *Bill 1: An Act Regarding the Future of Quebec* is rendered as an unlawful option as it rejects the requirements in the amending formula if a consensus on partition is not met under the guidelines of the constitution. Chapter 2 outlines what changes under the amending formula would be necessary in order to change the Canadian Constitutional order as it currently exists.

While the second chapter focuses more on the genesis of the amending formula, Chapter 3 undertakes a detailed examination of the ratification process and shows that separate amendments and not a comprehensive approach to ratification is necessary. It includes discussions about many amendments including the 7/50 Amendment, which means an amendment requires that both houses of Parliament and a minimum of seven provincial legislatures representing at least 50 percent of Canada’s population to pass resolutions, the Unanimity Procedure, which would remove much language regarding Quebec in the Canadian Constitution, and others such as the Bilateral Amending
Procedure, the Federal Unilateral Procedure and others. Each of these amendments would be necessary for a province to secede from Canada.

Chapter 3 will also focus on the idea that Quebec may secede based on the right of self-determination. However, this thesis will show that, even beyond the fact that the Supreme Court of Canada dismissed this argument, Quebec may not simply secede unilaterally. Instead, the right of self-determination is, in this case, the right of Quebec to engage in a series of legal processes that are in accordance with the Canadian Constitution and would see sole political control relinquished to the province. With this in mind, the chapter also discusses the possibility of negotiations and ratification issues pertaining to these discussions.

While the mention of laws and negotiation tactics is paramount to any provincial secession, Chapter 3 also demonstrates the need for good faith in such proceedings. Ultimately, the negotiators themselves are responsible for the outcome of any agreement. Therefore, neither side would be interested in trying to negotiate a deal where the only objective was to be uncooperative in order to ensure a dubious result. Therefore, it is necessary for both sides to understand that a non-agreement is detrimental to their own cause.

Next, Chapter 3 discusses the changes to borders as well as the considerations necessary in terms of minorities including First Nations Canadians living in Quebec. Such concerns are critical, particularly in terms of predicting the aftermath of such a drastic change to the makeup of Canada as a nation.

Ultimately, this thesis will argue that sovereignty attempts can be beneficial to the Canadian Constitution because it demonstrates that the right of self-determination is
achievable, regarding any secessionist project, however, it is not easily accomplished. Therefore, the Constitution cannot be defined as inflexible or recalcitrant to change.

Furthermore, while legislative consent is certainly a compulsory phase in the implementation of an adjustment to the Constitution, this thesis will argue that ultimate ratification should include a nationwide referendum. Clearly, the secession of a province from Canada is a far more complicated issue than a province simply expressing its will to secede by way of a referendum alone. As this thesis will show, the process of removing a province from the constitutional order requires a consensus from all pertinent stakeholders and would require a level of possibly unreasonable shared agreement. The amending formula as it exists today presents a deterrent to secession due to its complexity and requirement of consensus. Simultaneously, it allows for the process of partition to take place if an agreement occurs.

1.1 Literature Review

During the course of researching the subject matter for this thesis, it was apparent that many sources existed on the subject of Quebec secession. The sources I have selected reflect the points that this thesis seeks to make. I acknowledge that there are some excellent sources on the subject that I chose not to include; however, this was due to contextual circumstances and not a reflection on the quality of any omitted works.

In Trudeau and the End of a Canadian Dream, LaForest puts forth the argument that Pierre Trudeau’s patriation of the Canadian constitution was tantamount to the destruction of the dualistic concept of Canada. LaForest reaffirms the idea that Canada was conceived by two founding peoples, French and English, and that this is key concept
for Quebec’s understanding of themselves within the Canadian Federation. LaForest believes that Trudeau deceived the people of Quebec during the 1980 referendum on sovereignty-association by declaring an intention to renew federalism. Renewal of federalism for Quebecers, according to LaForest, was a reaffirmation of the two founding people’s concept. What they, and the rest of Canada, received was Constitutional reform including patriation and a Charter of Rights.¹

In *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Tully, 1998), James Tully attempts to answer the seminal question of whether or not a modern constitution is able to recognize and accommodate cultural diversity. Tully is careful to state that he is not making an argument for or against cultural diversity; the argument for is self evident. Instead, he is keen to examine what critical attitude, or spirit, is necessary to invoke an understanding of how justice may serve cultural recognition.²

Reading Tully, it is easy to conjure images around the world to which Canada is able to relate. Terms such as cultural diversity and recognition, used in a constitutional context, invoke the reader to use the almost inevitable example of a national movement in Quebec which seeks a constitutional recognition of their own distinctiveness. One does not have to restrict an understanding of this to Québec’s popular movement and their desire to have constitutional distinctiveness entrenched within the Canadian Charter of Rights and Freedoms. Certainly, the Basques in Spain (and France) come to mind for

---


those who are interested in such things; although it must be pointed out that the people of Québec, for the most part, have married their constitutional fate to democratic outcomes. Constitutionalism should not be approached in the same way that politics is approached. Politics, by its nature, is highly competitive and success is almost always denoted by victory, at the expense of an opponent. Democracy in many ways is as much about appealing to the masses to reject the ideas of another’s rival, as it is about seeking approval for a course of action.³

The idea of the permanence of constitutional rights does not easily allow for the resurrection of a defeated idea when constitutional dialogue and motive is gauged in terms of an angle of attack. Tully worries, correctly, that “[i]f one language or tradition gained ascendency in a constitutional negotiation, it would cease to be a dialogue at all. It would be a (liberal, nationalist or communitarian) monologue”. The only way to circumvent this impasse is to create an intercultural understanding that is not limited to the language of the dominant. This could apply to any theoretical negotiations on secession, however, this also relates to a general constitutional discussion that could include a dialogue towards the end of entrenching a distinct society clause, regarding Quebec, into the Constitution.⁴

David Smith’s Federalism and the Constitution of Canada submits that there is a cultural division of power between English and French Canada that represents itself as cultural federalism. He believes that Canadian federalism has the capacity to

³ Ibid, 37.
⁴ Ibid, 39.
accommodate change, which is also reflected in the Supreme Court of Canada opinion that secession is a constitutional possibility.⁵

In Peter Russell’s book, *Constitutional Odyssey: Can Canadians Become a Sovereign People?*, a well presented description is offered of Canada’s constitutional odyssey from its inception in 1867 through to the contemporary constitutional efforts that have been at times both acrimonious and unresolved. Russell begins by informing the reader that Canada’s history can be divided into two philosophical outlooks; Burkean and Lockean. For the most part Canadian Federalism has taken the unhurried evolutionary path of the Burkean tradition. However, this began to change in the 1960s, when many Canadians expressed a desire to transform the Canadian constitution. Russell presumes that Canadians became essentially Lockean in their thinking which manifested itself in the Constitutional attempts of the 1980’s and 90’s. He also does not discount the American influence on the Canadian contemporary conception of federalism that saw the incorporation of judicial review and an individual rights package into the Canadian constitution. This final point is acutely important because it illustrates the importance of Supreme Court decisions specifically regarding the topic of this thesis as it relates to the Quebec Secession Reference.⁶

In his book, *Misconceiving Canada: The Struggle for National Unity*, Kenneth McRoberts argues that former prime minister Pierre Trudeau was responsible for the closeness of the 1995 Quebec Referendum because of his resistance to any kind of

---

special status for Quebec. He argues, like LaForest, that Trudeau’s actions surrounding patriation of the Constitution and the entrenchment of the Canadian Charter of Rights and Freedoms ended any sort of coexistence between Canadian Federalism and Quebec Nationalism. Not least of Trudeau’s constitutional affronts in this context was his role in the failure of the Meech Lake Accord. Then prime minister Brian Mulroney’s attempt at Canada-Quebec reconciliation after a bitter patriation process was rebuked by Trudeau who still held great sway with the rest of Canada. The result was the eventual rejection of the Accord and Quebec’s resentment of the Trudeau vision and its apparent acceptance outside of Quebec. This was perceived as a rebuke of the idea that Canada was the result of two founding peoples, English and French, much as Laforrest believes.

In Summary, constitutional accommodation in Canada has proven difficult given the diversities involved. However, that is not to say that the Constitution cannot accommodate change in the form of both constitutionally entrenching the idea of Quebec being a distinct society and allowing for the removal of a province from the Canadian federation.

1.2 Background

Ultimately, the amending formula of the Canadian Constitution provides for the possibility of provincial secession. However, it is unlikely that Quebec secession will ever fully materialize due to the political difficulties involved in obtaining the consensus required by the amending formula itself. The amending formula is the most significant

---

issue for Quebec in terms of any future secession plans. Past large scale attempts at constitutional change have proven to be impractical given the regional, language and political differences that are quite defined in Canada and, as a result, would impede the consensus necessary for a successful secession attempt. The Quebec Secession Reference has afforded Canadians the comfort of informed expectations in the previously murky world of secession law and politics. It firmly states what many Canadians wanted to believe but had never previously dared asked: Do we live in a country where it is easier to resolve our differences rather than go our separate ways?

The closeness of the 1995 Secession Referendum left some Canadians numb. However, the results spurred the Canadian government to address the destabilizing prospect of Quebeckers one day choosing the separatist option. Quebec, or any province for that matter, may seek to leave Canada. After the narrow defeat of the 1995 Quebec Referendum proposal, the Canadian government decided to assume a more proactive role that sought to address the legalities surrounding the secession of a province; specifically, the issues surrounding a unilateral declaration of independence and the obligations associated with a winning referendum.

More still, the Quebec Secession Reference is an instrument by which we are able to gauge the strength of Confederation. Through it, we have discovered that Canada is a country that came together in consensus and must part in much the same way, assuming that there is a future political climate warranting this consideration.

The Reference may be constitutional proof that assures Canadians that we are a society governed by the rule of law. This is not a mere consolation, but a success for our
brand of democracy, which has secured the respect of its institutions and political actors in spite of the significant differences concerning national direction.

For Sovereignists, the *Quebec Secession Reference* has meant the end of the idea that secession is simply a matter for the province of Quebec to control, independent of the provincial and national constitutional stakeholders. A referendum, independent of a national negotiation, is not a sufficient instrument to achieve secession.

Following the Quebec National Assembly’s passage of Bill 1, *An Act Respecting the Future of Quebec*, signed into law on June 12, 1995, the Federal Government of Canada initiated a Supreme Court of Canada reference that questioned the legality of the Government of Quebec’s claim that the province could remove itself from the Canadian constitutional order by way of a unilateral declaration of sovereignty. Citing the amending formula, the Court’s opinion was decidedly against the notion, holding that a province did not have the constitutional jurisdiction to effect its own removal from Canada. Secession could only be formalized after consultation and negotiation of the terms of partition were made with the appropriate institutions. The Amending Formula of the Canadian Constitution, and the Court’s concern over this procedural point speaks to their belief that secession requires a constitutional amendment. Simply stated, the Court was of the opinion that a province did not alone possess the constitutional authority to leave Canada.

The Supreme Court of Canada was cautious in its opinion; however, it provided a framework intended to clarify the constitutional obligations that both the provincial and federal governments would be required to fulfill in any secession process. The Court reminded the relevant institutions that a successful referendum would task them with
carrying out the constitutional responsibilities required of an amendment to the Constitution. If this were to happen, the *Quebec Secession Reference* would serve as a map allowing navigation through the intricacies and boundaries imposed by our Constitution in any future provincial secession attempt. It is to the Court’s credit that the *Quebec Secession Reference* addresses the plausibility of a hypothetical secession by a province. It is in many ways a reaffirmation of the Constitution’s jurisdictional empowerment of Quebec, or any province, concerning its right to self-determination.

While Canada has been burdened with legal obstacles since Confederation, there is perhaps no other action, which has had a larger impact on the practicality of provincial secession than that of the *Reference* itself. The importance of the subject matter, even as a concept, gives rise to certain insecurities concerning the possibility of a partition. This idea enhances the *Reference*’s significance in terms of the national psyche because of the Court’s acknowledgement that a province has the constitutional right to secede.

However, the Court reminds those who seek to lead a province out of the Canadian constitutional order, that the right to secede and the means of achieving secession are two very different and complicated matters. As such, we may then think of the *Quebec Secession Reference* as a Rosetta Stone of sorts, a cipher by which to understand the Constitution’s guiding principles and requirements, in terms of both procedure and jurisdictional empowerment.

If, Quebec, or any province for that matter, should hold another referendum on sovereignty and the results demonstrate a public will to leave the Canadian constitutional order, the Supreme Court of Canada informs us that negotiations would have to take place between the relevant institutions in order to accommodate a change in Quebec’s
constitutional status. If these hypothetical negotiations were to become a reality, then it would be necessary to understand how the various procedures of the Constitution’s amending formula would ratify the removal of a province from the Canadian Federation. Essentially, it would be necessary to understand how negotiations between relevant actors would be translated into constitutional law. The purpose of this thesis is to understand how a tentative agreement between Canadian institutions on the subject of provincial secession could be ratified in accordance with the existing amending formula of the Canadian Constitution. Ultimately, the amending formula is the primary deterrent, due to the difficulty of achieving the required legislative consensus. Ironically, the Amending Formula facilitates the possibility of secession, the very concern it is supposed to prevent. As this thesis points out, when such legislations are not tested or challenged, their intent is purely speculative and may not live up to their billing.

Of course, the constitution is just a document, regardless of its importance. The constitution can be circumvented in any number of ways, ranging from a refusal to acknowledge it, to the use of violence in order to deter, or coerce, those who adhere to it. As such, Quebec, or any other province, could announce that they are independent from the rest of Canada. In fact, should they get international recognition and a loss of federal control occurs, Quebec could become a de facto state. However, because they can achieve unilateral secession, this does not mean that they have the right to do so. The Court notes the difference by saying:

A distinction must be drawn between the right of a people to act, and their power to do so. They are not identical. A right is recognized in law: mere physical ability is not necessarily given status as a right. The fact that an individual or
group can act in a certain way says nothing at all about the legal status or consequences of the act.⁸

Perhaps the most critical test a federation can face is the realization that one of its components could effectively remove itself from the federal regime. Recent generations of Canadians have rarely known a time when secession has not been a concern. However, the legal process for secession creates inherent constitutional deterrents such as the amending formula. Convoluting the legality of secession within Canada is the notion of whether preconditions exist warranting the secession of a province in order to satisfy its right of self-determination, as Thomas Frank’s *Why Federations Fail* suggests.⁹

Certainly, many federalists do not agree with the *precondition theory* and argue that the preconditions for secession are on no account found in a contemporary democracy.¹⁰

Regardless, the role of the Courts is to uphold the Constitution of Canada and ensure respect for the *federal principle* of Canada. That is to say, the Courts have a duty to make certain that the boundaries of the provincial and federal constitutional jurisdictions are honoured and obeyed. In terms of secession, a province that hopes to remove itself from the Canadian federation would inevitably frustrate the composition and reach of the Constitution in its present form. Therefore, in order to satisfy the demands of the legal order governing the freedom of action available to a province, an amendment to the Constitution is the only course of action that would facilitate partition.¹¹

---

¹¹ Ibid.
The argument for a united Canada is ultimately an argument for liberal democracy, as Stephane Dion argues, emerging from French liberal thought and the likes of Rousseau, Montesquieu and de Tocqueville, the last of whom believes that democracy cannot simply exist as an expression of the majority. Instead, the rights of the minority have to be functionally incorporated into society to allow for the development of that minority within the greater whole. This of course extends to the smallest minority of all, the individual in his or her capacity as citizen.12

These three wise men of liberalism have guided constitutional democracies in establishing their rules of law. In other words, “the supremacy of law is a vital component of democracy”.13 For separatists their cause is, and must be, one decided through democracy and the rule of law. Secession can be defined as a, “rupture of solidarity amongst fellow citizens”.14 Therefore, international law only allows the right of self-determination in the form of secession where there is an indisputable rupture of solidarity.15 Clearly, the amending formula should exist to maintain such a sentiment for Canadians, though in practice this may not be the case, as I will argue later.

The secessions that have taken place around the world have all been the result of decolonization or the collapse of a totalitarian regime. In a democracy, especially one as established and respected the world over as Canada, it is difficult to justify such a dramatic step. A democracy must allow for people who decide to secede to do so; populations wishing to form their own states are rarely held against their will in

13 Ibid.
14 Ibid.
15 Ibid.
perpetuity. International law goes to great lengths to encourage people not to split along ethnic or culture ties. After all, it is not practical or desirable that every ethnic group has their own country. As such, there are set of conditions under which secession may take place if in fact that is the desire of a predetermined majority of people. This ensures protection of the rights of those wishing to secede and those who wish to remain as part of the remainder. These rules must be laid down, in accordance with the Constitution and international law, in quieter times and not be, as Stephane Dion correctly points out, “done in confusion and haste two weeks before a referendum”.  

This thesis argues that sovereignty should be attempted within the Canadian Constitution and that attempts to circumnavigate constitutional supremacy, by way of a unilateral declaration of independence, would be harmful to the legitimacy of any secessionist project. In other words, despite the amending formula’s capacity to deter, attempts should still be made in order to maintain constitutional legitimacy. Again, testing such legislation is key for the democratic process. In fact, doing so may help to reveal flaws in the original intent of certain constitutional values such as the amending formula.

Furthermore, any agreement on sovereignty would be required to implement and connect them to the appropriate amending formula necessary for the ratification process to be complete. While legislative approval is certainly a necessary step in the execution of an amendment to the Constitution of this or any other extent, this thesis will argue that ultimate ratification will have to include a nationwide referendum in order to conform to

\[16 \text{ Ibid.}\]
the constitutional convention implemented with the failed Charlottetown Accord, a legacy of the closed negotiations of Meech Lake.

Certainly, the outcome of a referendum on secession, and the causes of it for that matter, is the expression of a political will. The Court, recognizing this, made its determination on whether or not the province has the right to do so and what boundaries, the rights of those in opposition, create. In other words, democracy’s majority rule is not to the exclusion of other constitutional values. Therefore, the right of a province to determine its future, outside of the current constitutional arrangement, is not legitimately recognized simply because a majority of votes is cast, a point that the Court articulates rather well:

The argument that the Constitution may be legitimately circumvented by resort to a majority vote in a province-wide referendum is superficially persuasive, in large measure because it seems to appeal to some of the same principles that underlie the legitimacy of the Constitution itself, namely democracy and self-government.

Democracy is the means by which the political will of the people is determined; however, the ultimate authority found in the constitution tempers its power.

### 1.3 Constitutional Rejection and Quebec Secession

The demise of the dualistic legal understanding of Canada, an idea constitutionally affirming English and French peoples as the primary founders of Canada, has often been cited as the primary reason for Quebec’s suspicion, and subsequent refusal to formally sign the Constitution Act 1982. While the existence of an individual rights package, The

---

Canadian Charter of Rights and Freedoms, may undermine Quebec’s preferred dualistic notion of Canada, it is not the only source of Quebec’s constitutional disillusionment. In fact, it may have more to do with the context of negotiation than anything else may.

Political scientist Guy LaForest puts forth the argument that Pierre Trudeau’s patriation of the Canadian constitution was tantamount to the destruction of the dualistic concept of Canada. The idea that two founding peoples, French and English, conceived Canada was, and is, an important component for Quebec’s understanding of itself within the Canadian Federation.

Moreover, LaForest believes that Trudeau deceived the people of Quebec during the 1980 referendum on sovereignty-association by declaring an intention to renew federalism. A renewal of federalism for Quebecers, according to LaForest, was a reaffirmation of the two founding people’s concept. Instead, Quebec, and the rest of Canada received Constitutional reform including patriation and a Charter of Rights.

LaForest maintains that Quebec’s perception of the subversion of their historic position in the country has to do with the form of patriotism that is required of them due to the Charter’s championing of individual rights and support of multi-culturalism. Before 1982, the idea of duality enabled Quebecers to embrace their own brand of Canadian patriotism without Quebecers having to renounce their primary loyalty to Quebec.\(^\text{19}\) Further, LaForest contends that Quebec’s rejection of the constitutional process makes the Constitution illegitimate within that province. Despite this discontent, the amending formula is meant to make secession difficult.

1.4 Quebec Sovereignty

In Quebec, federalists are often accused of being centralist and are often branded as agents of Pierre Trudeau’s legacy. This, of course, is not the case. Today’s approach to federalism is more reconciliatory and interdependent than Trudeau’s Canadian federalism; federalism is no longer about the central government confronting the provinces. If both the central government and the provincial governments respect each other’s constitutional jurisdictions without challenge, then there should be an amicable working relationship between both levels of government. This would be a return to the 1945-60 period of cooperative federalism where neither the federal nor provincial governments were subordinate; they are intertwined and do not operate independently.\(^{20}\)

That is to say, any of the parts, in any configuration, affect the whole and a process for change should reflect the idea of a lateral power sharing agreement that is mutually dependent.

The Supreme Court held that the idea of a unilateral declaration of independence was unlawful because it goes against a ‘mutually dependent’ conception of federalism. One province alone should not be able to decide the constitutional fate of the rest of the country, just as the central government alone should not be able to do so. It is necessary not to deny the recourse of secession to any province that displays a clear willingness to leave; however, secession may only occur with a clear majority and a clear question. This is the main point of initiating the Secession Reference questions and the Clarity Act. The legacy of both the Quebec Secession Reference decision and the Act that followed

allowed Quebecers to know exactly what was at stake when they cast their vote in a provincial referendum on sovereignty.

It may be that Quebecers will never choose a separatist option because Canada is a decentralized country with a strong system of rule of law. It simply would not make sense that Quebecers would knowingly put their quality of life in jeopardy. It may be for this reason that Federalists have put so much energy into making sure that Quebecers cannot be politically manipulated on such an important and permanent matter.

Quebec journalist Benoit Aubin observed that the idea that a Parti Québécois government, elected with say 38 percent of the population, could launch a referendum campaign, win it, and then separate unilaterally with everyone improvising along the way would be impossible because of the Quebec Secession Reference. The Quebec Secession Reference may require that all parties must abide by in the event of an attempted secession, but it is the Supreme Court ruling on the Quebec Secession Reference that asserts that unilateral declaration independence of a province is not possible under the Constitution. A constitutional amendment must be executed for a province to legally secede from the Canadian Federation.

2. CONSTITUTIONAL AMENDING PROCEDURES

2.1 The Genesis of the Amending Formula

Immediately following the 1980 Quebec referendum on sovereignty-association, Prime Minister Pierre Elliott Trudeau announced his intention to patriate and renew the

British North American Act.\textsuperscript{22} This effort at constitutional renewal would differentiate itself from other attempts because it was successful, with the exception of Quebec’s refusal to sign the final document.

The outcome of the 1980 referendum was a catalyst for the patriation process to occur. LaForest points out that the “no” camp argued that real constitutional reforms were difficult if not impossible to achieve while a separatist government sat in the National Assembly of Quebec. Nevertheless, Trudeau pledged to renew the Constitution if Quebecers agreed to cast their vote in favour of Canada.\textsuperscript{23} According to LaForest, this was the renewal of Quebecers’ trust in Trudeau.\textsuperscript{24} In fact, LaForest believes that during the 1980 Quebec Referendum on Sovereignty-Association, Quebecers believed that the constitutional renewal advocated by Pierre Trudeau during the campaign was a promise to reaffirm the concept that Canada was the product of two founding peoples: English and French. Of course, Trudeau’s concept of constitutional renewal was somewhat different, as his patriation process hoped to redefine the Canadian Constitutional conception of the role of the Courts, the rights of the individual, and the process of amendment.

For Trudeau and the premiers, the path to patriation and renewal was fraught with difficulty and distrust as a battle was waged to preserve the tradition of parliamentary supremacy against the entrenchment of a negative rights regime and a new amending formula. Understanding that the premiers of the provinces would give up very little and ask for a lot, Trudeau was at first inclined to achieve patriation and renewal of the Constitution by way of unilateral action. The provinces, excluding Ontario and New

\textsuperscript{22} Stephen Clarkson and Christina McCall, \textit{Trudeau and Our Times}, (Toronto: McClelland & Stewart Inc., 1990), 245.
\textsuperscript{23} LaForest, \textit{Trudeau and the End of a Canadian Dream}, 29.
\textsuperscript{24} LaForest, \textit{Trudeau and the End of a Canadian Dream}, 35.
Brunswick, formed a coalition known as the Gang of Eight. This group hoped to impede Trudeau and force him to negotiate, even hinder, the terms of patriation and the amending formula.

To force Trudeau’s hand in admitting the provinces into the process, the Gang of Eight, the premiers resistant to Trudeau’s constitutional plans, petitioned the Supreme Court of Canada to issue a reference on the legality of Trudeau’s proposed unilateralism. In what would become known as the Patriation Reference, the Court ruled that, “It would be legal for parliament to act without provincial consent, but that this would still be unconstitutional since it would breach an established convention of substantial consent.”

The Court clearly acknowledged that the written provisions in the Constitution provided a legal basis for Trudeau’s unilateral intention. However, the Court believed that a precedent had been set by earlier attempts to achieve a consensus on a new amending formula requiring the agreement of all the provinces. In other words, Ottawa and the provinces would have to negotiate an agreement.

For Quebec Premier René Lévesque, who had his hope for an independent Quebec dashed by Trudeau’s efforts in the 1980 Québec Referendum, the Court’s decision provided him with an opportunity to undo Trudeau’s own Constitutional ambitions. Lévesque was cautious in his praise of the Court’s rendering of the Patriation Reference due to the contradiction of having a secessionist’s attempts at blocking a federal effort buoyed by the Canadian Supreme Court. The Reference effectively tempered Trudeau’s attempt of unilateral action, to the benefit of both Quebec and Lévesque. The Quebec Premier took the legal system to task and lamented that the

---

confusion of interpreting a common law reference decision from a civil law point of view asking, “What did this hocus-pocus amount to coming on top of all the hair splitting we were already embroiled in? Issuing from the English tradition where well-established precedents so often replace written law.” Publicly, Lévesque claimed exasperation over Canada’s English legal tradition holding precedence over his familial recognition of Quebec’s legal system. However, politically, Lévesque had reason to be pleased with the Court’s decision, in that it stalled Trudeau’s plan of unilateral action. For Lévesque, the Patriation Reference set the stage for his second act, which would be his last.

By linking his fate to the Gang of Eight, Lévesque was able to claim that his issue with Trudeau’s constitutional vision was a matter of a collective concern, and not merely a personal vendetta. For Lévesque, this meant that Trudeau would not be able to garner public support for his proposal by simply dismissing Lévesque as an unfulfilled separatist, motivated by revenge. Regardless of what Lévesque’s real intentions were, he almost certainly defined his partnership with the other provinces not so much by what it could achieve, but by what it could prevent.

Concerned that Trudeau’s constitutional proposal would be well received by the Canadian public, a member of the delegation representing Alberta suggested that the Gang of Eight should make a counter-proposal to the federal amending formula. Ultimately, the Gang of Eight’s proposal became known as the Vancouver Formula. To amend the Constitution successfully under the terms of the Vancouver Formula, a parliamentary consensus would be necessary. This would mean at least seven provincial legislatures, representing at least fifty percent of the population, would need to be in

favour. The Vancouver Formula would not empower any province with the power of 
veto; instead, it would allow provinces to opt-out of any future government programs,
necessitating two-thirds of a legislature’s approval.27

Quebec objected to this formula (as it was first presented) on the basis that it did 
not provide financial compensation to any of the provinces that opted-out of future 
programs. This meant that the cost of a program initiated by the federal government,
would be payable to the province that opted out of the program.28 René Lévesque shared 
his disapproval with the other premiers, saying that:

Suppose a majority of you, or perhaps all, came to the conclusion that one of the 
fields under your jurisdiction was costing too much and you decided to offer it to 
Ottawa. Ok, good luck to you, but we have fought so hard to keep the federal 
government out of our flowerbeds that in all probability any transfer of this kind 
would be unthinkable to us. If there wasn’t any compensation, you can see what 
the result would be: you could wipe out budget items that we would have to 
maintain while still continuing to pay our part of the burden you had shucked 
off.29

Quebec also took issue with the idea that a two-thirds majority vote would be 
required to make a Constitutional amendment. The Quebec government believed this to 
be contrary to the democratic principles and identity of Quebec, that the consensus 
betrayed an attachment to Canada first and to the provinces second. Lévesque believed 
that the premiers of the other provinces “were still attached to the notion of national unity 
which, in the final analysis, an Anglo-Canadian puts before provincial autonomy.”30 As

27 Graham Fraser, PQ: René Lévesque and the Parti Québécois in Power, (Toronto: 
Cage, 1984), 280.
28 Peter H. Russell, Constitutional Odyssey: Can Canadians Become a Sovereign People? 
(Toronto: University of Toronto Press, 2004), 116.
29 Lévesque, Memoirs, 324.
30 Lévesque, Memoirs, 325.
such, Lévesque believed the other dissenting premiers desired a two-thirds majority.

Quebec’s position, as articulated by Lévesque was:

For us, too, principle and strategy met very precisely, but applied in the opposite direction. For Quebec, which in all likelihood would have to use it more often than others, the exercise of the opting-out provision should be made as easy as possible.31

Quebec, with its membership in the Gang of Eight, eventually arrived at an agreement in principle whereby financial compensation would be given to any province that opted-out of a future federal program. However, Lévesque found it much more difficult to achieve a consensus over the necessary percentage required by a provincial legislature to opt-out of a future federal program. Lévesque believed, “that in a democracy, except in certain extreme cases, a simple majority should carry the vote.”32

Upon recognition that Quebec would not move on this point, the Gang of Eight decided to concede the point. In exchange for agreeing to Quebec’s terms, Premier William Bennett of British Columbia insisted that Levesque sign a full-page newspaper advertisement supporting patriation and the terms of the proposal. This was the first time a Quebec premier had publicly endorsed the idea of patriating the constitution without having first obtained an agreement on a new division of powers.33

For Quebec, it was essential that Trudeau’s unilateral machinations, designed at constitutional patriation and renewal, be rejected outright. Lévesque understood very well that successful opposition to Trudeau’s plans required not only a coordinated opposition, but also a commitment to endure both the forcefulness of his attack and temptation of his terms. The Gang of Eight was united, and defined, by what it sought to

31 Ibid.
32 Lévesque, Memoirs, 324.
33 Fraser, PQ, 282.
impede. However, it was born of different commitment levels and was never meant to endure the crippling affects of Trudeau’s constitutional conviction. Therefore, a deal was necessary. As a result, the Gang of Eight’s function was to present an alternative constitutional front, one that was connected by a common defiance against Trudeau’s unilateral action and vision. Lévesque was acutely aware that in order to maintain the unity of the movement he helped to create, an equal constitutional result would have to be offered.

With a literal and figurative stroke of a pen, Lévesque bound himself and his province to a gesture of equality that dissolved away what he believed to be Quebec’s historic right of veto. No stranger to symbolic gestures, after all he changed the motto of the province to the unveiled historical reference, je me souviens. Lévesque was perhaps concerned that a misconceived or negative notion of his motives could undermine his membership within the Gang of Eight. While the motives of a separatist in a federalist endeavour could easily be considered suspect at best, under most conditions, it is useful to allow Lévesque to reveal his considerations for himself and take them at face value. In his autobiography, Lévesque describes how he came to the decision to forgo any attempts to secure a right of veto for Quebec, saying that:

I should perhaps admit that this old obsession has never turned me on. A veto can be an obstacle to development as much as an instrument of defense. If Quebec had it, Ontario and perhaps the other provinces would surly ask for it, too. And, as in Victoria in 1971, it would be possible to block change and in protecting oneself paralyze others, leaving everyone way ahead…or behind. On the other hand, the right to opt out […] is in my view a much superior weapon, at one and the same time more flexible and more dynamic.34

34 Lévesque, Memoirs, 326.
It is interesting to note that over a decade after Lévesque made these remarks, and well after the demise of the Meech Lake Accord, ardent federalist Stephane Dion cited two reasons for moving quickly on the same front. In the days after the Second Quebec referendum, Dion believed that the Parti Quebecois was looking for an excuse to call another referendum. Therefore, the federal conception of decentralization had to be clearly defined before the then proposed constitutional talks that took place in 1997. Dion was sure that along with a well-defined constitutional decentralization, a distinct society clause and a veto for Quebec, and perhaps the rest of the provinces, would be necessary. Otherwise, secession may be inevitable.\(^{35}\)

Lévesque secured a tentative agreement on an amending formula that would, in his opinion, secure Quebec’s ability to protect its own interests by including an opt-out clause. Furthermore, this \emph{superior weapon} was not singular to Quebec’s own right of jurisdictional protection and could be advanced to the Canadian public as a popular provincial power, increasing the possibility of its entrenchment within the Constitution of Canada. Lévesque endorsed what would later become known as the \emph{notwithstanding} clause. It was his intention that this clause would be used as a legal implement that “perfectly protects the rights and powers of Quebec.”\(^{36}\) In many ways, if not all, the legal capacity of a province to opt out of future federal programs made a right of veto redundant.

Oddly, the events surrounding Quebec’s act of veto displacement became the subject of a December 6, 1982 Supreme Court of Canada ruling, which revealed that

\(^{35}\) Stéphane Dion, “Canada Has to Change, but So Do Federalists in Quebec.” \emph{The Gazette}, November 25, 1995, B5.

\(^{36}\) Fraser, \emph{PQ}, 283.
Quebec’s past claim to a historical right of veto was not legitimated by any precedent or article within the Constitution. One can only imagine the atmosphere of disbelief that took hold of the Quebec Premier’s Office upon learning of the Supreme Court’s decision. The decision must have been an unsettling moment for those involved with the Gang of Eight as a whole, considering all the provinces believed Quebec gave up the constitutional equivalent of a nuclear weapon, a staggering discovery considering the time and effort involved in dealing with this issue. Incredibly, the removal of a nonexistent veto gave birth to a provincially universal provision to be included within the amending formula of what became the Constitution Act 1982. Rarely used, a province now had a constitutionally entrenched jurisdictional right to render future constitutional changes and Supreme Court rulings as non-binding on that particular province, so long as two-thirds of a provincial legislature approved that action every five years.37 It is interesting to note that this power is an overwhelming display of provincial autonomy within the Constitution, and remains as an offset to the secessionist argument that it is necessary to remove Quebec from Canada in order to defend against interference from the central government.

2.2 Amending the Amending Formula

While the provinces each had a collective interest in impeding Trudeau’s impatient Constitutional agenda, there was also an understanding amongst the English speaking provinces that the Accord of April 16 was a position from which they were

37 Ibid.
willing to negotiate.\textsuperscript{38} For Quebec, the \textit{April Accord} was the only acceptable new constitution design because it was not a bargaining position, but a final position.\textsuperscript{39}

The final negotiations that produced an agreement in principle on a future amending formula, without the consultation of Quebec, has been ominously referred to as the “Night of the Long Knives”. This symbolic description of the events surrounding the final agreement on an amending formula proved to be perhaps the most important provision that emerged from these very self-interested negotiations was the removal of any financial compensation for a province that chose to opt out of any future federal programs. Though it did adopt an override clause, it would not apply to the minority-language rights clause in the Charter.\textsuperscript{40}

Ultimately, Quebec refused to endorse the final version of the Constitutional package, formally or otherwise, because financial compensation would not be available to provinces that opted out of future federal programs. Lévesque and his ministers were confused as to why the Gang of Eight did not include them in what turned out to be an informal, final negotiation.

The terms of the amending formula are not the only lament that subsequent Quebec governments have had with the Constitution as it stands; however, time has revealed that the amending formula is the most significant issue for Quebec in terms of any future secession plans. The province objected to the inclusion of the mobility clause, which it was argued would endanger Quebec job creation programs and construction labour regulation, and the minority language rights clause in the Charter. Claude Morin,

\textsuperscript{38} Ibid.
\textsuperscript{39} Ibid.
\textsuperscript{40} Fraser, \textit{PQ}, 297.
Quebec’s Minister for intergovernmental affairs, wrote to his colleagues in the Gang of Eight, expressing his dissatisfaction with what he felt was an Anglo-Canadian dominated federal government conspiring with Anglo-Canadian provinces to ask an Anglophone government in London to, “Diminish, without our consent, the integrity and jurisdiction of the only French-language government in North America.”41 Clearly, the Quebec delegation was adamant that this was a matter for Quebec to decide on its own.

2.3 Meech Lake Accord: An Example of the Difficulties of Constitutional Amendment in Canada

Two particular events are identified as the cause of and the maintenance of a Canada defined by the Charter of Rights and Freedoms, a Canada free of a dualist conception outside the province of Quebec. They are the 1980 Referendum on sovereignty-association and the failure of the Meech Lake Accord, the latter of which LaForest surmises was the moment that the Canadian and dualist dream of the Québécois was shredded.42

The Meech Lake Accord, often cited as a failed attempt at amending the Constitution, unwittingly became a catalyst for national unity by providing the historical context by which the amending formula itself would evolve future precedent. The failure to ratify the Meech Lake Accord was the result of a public resistance to an elitist conception of constitutional reform as much as it was a rejection of the clauses included within it. The subsequent Charlottetown Accord heralded a new era of public input into Constitutional matters that may require the unanimous consent of Canada’s legislatures and people, by way of referenda, to effect major constitutional change in the future.

41 Lévesque, Memoirs, 333.
42 LaForest, Trudeau and the End of a Canadian Dream, 108.
Certainly, the secession of a province qualifies in terms of degree. Arguably, this is the real and lasting legacy of the Meech Lake Accord.

For LaForest, and for others in Quebec, The Meech Lake Accord demonstrated that the concept of a Canada based on a duality was not possible.\(^{43}\) However, this was not evident early on, as one of the key differences between these constitutional negotiations and the ones of the early eighties was the existence of the Ottawa-Quebec alliance: the result of Brian Mulroney’s conciliatory efforts. Moreover, the premiers of the other provinces agreed on how to proceed with the federal-provincial process, using Quebec’s five proposals in order to have Quebec’s endorsement and participation in the Canadian federation.\(^{44}\) In April of 1987, the federal government and all ten provincial premiers reached a unanimous agreement that would see Quebec constitutional recognized as a distinct society, while also giving significant new powers to all provinces.\(^{45}\)

The 1985 Quebec Provincial Election heralded the return of Robert Bourassa to the role of Premier. No stranger to constitutional negotiations, Bourassa demonstrated a willingness to revisit the wrangling of 1982 in order to address Quebec’s displeasure with the final document.\(^{46}\) However, the Premiers and the Prime Minister fatally misjudged the Canadian people’s reaction to the exclusionary negotiation process that sought little input beyond what was politically expedient. Behind closed doors, the First Ministers achieved a consensus on how to best address the contentious issues surrounding Quebec’s

---

\(^{43}\) LaForest, *Trudeau and the End of a Canadian Dream*, 107.
\(^{44}\) Russell, *Constitutional Odyssey*, 135.
\(^{46}\) Russell, *Constitutional Odyssey*, 133.
refusal to sign the *Constitution Act 1982*. Gil Remillard, Minister of Intergovernmental Affairs, laid out the five conditions under which Quebec would affix its signature to the Constitution.

First, Québec wanted to be recognized in the Constitution as a *distinct society*. Remillard said, “We must be assured that the Canadian constitution will explicitly recognize the unique character of Québec society and guarantee us the means necessary to ensure its full development within the framework of Canadian federalism.”

Second, Québec sought a greater role concerning immigration. Third, the Constitution had to include a written clause reaffirming Quebec’s longstanding tradition by selecting three Supreme Court Judges from the civil law tradition. Fourth, Quebec demanded the option of opting out of federal spending programs in the areas that fall under provincial jurisdiction without a fiscal consequence.

Finally, Quebec sought to entrench a *right of veto* in order to undo the findings of the Supreme Court of Canada ruling that denied the existence of such a power. Here, by way of constitutional prerogative, according to Russell, Quebec would be able to employ a *right of veto* to any future amendments to the Constitution that were in conflict with their provincial interests. However, it is reasonable to assume that any designs on a *right of veto* may very well be a redundant notion, as the *notwithstanding clause* already allowed for Quebec, or any province for that matter, to opt out of any future constitutional considerations. This clause further demonstrates how the Constitution

---

50 Ibid.
affords each province extraordinary insulator powers to an already decentralized regime, and does not lend itself to the argument of necessary separation by a province.

Many were shocked by the 1995 Quebec Referendum results, and the efforts of the Meech Lake Accord were reflected on with renewed interest. The two strengths that have made the Canadian federation strong, linguistic duality and decentralization seemed to have only accentuated regional differences. All Canadian provinces are distinct but Quebec argues that it is deserving of special distinction because of the province’s French language and culture. After all, it is a French speaking society within a predominantly English-speaking continent. This recognition of distinction within the Federation would guarantee that the less explicit areas of the Constitution, where the rules require some interpretation, as would be the case with Quebec's distinctiveness, would be taken into account.\(^{51}\) Advocates of a distinction clause believed that this concession by the rest of Canada would render the separatist argument moot.

During the 2006 Liberal leadership campaign, the Harper government passed a law that recognized Quebecois distinctiveness. However, while this achieves a level of legal acknowledgment, it must be stressed that the recognition of Quebec’s distinctiveness is not entrenched within the constitution. It is the constitutional recognition of this distinction that has been, and remains, the issue that many Quebecers are anxious to see resolved in lieu of secession. Ultimately, the failure of the Meech Lake Accord suggests that secession is difficult due to the requirement of constitutional amendment in order to do so, however the amending formula, the very key to stopping secession may be the crucial part in separation as well.

\(^{51}\) Dion, “The World Can't Afford”, 17.
2.4 A Distinct Quebec and the Canadian Charter of Rights and Freedoms

Trudeau was famously against the concept of Quebec becoming a constitutionally endorsed, distinct society. The idea of a distinct society is significant because this is an example of the amending formula’s rigidity in relation to the constitution, which does not facilitate change easily. As such, Quebec’s desire for a distinct society was not plausible, and a referendum was required where an amendment could have created stability instead of creating separation or division. As such, had Meech been successful, another referendum may not have materialized. Here, we see how a solution for a problem at one period can create difficulty in facilitating change later, particularly in terms of societal classifications.

It is not within the purview of this thesis to compare and contrast an individual rights package versus a group rights package or the difficulties of entrenching the concept of one into the other. However, it is useful to be aware of Trudeau’s objections and the reasons for them. Would Quebec’s status as a distinct society override the Canadian Charter of Rights and Freedoms? In addition, it is possible that one group, in this case Quebec, enjoying a special status, would undermine the spirit of the Charter. Then, there is the obvious contradiction of how one group can be distinct from another group without them being distinct from the first group. Either way, had Quebec obtained what it asked for, the 1995 Quebec Referendum may never have happened and Quebec’s signature may very well have been affixed to the Constitution.
In stark contrast to most consensus attempts within the Canadian Confederation’s history, there was an agreement endorsed by all of the provinces and the federal government to attempt to achieve ratification of the accord. In accordance with being a distinct society, Quebec would have received the following: more of a role concerning immigration and a role in the selection of the three Quebec judges, in the civil law tradition, on the Supreme Court. Quebec would have the option of opting out of federal spending programs in the areas constitutionally defined under provincial jurisdiction, without a fiscal consequence. Finally, Quebec would receive a veto on future amendments to the constitution that affected their interest.\textsuperscript{52}

The concessions afforded to the Quebec delegation in the Meech Lake Accord by the first ministers are quite extraordinary when examined in a contemporary context. In 2011, it is difficult to imagine circumstances whereby a provincial premier would agree to bestow such generous powers upon one province, while asking nothing in return. The premiers came to an agreement on how to best proceed with the federal-provincial process, using Quebec’s five proposals to receive Quebec’s endorsement and participation in the Canadian federation.\textsuperscript{53}

It must be emphasized that it is important that the provinces and the central government faithfully try to make the federal system work. The idea that a province may act as a selfish actor within confederation is not an unprecedented concept in Canada; however, \textit{profitable federalism} is not conducive to long-term cohesion. Bourassa maintained that: “Quebec voters will give all the kicks to the federal system, all except

\textsuperscript{52} Russell, \textit{Constitutional Odyssey}, 134.  
the ultimate one.”

It seems that Bourassa was of the mind that secessionist politics is a mere toll in Quebec that serves to achieve autonomy and further decentralization, without ultimately seceding. He has been proven correct in that the referenda results were in favour of a unified Canada, but it is clear that the second referendum betrayed a willingness by the Quebec populace to demonstrate that the secessionist sentiment is more than calculated manipulation.

It is useful to understand exactly what constitutes a distinct society under the terms of the proposed Meech Lake Accord, or more to the point, know if it was specifically referenced to the Francophone majority. Robert Bourassa explained his position in the Quebec National Assembly in June of 1987. He remarked:

The French language is a fundamental characteristic of our uniqueness, but there are other aspects, such as our culture and our institutions, whether political, economic, or judicial... It must be noted that Québec’s distinct identity will be protected and promoted by the National Assembly and government, and its duality preserved by our legislators. It cannot be stressed too strongly that the entire Constitution, including the Charter, will be interpreted and applied in the light of the section proclaiming our distinctiveness as a society. As a result, in the exercise of our legislative jurisdictions we will be able to consolidate what has already been achieved, and gain new ground.

The failure to ratify the Meech Lake Accord by all the provincial legislatures within the three years agreed upon, left many Quebecers feeling that Canada’s constitutional process was unworkable and that Quebec would have to find another model. On June 22, 1990, Bourassa declared in the National Assembly that, “No matter

---


what anyone says and no matter what anyone does, Quebec is, today and forever, a distinct society, free and capable of assuming its destiny and development."\(^{57}\)

Therefore, Canada should reconcile the idea that Quebec nationalism exists and that politicians have to allow for it constitutionally; otherwise, they risk the further alienation Quebec. It is not enough to tolerate Quebec; the country must embrace the idea of Quebec nationalism. The will to separate from the rest of Canada may fluctuate in terms of the relative seriousness, but Quebec nationalism may be a permanent part of Quebec’s identity. In order to have Quebecers reject the separatist option, one may have to be prepared to accept Quebec's distinctiveness.\(^{58}\)

Historically, constitutionally entrenching Quebec’s distinctiveness has been, to say the least, a very difficult task. The last time it was attempted, a referendum on secession followed. When, and if, it is deemed that constitutional change is necessary, Canadians must know exactly what they are trying to achieve and why. If the mega-constitutional deals of the 1980’s and 1990’s have revealed anything, it is that regional squabbling can easily thwart even concerted efforts.

Bourassa, who took an interest in the burgeoning supra-national European Community after his 1976 election defeat, referred to it in an interview while accessing Quebec’s options, saying: “Now they [the European Community] are talking about political union and a common currency...Many Quebecers say we want sovereignty in association with Canada, but they would prefer to have members in the Canadian

\(^{57}\) Canadian Broadcast Corporation, “What does Canada want?”, \textit{The CBC Digital Archives Website}, May 6, 2010 [http://archives.cbc.ca/politics/constitution/topics/1180-6498/].

\(^{58}\) Dion, “The Insecurities”, A15.
Parliament.⁵⁹ The notion of sovereignty-association may still be on the minds of many Quebecers, but the ramifications of the Charlottetown Accord and the 1995 Quebec Referendum on sovereignty shed light on Quebec sovereigntists’ biggest obstacle: the amending formula for the Constitution.

Nothing within the last 40 years has contributed more to the sense of rejection that many Quebecers feel than the failure of the Meech Lake Accord. Ironically, the proposed accord was an attempt to secure Quebec’s signature on the Constitution; instead, it remains a symbol of Canadian government inflexibility to many in Quebec. Constitutional negotiations are rarely, if ever, calm even within systematic negotiations between fully understanding parties. At times, seemingly destructive demands are inserted into the negotiating process, which only serves to derail and thereby stop the procedure. This creates an aversion to constitutional attempts of any kind, by voter and politician alike. Constitutional negotiations often cause the debate to enter into constructs, which may demonstrate some sort of symbolic significance for a particular region beyond what is practical or agreeable for the country as a whole. When this symbolism, regardless of what it may be, is offered as a minimum requirement for a region or province’s participation as a national shareholder, there is often little room for compromise. Therefore, realistic considerations are often abandoned (Dion, “The Insecurities”). The negotiations become increasingly about a conflict between collective identities and nationalism and less about what is good for the country as a whole. Inevitably, different regions of the country become fatigued and disenchanted by such conflict (Dion, “The Insecurities”).

⁵⁹ MacDonald, “Bourassa Vows Wide-Scale Consultations”, A3.
Much of the furor surrounding Meech Lake centered on the clause that would have recognized Quebec as a distinct society. This was apparently offensive to many Canadians living outside of the province because they too may have seen themselves as distinct. When the Meech Lake Accord collapsed, Quebec believed the denial of constitutional distinction was a rebuke from the rest of Canada, which encouraged Quebecers to “consider radical options ranging from a high degree of autonomy to outright independence.”60 This manifested itself in the 1995 referendum. Ultimately, Quebecers proceeded with a referendum on independence, and rejected the option, but just barely.

2.5 Secession Referendum ’95

For many Canadians, the 1995 Quebec Referendum remains one of the most sobering examples of the power of democracy under the rule of law. There would be no storming of palaces or shots fired from battleships to signal its beginning. Many of us, including the politicians who played a role, watched like enthralled spectators at a sporting event. Canadians felt helpless to do anything but try to will their side to victory and, in their uncertainty, asked themselves questions, which surprisingly had no clear answer. What would happen if the Yes side won? What rights were available, and to whom?

In the days leading up to the 1995 Quebec Referendum, federalists like Stéphane Dion began to gain prominence throughout Quebec by being one of the few intellectuals in the province who were willing to speak out in support of federalism. The Parti Quebecois did much to define the federalist position in their terms. They constantly

60 Ibid.
portrayed people like Dion as a ‘Trudeau centralist’ who sought to place Ottawa in a decidedly dominant position over the provinces by stripping them of their constitutional rights. Instead, Dion believed that it was necessary to defend provincial rights and that the provinces should respect the national government’s rights as well.

The reciprocal respect of constitutional jurisdictions is something that must speak to the supremacy of the Constitution, in that both sides need to be aware of those rights and resign themselves to them. Those who seek to maintain the current constitutional order have conveyed this belief prior to the Quebec Secession Reference, and affirmed it afterward in their defense of federalism over secession. It is essential that both the provinces and the central government know exactly what their rights are and to understand that in many ways they are interdependent.

In an odd way, the crisis caused by Quebec’s attempts at secession by referenda has reaffirmed the constitutional conviction for the political actors to affirm their processes and rights. It has also reaffirmed the legitimacy of our legal system in that Canadians were willing to allow the matter of partition to be examined by a judicial reference, which affirmed that a referendum is not a sufficient instrument, in of itself, to allow a province to leave the constitutional order. As such, may we examine both the federalist’s and the separatist’s arguments knowing that they are in accordance with the law?

2.6 Towards the Quebec Secession Reference.

Immediately after the 1995 Quebec referendum, many Canadians were disappointed about the result despite the victory of the No side. Most people were
acutely aware that the issue was far from over and that reconciliation was necessary to address the fact that almost half of Quebecers had cast their vote to secede from Canada. Despite the victory, many were not pleased with how the federal government performed. Most predicted that the separatists would win a future referendum if Chrétien failed to act on the expectations of those Quebecers that voted to remain in Canada. Federalists, who were weary of conceding too much central power to the provinces, began to believe that it was imperative that recognition be given to Quebec’s distinctiveness, more decentralization take place, and that there be more support in Quebec for the Canadian identity.\(^6^1\)

Many Canadians believed Quebec should be recognized as a distinct society and that this notion must be constitutionally entrenched. For these Canadians, at the very least, recognition must be achieved by way of a federal law. However, like Diefenbaker’s Bill of Rights, true recognition of distinction necessitates eventual constitutional enactment with provincial ratification. As such, Non-Francophone Canada's reluctance to entrench Quebec’s distinction constitutionally may well lend to the sense of rejection Quebecers feel.\(^6^2\)

In the uncertain days after the referendum, even federalists believed strongly that further decentralization would have to take place. Evidenced in a September 1995 SOM/Environics poll, Canadians supported this notion. The poll indicated that 84 per cent of Canadians outside of Quebec opposed giving more power to Quebec; however, 46 per cent said that they would be in favour of giving more power to all provinces. This


\(^{62}\) Ibid.
would be best achieved by giving the provinces an “opt-in” option that would allow for
the special status of Quebec without the perception of inequality. 63 The federal
Intergovernmental Affairs Minister, Marcel Massey, was pressured to complete a
program review detailing a plan concerning the devolution of powers to the provinces.
This review set out to identify federal government programs that were to be handed over
to the auspices of provincial jurisdiction. 64 Presumably, this would achieve a consensus
amongst the provinces on at least proceeding with devolution of powers.

2.7 Post-Referendum Identities

Quebec federalists, especially the Quebec Liberal Party, were unsure if their
identity was sufficient to offer Quebecers a true alternative to the separatist Parti
Québécois. Their goal remained the same, convincing Quebecers it was necessary to
keep an attachment to Canada alive, while observing the pride in being both a Quebecker
and a Canadian. The danger of avoiding any reference to Canadian realities outside of
Quebec was the ensuing inability to offer the federalist system as positive force in
Quebecers lives; thus, aiding the politics of separatism. The days of the Liberal Party
trying to win over Parti Quebecois voters by reiterating the PQ's message of Quebec
nationalism as their own were over. 65

Due to the closeness of the referendum, the Parti Québécois made good use of
“Canada Bashing” as means to assert that federalists failed to make the case that the
Canadian Federation benefited Quebec. In addition, the secessionists claimed that

63 Ibid.
64 Ibid.
65 Ibid.
Canadian politicians sought to avoid the issue due to an absence of any real benefits. Many claimed that the only offering that the Canadian government could make was further decentralization. Critics of this concession cited that Canada was, and is, adequately decentralized; however, the division of powers afforded by the Constitution must protect both sides: federal and provincial. This means that both the provincial governments and the federal government must respect, even embrace, the division of powers in the Constitution. This notion was tested against Bill 1, *An Act Respecting the Future of Quebec*, and as with the Quebec Secession Reference, it was deemed that Quebec overstepped its jurisdictional bounds by stating their Constitutional right to unilateral declaration of independence in both cases.

In many instances around the world, governments resist giving minorities any kind of autonomy because they believe that to do so is the first step to secession by the minority seeking more political autonomy. The breakup of Canada would be perceived as proof that decentralization and tolerance is a recipe for fragmenting a nation.⁶⁶ Those of the majority in a newly formed Republic of Quebec would find it difficult to win the trust of its minorities because they would never be able to give them the same amount of autonomy that Canada provided; out of a fear that a secession movement in the new republic would present itself.⁶⁷

Furthering this divide, the Meech Lake Accord gave no new powers to Quebec and the Supreme Court may have taken into account a newly Charter-entrenched distinctness when making some of its decisions. However, Dion suggests that the Supreme Court may have already considered Québec’s distinctness when making its

⁶⁶ Dion, “The World Can't Afford”, 17.
⁶⁷ Dion, “The World Can't Afford”, 18.
decisions. Following the referendum, Dion insisted that Quebec be reassured with a strong and explicit clause. 68

It is not certain that official recognition will assist in reducing the support for independence. Some, like Lucien Bouchard, have condemned this symbol as ridiculous. Even federalists like Claude Ryan have opined that only acknowledgment of Quebec as a people could stop the inevitability of Quebec sovereignty. However, collective recognition of a Quebec nation is not necessarily the answer to a permanent state of Canadian unity. 69

2.8 The Quebec Secession Reference

“Do you agree that Québec should become sovereign, after having made a formal offer to Canada for a new economic and political partnership, within the scope of the bill respecting the future of Québec and of the agreement signed on June 12, 1995. 70 This question, presented to those voting in the 1995 referendum on Québec sovereignty was the impetus for what would become known as the Reference re Secession of Québec.

It was after this hearing, after the referendum vote, that the federal government decided that it would formally seek a reference from the Supreme Court of Canada in order to understand the legal realities of this political issue. The questions that the Federal Government of Canada posed to the Court were as follows:

---

68 Dion, “Canada Has to Change”, B5.
69 Ibid.
1. Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally?

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

3. In the event of a conflict between domestic and international law on the right of the National Assembly, legislature or government of Quebec to effect the secession of Quebec from Canada unilaterally, which would take precedence in Canada? ([1998] 2 S.C.R. 217)\(^{71}\)

The 1995 Quebec sovereignty referendum brought with it inevitable questions about the Constitution. The referendum question, presented to those voting in the 1995 referendum on Quebec sovereignty, was the impetus for what would become the

*Reference re Secession of Quebec [1998] 2 S.C.R.* The reference, while addressing other matters besides sovereignty, concluded that a province does not have the right to unilaterally secede from the rest of Canada. In fact, any province seeking to secede could only do so by way of a constitutional amendment.

The first question the Quebec Secession Reference committed itself to answering, was whether Quebec’s legal authority extended from a Constitutional right of unilateral secession to the province’s institutions. Intrinsically, secession involves the contravention of part of a state in order to attempt to become a state in its own right.\(^{72}\) This unavoidably takes place at the expense of the political and legal order of the remaining state from which the part once belonged. The very nature of secession is destabilizing because it undoes the definition of the state prior to the event of partition.

\(^{71}\) Magnet, *Constitutional Law of Canada*, 70.
Ultimately, the seceding entity seeks to withdraw itself from the existing constitutional order by eliminating the authority governing its jurisdictional capacity and replacing it with one of its own design.\footnote{Ibid.} Whereas, Meech Lake sought to render more autonomy to Quebec within the Canadian Constitution.

In answering question one of the Reference, the Supreme Court identified four "fundamental and organizing principles of the Constitution that are relevant to addressing the question" (32).\footnote{Magnet, \textit{Constitutional Law of Canada}, 32.} They are federalism; democracy; constitutionalism and the rule of law; and respect for minorities (32).\footnote{Ibid.} However, the Court, who held that secession required a constitutional amendment and could not transpire merely from a referendum result, determined whether a province had a legal right to a future outside of the Canadian constitutional framework. As such, it is the rights of not only the province seeking to secede, or the rights of the Federal Government that is taken into account, but the rights of the other provinces as well, which are granted to them by the Constitution.

In answering question 2, the Court rejected the notion that international law gave Quebec the right to secede unilaterally. Here, they pointed out that the right to secession occurs under the principle of self-determination at international law where or if they are a colonial people, an oppressed people, or if they have been denied meaningful access to government to pursue, political, economical, cultural and social development.\footnote{Magnet, \textit{Constitutional Law of Canada}, 3.} The Court believes that Quebec does not meet any of these criteria due to the success of francophones in all walks of Canadian life including political and economic. Certainly,
the number of francophone prime ministers alone does much to disprove the notion that Quebecers are oppressed or lacking in the principle of self-determination.

In terms of question 3, in view of the answers to question 1 and 2, the Court decided that there was no conflict between domestic law and international law and as a result did not address them.77 The Constitution Act, 1982 does not refer to the prospect of provincial secession. It makes no mention of either the permissibility, nor the preclusion of such an event. This omission is not unexpected when it is understood that a constitution is generally meant to be a unifying document. While states may vary in terms of the specifics surrounding the conditions and circumstances by which the constitutional mechanics of secession may be employed, states are generally not willing to accept secession lightly. Certainly, states are unwilling to accept secession based on the terms solely proposed by the territory seeking to remove itself from the state.78

The Constitution Act, 1982 does not provide instruction on how a province could remove itself from Canada, nor does it permit or prohibit such action as such. At the time of the Quebec Secession Reference, it was the opinion of the Attorney General of Canada that the Constitution Act, 1982 was in fact capable of adjusting the federation and its institutional structures, up to and including secession, in any fashion that was agreed upon by all of the parties concerned.79

The effect of secession on Canada’s federal framework meant the removal of federal institutions from the seceding territory. The complex system of political, legal, and social arrangements and relationships would be irrevocably overturned, rendering the

---

77 Magnet, Constitutional Law of Canada, 4.
78 Magnet, Constitutional Law of Canada, 71.
79 Ibid.
description of the current constitutional order unsatisfactory. Obviously, partition is contrary to the origin and definition of the Canadian federal state. Therefore, the decision to actively pursue a secessionist agenda is so converse to the federal arrangement, there is no provision in the Constitution Act, 1982 for leading a province out of Confederation.

Usually, a constitution does not provide for a legal mechanism for ending the existence of a union. In fact, most constitutions demonstrate, in the wording and spirit of the document, an unwavering commitment to the continued existence of the state system it has been empowered to serve. As a result, the constitutions of most states do not offer any remedial separation clauses, while others prohibit secession altogether.\footnote{Ibid.} Clearly, the legal realities concerning provincial secession make doing so difficult, even nearly impossible. This is because a referendum result in favour of secession, if a sufficient number of votes were cast and that a clear question was posed, would only commence a negotiation process. The result of those negotiations, essentially what terms the other provinces would want met for secession to go ahead, would make secession difficult.

If a province decides, by way of a referendum, that their destiny is best served outside of the Canadian Constitutional order, it is in the interest of both the province in question and the rest of the country to accommodate secession within the existing rules of the Canadian Constitution’s amending formula. It is also in the interest of all Canadians to understand how this process would work.

Many observers may claim that creating a formalized understanding of the processes involved to remove a province from the Canadian Constitutional order is a self-
fulfilling prophesy. Some may even claim that the very uncertainty of how a province could achieve statehood is in of itself an effective deterrent.

2.9 Part V of the Constitution Act, 1982 & Unilateral Declaration of Independence

Bill 1, an Act respecting the future of Québec, ostensibly claims that the National Assembly of Quebec is authorized to effect the secession of the Province of Quebec from Canada by way of a unilateral declaration. Essentially, the Parti Québécois passed Bill 1 with the intention of giving the National Assembly the power to withdraw Quebec from the Canadian Constitutional order. While Part V s. 45 of the Constitution Act, 1982 authorizes either the provincial or federal government(s), in limited circumstances, to make unilateral constitutional amendments, it does not recognize the jurisdiction of a singular legislature to unilaterally secede.\(^{81}\) Therefore, the legal objective of Bill 1 reaches beyond the jurisdictional competence afforded to Quebec’s institutions under the Constitution of Canada.\(^{82}\)

The Supreme Court of Canada warned government legislatures in the Quebec Secession Reference against ignoring the constitutional principle in order to achieve a political objective, explaining that:

The constitutionalism principle bears considerable similarity to the rule of law, although they are not identical. The essence of constitutionalism in Canada is embodied in s. 52(1) of the Constitution Act, 1982, which provides that "[t]he Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the

\(^{81}\) Magnet, Constitutional Law of Canada, 72.

\(^{82}\) Magnet, Constitutional Law of Canada, 73.
inconsistency, of no force or effect.” Simply put, the constitutionalism principle requires that all government action comply with the Constitution. The rule of law principle requires that all government action must comply with the law, including the Constitution.83

2.10 Bill 1: An Act Regarding the Future of Quebec

The legal challenge to the allusion in the referendum question and in Bill 1, An Act Respecting the Future of Quebec, that a declaration of independence was sufficient to achieve sovereignty, came from intermittent separatist and former contender for the leadership of the Parti Quebecois, Guy Bertrand.84 Justice Robert Lesage of Quebec’s Superior Court ruled that Quebec’s intent to unilaterally secede was unconstitutional, though he did not order that the referendum refrain from proceeding, a result Bertrand wanted.85 Justice Lesage allowed the referendum to take place because Quebeccers, “wished to express themselves” on the sovereignty issue.86 Despite the fact that Bertrand failed to get the injunction, this was the first legal shot fired at the Pequistes concerning the unconstitutionality of their unilateral secession strategy. Later, Bertrand appeared in front of the Quebec Superior Court again, this time to seek an order that would prohibit the PQ government from trying to realize the sovereignty option in Bill 1, An Act Respecting the Future of Quebec, which held that:

The negotiations…must not extend beyond October 30, 1996, unless the National Assembly decides otherwise. The proclamation of sovereignty may be made as

83 Magnet, Constitutional Law of Canada, 72.
84 Russell, Constitutional Odyssey, 233.
85 Ibid.
86 David Schneidermann, The Quebec Decision: Perspectives on the Supreme Court Ruling on Secession, (Toronto: James Lorimer, 1999), 3.
soon as the partnership treaty has been approved by the National Assembly or as soon as the latter, after requesting the opinion of the orientation and supervision committee, has concluded that the negotiations have proved fruitless…This Act comes into force on the day on which it is assented to.\textsuperscript{87}

This entitled the National Assembly to unilaterally declare Quebec sovereign one year after the referendum date (or sooner) if the legislature so deemed. In rendering a dismissal, on the grounds that the case was non-justiciable, Mr. Justice Pidgeon observed:

\begin{quote}
The issue raised by the plaintiff, namely, that the Government of Quebec cannot rely on parliamentary immunity to evade the Constitution of Canada, the source of its power, in order to accomplish its plan for unilateral secession, raises an issue that ought to be referred to the judge in the main action.\textsuperscript{88}
\end{quote}

Secessionists claim that unilateral secession as was set out in Bill 1, \textit{An Act Respecting the Future of Quebec} is possible. Bill 1 claims that the province of Quebec could commence a negotiation with the federal government of Canada over a political and economical partnership. However, the Supreme Court’s ruling does not allow for a convoluted question or unilateral secession; neither does international law for that matter. If Quebec declared unilateral secession, Canada would be entitled, “to the protection under international law of its territorial integrity.”\textsuperscript{89} In the end, separation can only occur by way of a constitutional amendment.

Allan Rock, in his capacity as the Attorney General of Canada, was concerned that Bill 1 was not compliant with the powers afforded Quebec under the Constitution. In order to clarify his position, the Attorney General of Canada reiterated the importance of the rule of law and the role of the Court, saying that:

\textsuperscript{87} Bill 1, \textit{An Act Respecting the Future of Quebec}, Section 27, 27
\textsuperscript{89} Stephane Dion, “‘Stop this Game of Light and Shadows’: A Clear Response to a Clear Question on Secession an Absolute Must, Dion Says,” \textit{The Ottawa Citizen} August 26, 1998, A15.
Canada is a constitutional democracy. Its political institutions are subject to fundamental rules which govern the conduct of all actors, including governments and legislatures, and which forbid the exercise of arbitrary powers. No one is above the law. All are subject to the rule of law. The Courts are the guardians of the Constitution. The role and powers of the provincial superior courts are essential to the preservation of the rule of law. It is manifestly the prerogative and duty of the courts, as defenders of the Constitution, to ensure that the principles of this supreme law are respected. It follows that the validity of any bill, if enacted— or any similar measure to which the legislature or government purports to give binding legal effect—may be tested before the courts. If the measure is found to be inconsistent with the provisions of the Constitution, the courts will declare ultra vires or no force or effect.  

2.11 The Amending Formula: Accommodating Single Package Secession

Canada’s experience with one package mega-constitutional accords in post Constitution Act, 1982 Canada has been dismal. When a myriad of important, and emotional, issues are packaged together in one deal, the probability is that some of the clauses in the proposal will unnecessarily be held to the unanimity procedure in the amending formula. For instance, if there is a proposal to change certain aspects of the senate, that proposal would be subject to the “7/50” proposal. However, if the proposal to senate reform were to include a clause that sought change to the role of the monarchy in Canada, the entire package would be subject to the unanimity procedure in the amending formula. It is therefore prudent to create a series of amendments and subject each of them to the corresponding amendment procedure, thereby allowing for both success and failure without dissolving the process on a contentious point.

2.12 Likely Components of a Sovereignty Agreement

It is not surprising that the Canadian Constitution does not contain a formal process for removing a province from the federation. Perhaps, it is just as surprising when a country, like France, maintains in its constitution that partition is not possible when all that is required for doing so is an amendment to the Constitution. The Constitution of Canada allows even for the amendment of the amending procedure. Part V of the *Constitution Act, 1982* describes the various amending formulas and their corresponding categories of amendment. It is from this section that we are able to understand not only the procedures necessary to remove a province from the constitutional order, but that it is indeed possible to effect secession at all.

2.13 The Minimum Required Amendments

Provincial secession is a very complicated constitutional matter. There are many issues, from a legal and political point, that must be addressed in order to achieve secession in a manner that both sides can tolerate. However, the removal of Quebec would also create issues for what remained of Canada. Ontario, for instance, would hold a disproportionate amount of democratic power to the degree that the other remaining provinces would almost certainly demand a redistribution of some kind. The negotiations that would take place on the issue of Ontario, relative to the remaining provinces, would probably be best kept out of the negations over secession.

A province that demonstrates its ambition to withdraw itself from the Canadian federation presents a profound dilemma to the constitutional order. It is not beyond the capacity of the amending formula to accommodate such change; however, s. 45 does not
empower a province to do so unilaterally. The Attorney General of Canada argued to the Supreme Court of Canada that secession of a province goes beyond the jurisdictional mandate under s. 45 of the Canadian Constitution. On September 26, 1996, the Minister of Justice and the Attorney General of Canada, Allan Rock, outlined his reasons for submitting a reference to the Supreme Court of Canada relating to the unilateral secession of Quebec from the rest of Canada, stating that:

The Government of Quebec and of Canada are in disagreement over a process so serious that it could lead to the secession of Quebec. Other provincial governments have also stated points of view that are different from that of the government of Quebec. The Government of Quebec submits that it can determine by itself alone the process of secession and that this supports it by international law. The federal government submits that international law does not give this power to the Government of Quebec and that a referendum does not create, as a matter of law, an automatic right of secession.

Part V of the Constitution Act, 1982 concerns itself with the procedure necessary to amend the Constitution of Canada. Section 45 of Part V allows a province to make unilateral constitutional amendments when it is the sole jurisdictional concern of that particular province. Therefore, S. 45 of Part V of the Constitution Act, 1982 is not capable of effecting the secession of a province in of itself. Due to the non-existence of a constitutional implement capable of empowering a province with the authority to undertake unilateral constitutional amendments, other than what is specified in s. 45, the province of Quebec is therefore incapable of effecting unilateral secession under Canadian law. However, the Amending Formula may provide a means of accomplishing this act even if the secession of a province would require a constitutional

---

91 Magnet, Constitutional Law of Canada, 73.
93 Newman, The Quebec Secession Reference, 68.
amendment beyond the capacity of s.45. As such, Part V institutional participants, including the National Assembly of Quebec, would need to be involved in the amendment process.

2.14 Unilaterally Secession Is Not An Option

The Inter-Governmental Affairs Minister advised the prime minister and the rest of the cabinet to submit a series of questions to the Supreme Court of Canada as to whether or not a province could legally secede from the rest of Canada by way of a unilateral declaration of independence. The Court ruled that indeed a province could not pursue secessionist goals independent of the rest of the Canadian stakeholders. At the same time, the Court ruled that the federal government could not force Quebec to stay within Canada if they expressed a will quantified by a substantial majority. Each of these was believed by Stéphane Dion to be the case from the beginning, according to the Constitution.

The Canadian Government was dismayed at the idea of asking the Court to rule on Quebec seceding from the rest of Canada. Then, they were apprehensive to say the same over Dion’s proposed Clarity Act. This Act confirmed that the federal government, and provincial governments who wished to stay in Canada, would only negotiate partition if there were a clear question and a clear majority. Many federalists and some separatists believed that this was a provocation and the result would be renewed support for Quebec becoming an independent state. However, this was not the case as support for secession has declined since the introduction of the bill.
Whatever one’s viewpoint, it is the responsibility of our institutions to address the legal responsibilities involved if secession should ever present itself as a possibility. Certainly, two referenda on sovereignty in the last 30 years meet the requirement of possibility. It is not enough to simply reject the possibility of secession, especially in the event that a, to be determined, majority of Quebecers were to demonstrate the desire to operate outside of the Canadian federation. As former federal justice minister Allan Rock famously stated, “[Canada] will not be held together against the will of Quebecers.”

While most Canadians would like to see a province achieve self-determination within the Constitutional order, it cannot be said after two referenda that partition is not within the realm of possibility. In the event of such a schism, it would be in the interest of all Canadians to accommodate a process by which all parties observe the rule of law and make use of the legal processes that are available.

However, many sovereignists are wary of committing themselves to a constitutional process because they believe that Quebec did not ratify the Constitution Act, 1982, and are therefore not bound by the complicated amending formula. In fact, it is debatable that the Amending Formula is purely preventative of secession. It may help facilitate provincial secession. Given that many also argue that Quebec has the right to self-determination and that this right gives their legislature the sole authority to decide Quebec’s fate relative to their status within Canada, constitutional amendment is the only way to make this dream of self-determination a reality.

In order to form an opinion regarding the legality of secession, by way of a unilateral declaration, the Constitution of Canada must be the primary document.

---

consulted for the obvious reason that it is the supreme legal document by which all laws must conform. Canada’s constitution does not provide any specific condition by which a province may affect secession. In fact, the powers afforded to the provinces by the Canadian Constitution do not include the jurisdictional authority to secede from the rest of Canada by way of unilateral action. Therefore, the secession of a province from the rest of Canada would require a constitutional amendment. In rendering its opinion in the Quebec Secession Reference, the Court affirmed this requirement, stating:

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

If it is agreed upon that the secession of a province would require an amendment to the Constitution, it is necessary to understand the nature of the requirements to effect such an amendment. Section 52 of the Constitution Act, 1982 clearly states that amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada.

The Patriation of the Constitution of Canada in 1982 did not change the fundamental capacity of the Constitution of Canada to accommodate modifications. The

95 Magnet, Constitutional Law of Canada, 71.
97 Magnet, Constitutional Law of Canada, 71.
consequence of patriation was the empowering of Canadian institutions with the exclusive right to provide for amendments to the Constitution without involving the United Kingdom Parliament in the procedure. Patriation altered the way amendments were made to the Canadian Constitution in that the agreement surrounding patriation included a new amending formula. However, patriation did not alter the basic capacity of the Constitution to provide for change. This means that amendments to the Constitution are accomplished through the established constitutional structure, which has never included the power of unilateral secession from the federation by a province.\textsuperscript{98}

The Procedure for Amending the Constitution of Canada, contained within Part V of the Constitution Act, 1982, more narrowly defines the jurisdictional entitlement that the Parliament of Canada and the provincial legislatures may respectively employ to their own independent end. Simply stated, Part V of the Constitution Act, 1982 is clear as to both the Constitution of Canada’s legal supremacy and the jurisdictional powers that it confers to the Parliament of Canada and the provincial legislatures. The Supreme Court of Canada in the Quebec Veto Reference detailed the legality and source of these assertions.\textsuperscript{99} In rendering their opinion, the Court stated that:

The Constitution Act, 1982 is now in force. Its legality is neither challenged nor assailable. It contains a new procedure for amending the Constitution, which entirely replaces the old one in its legal as well as in its conventional aspects.\textsuperscript{100}

Moreover, in rendering the Quebec Secession Reference, the Court declined explain how the amending formula would apply to a negotiated agreement on Quebec

\textsuperscript{98} Magnet, \textit{Constitutional Law of Canada}, 72.
\textsuperscript{99} Ibid.
\textsuperscript{100} Ibid.
secession.\(^{101}\) What the Court did say is that the rule of law requires that the removal of a province from the federation must occur in accordance with the legal rules governing a constitutional amendment.\(^{102}\) Therefore, if one province or one house in the Parliament thought that the negotiated terms for secession were unacceptable, it would be denied. In fact, even insisting that the unanimity procedure of the amending formula be implemented, as a condition from which everything else would flow, would fall under the context of negotiation. The extreme difficulty that this poses to the sovereignty movement makes a referendum on the subject almost pointless from an achievement standpoint.

The Reference, while addressing other factors, concluded that a province does not have the right to unilaterally secede from the rest of Canada. Therefore, any province seeking to secede could only do so by way of a constitutional amendment. Although he Court is not specific on how the amending formula should be applied, the amending formula of the constitution requires the approval of at least seven provincial legislatures, which amounts to at least fifty percent of the population, and, in some cases, all of the provinces as well as both houses of Parliament.\(^ {103}\)

Section 41 of the amending formula contains the matters that require “the Senate and House of Commons and of the legislative assembly of each province” to have full consensus in order to affect change.\(^ {104}\) Due to the enormity of what secession of a province would amount to, s. 41 of the Constitution Act, 1982 is known as the Unanimity Procedure. It reads as follows:

\(^{101}\) Russell, *Constitutional Odyssey*, 337.
\(^{103}\) Martin, *Iron Man*, 140-1.
\(^{104}\) (Section 41, Constitution Act, 1982)
S. 41. An amendment to the Constitution of Canada in relation to the following matters may be made by proclamation issued by the Governor General under the Great Seal of Canada only where authorized by resolutions of the Senate and House of Commons and of the legislative assemblies of each province:

(a) the office of the Queen, the Governor General, and the Lieutenant Governor of a province;

(b) the right of a province to a number of members in the House of Commons not less than the number of Senators by which the province is entitled to be represented at the time this Part comes into force;

c) subject to section 43, the use of the English or the French language;

(d) the composition of the Supreme Court of Canada; and

(e) an amendment to this Part.\(^{105}\)

One matter pertaining to this particular section is any amendment in relation to the office of the Queen and Her Vice Regales. This means that if there was a movement in Canada to make the Prime Minister the Constitutional head of state, or to abolish the Monarchy for that matter, it would require that all provincial legislatures and both houses of the Parliament be in agreement in order to realize either scenarios. However, realistically, secession of a province is quite difficult to achieve given the constitutional process required.\(^{106}\)

2.15 The Relevant Amending Procedures

The session of Quebec could potentially make use of all five formulas depending on the section of the Constitution that requires amendment. It is helpful then to understand how the various amending formulas would apply to a sovereignty agreement and ultimately facilitate provincial secession. To do this, it is first necessary to identify what components are likely to be subjected to the amending formula so that they may then be matched accordingly.

\(^{105}\) Ibid.

\(^{106}\) Ibid.
3. RATIFICATION PROCESS

3.1 Seeking Flexibility in Ratification

Due to the complicated amending process, it seems likely that a comprehensive one-time amendment package is not very practical. As previously mentioned, a one package deal would mean that if any of the amendments contained a proposal that required the unanimity procedure then the entire amendment package would be subject to that particular formula, and the process would end. Combine this with the convention of a nationwide referendum, as was the case with The Charlottetown Accord, and a successful ratification of an amendment effecting secession seems unattainable.

The best approach would be to separate the amendments according to the required amending formulas. This approach would lend itself to a better chance of success in that a contentious issue may have a chance of passing if it was subject to a less severe amending formula than the unanimity procedure.

3.2 The “7/50” Procedure

Most of the amendments necessary to effect the secession of Quebec would necessitate the section 38 general amending formula, otherwise known as the “7/50” formula. Under this formula, an amendment requires that both houses of Parliament and a minimum of seven provincial legislatures representing at least 50
percent of Canada’s population to pass resolutions. As Russell and Ryder suggest, “most amendments necessary to accomplish Quebec’s orderly secession would fall within the section 38 general (“7/50”) amending formula, which applies to all amendments in relation to matters not specifically allocated to one of the other four formulas.”

To complicate matters, February 1996 saw the implementation of the Constitutional Amendments Act, creating five regional vetoes mandating the approval of British Columbia, Ontario, Quebec and at least two prairie provinces and two Atlantic provinces comprising 50 percent of their respective population in order to satisfy the “7/50” requirements. However, the Constitutional Amendments Act has not been formally entrenched within the amending formula.

3.3 “7/50” Amendments

If the point of boundaries relating to the new state of Quebec could be agreed upon, there would be other amendments to consider involving the “7/50” formula. According to Peter Russell and Bruce Ryder, these amendments include:

- The power of the federal government to pass laws affecting Quebec would have to be removed.
- The authority of the Charter of Rights and Freedoms would have to be terminated as far as its application to Quebec.
- The authority and jurisdiction of the Supreme Court of Canada, Federal Court of Canada and all of the courts in Quebec relating to the Canadian Constitution would have to have their authority in Quebec concluded.
- Section 22 of the Constitution Act, 1867, would require an amendment that would delete references to Quebec in the Senate. This would also reduce the number of regions, from which senators are selected, from three to four. An obvious result of this would be a significant consolidation of power for Ontario.

108 Ibid.
Lastly, an amendment to section 108 of the Constitution Act, 1867, stating federal property in the province belongs to Canada, would have to be put in place and compensation would have to be negotiated.\(^\text{109}\)

3.4 The “Unanimity Procedure”

As has been previously mentioned, the process involved in creating the constitutional conditions under which the secession of Quebec could be effected requires the use of the unanimity procedure in three instances.

The first instance involves the role of the monarchy in a sovereign Quebec. It is difficult to imagine that a government entering into negotiations to remove Quebec from the constitutional order would retain the institution of the British Sovereign as head of state. Assuming this, offices such as the lieutenant governor and all of the powers contained within it would cease to exist.\(^\text{110}\)

The second amendment that would require the use of the unanimity procedure concerns the removal of Quebec’s seats from the House of Commons. The unilateral formula in section 44 of the Constitution Act, 1982 allows the House of Commons to make changes to the composition of the House; it does not allow for unilateral reduction. According to the “Senate Floor” stipulation of the Constitution Act, 1867 (section 51 (a)), the province of Quebec is assured a minimum of 24 members in the House of Commons. Furthermore, according to Russell and Ryder, given that the “Senate Floor” stipulation requires the unanimity procedure in order to ratify an amendment, it is certain that the

\(^{109}\) Russell and Ryder, “Ratifying a Postreferendum Agreement on Quebec Sovereignty”, 16.

\(^{110}\) Russell and Ryder, “Ratifying a Postreferendum Agreement on Quebec Sovereignty”, 16.
removal of Quebec’s seats from the House of Commons could only be achieved by making use of the unanimity procedure.\textsuperscript{111}

The final use of the unanimity procedure would be to remove the following language rights from applying to Quebec:

- Section 133 of the Constitution Act, 1867 abs sections 16-19 of the Canadian Charter of Rights and Freedoms, guaranteeing the right to use either English or French in the Parliament and federal courts;
- Section 20 of the Canadian Charter of Rights and Freedoms, guaranteeing the right to use English or French in federal government offices;
- Section 23 of the Canadian Charter of Rights and freedoms, guaranteeing the right of Quebec Anglophones to educate their children in English.
- It is unlikely that any other features of the secession process would be subject to the unanimity procedure. It may be pointed out that in the current arrangement, the Supreme Court of Canada always maintains three Quebec judges and that any change to the Court would require the unanimity procedure, however, the selection of the Quebec judges from the civil law tradition is a convention.\textsuperscript{112}

3.5 The “Bilateral” Amending Procedure

Section 43 of the amending formula gives Parliament and a provincial government the ability to amend the Constitution in areas that are the concern of the province in question and have no legal bearing on any other province. For the purposes of Quebec secession, a few amendments could be made using the bilateral amending procedure. They are as follows:

- Subsections 93(1) to (4) of the Constitution Act, 1867, applying to denominational school rights;
- Section 98 of the Constitution Act, 1867, requiring that Quebec judges will be appointed from the bar of Quebec;
- Section 133 of the Constitution Act, 1867, governing the use of English or French in both the judicial and legislative branched the Quebec government; and

\textsuperscript{111} Ibid.
\textsuperscript{112} Russell and Ryder, “Ratifying a Post referendum Agreement on Quebec Sovereignty”, 17.
• Section 59 of the Constitution Act, 1982, defining minority language education rights in Quebec.  

3.6 The Federal Unilateral Procedure

As the title suggests, the federal unilateral procedure gives Parliament the power to make amendments to the legislative and/or executive branches of the federal government so long as the provinces remained unaffected. The following amendments, according to Russell and Ryder, would be required under the federal unilateral procedure:

• Sections 28-28 of the Constitution Act, 1867, reducing the number of regional senate selection from three to four;
• Section 40 of the Constitution act, 1867, where references to Quebec electoral districts are mentioned etc.

3.7 The Provincial Unilateral Procedure

Section 45 allows a province to amend the Constitution unilaterally as it pertains to internal matters of the province, where it is of no consequence outside of the province. The crux of the Supreme Court’s reference is that no constitutional power exists allowing one legislature to act unilaterally on the subject of secession.

The five instruments available in the amending formula underscore the difficulties involved in proceeding with a comprehensive amendment package. The Meech Lake Accord and The Charlottetown Accord are examples of the consequences of bundling the amendments together and subjecting them to the unanimity procedure of the amending formula. If one is to include the possible convention of a nationwide referendum and the

---

113 Ibid.
114 Ibid.
inclusion of Aboriginal peoples into the ratification process, and the secession of a province becomes a complicated task indeed.\textsuperscript{115}

\section*{3.8 The Right of Self-Determination}

Perhaps the most contentious point surrounding secession is the idea that Quebec reserves the right to declare its independence unilaterally. The Supreme Court of Canada dismissed this argument. Russell and Ryder correctly point out that the international right of self-determination only allows for a right of secession whereby a people suffer egregiously under forms of oppression, such as the deprivation of civil rights.\textsuperscript{116}

Clearly, the people of Quebec are not impaired in their ability to fulfill themselves politically under the current constitutional arrangement. As a result, they do not meet the requirements that would afford them the right to unilateral secession, as it is understood as international law. Accordingly, those representing the sovereignty movement are less likely today to formulate a strategy that would rely on a unilateral declaration of independence as a means of avoiding a Canadian Constitution based solution. Bill 1, avoided any reference to the international right of self-determination as a means of achieving sovereignty.\textsuperscript{117} The right of self-determination is, in this case, the right of Quebec to engage in a series of legal processes that are in accordance with the Canadian Constitution and would see sole political control relinquished to the province. The fact that this result is available at all is a clear indication that Quebec’s right to self-determination is intact in its present constitutional status.

\textsuperscript{115} Russell and Ryder, “Ratifying a Postreferendum Agreement on Quebec Sovereignty”, 18.
\textsuperscript{116} Russell and Ryder, “Ratifying a Postreferendum Agreement on Quebec Sovereignty”, 5.
\textsuperscript{117} Bill 1, An Act Respecting the Future of Quebec, 1\textsuperscript{st} Session, 35th Leg., Quebec, 1995.
3.9 Negotiations

Negotiations would be conditional on a clear majority for the Yes side in a referendum. The Quebec Secession Reference points out that there must be a clear majority responding to a clear question on secession and political actors on both sides of the issue would judge the clarity of the question and what constitutes a clear majority. Therefore, the National Assembly may ask whatever question it wants but the federal government will evaluate the clarity of the question. The question cannot have reference to any other topics other than secession and must say unequivocally that Quebec will sever all ties with Canada in order for there to be an obligation to negotiate.118

It is clear that the legal realities concerning the secession of a province make doing so very difficult. A referendum result in favour of secession, if a sufficient majority was achieved and that a clear question was posed, would commence a negotiation process. The result of those negotiations, essentially what terms the other provinces would want met for secession to go ahead, would almost certainly make secession challenging. However, reaching a consensus in the negotiations would be difficult and the duty to negotiate would only arise where there is a clear majority responding to a clear question. According to the Court, there is no guarantee of negotiated secession and a stalemate is a real possibility.119 One would presume that this would call into question the possibility of a settlement, thereby ending the constitutional process.

Lucien Bouchard asserted that a 50-percent-plus-one majority is sufficient to begin the process of negotiating Quebec’s secession from the rest of Canada. However,

118 Dion, “Stop this Game of Light and Shadows”, A15.
119 Schneidermann, The Quebec Decision, 11.
the federal government believed that the majority percentage votes necessary to achieve secession would need to be adequately unambiguous in order to avoid any likelihood of collapse under economic and social pressures or any other difficulties that an attempt at secession would cause. The proportion of the majority must also be sufficient to the point that it would legitimize such a drastic adjustment to the current constitutional order and the affect it would have on future generations. We must be wary of circumstantial majorities.\(^\text{120}\)

The right is not to secession, but rather the right for negotiations to take place in good faith. Both success and failure are not guaranteed under the law. It is quite possible that the secessionists and the federalists would be unable to come to an acceptable agreement. Thus, negotiations would conclude without a constitutional amendment affecting the secession of Quebec. In fact, there would be no conclusions preset by law on any issue. Negotiations, as affirmed in the Quebec Secession Reference, would ultimately need to attend to the interests of the other provinces, the federal government, Quebec, and the rights of all Canada’s citizens, specifically the rights of minorities.\(^\text{121}\)

### 3.10 Ratification Issues in the Negotiations

One factor that casts doubt over the idea that negotiations could be entered into in good faith, clearing the path for a ratified settlement, is our own history when confronted with large-scale constitutional change. First ministers have in the past been able to reach an agreement in principle, but have failed miserably when they tried to ratify the proposed amendments. The proposed Meech Lake and Charlottetown accords remain

\(^\text{120}\) Dion, “Stop this Game of Light and Shadows”, A15.
\(^\text{121}\) Dion, “Stop this Game of Light and Shadows”, A15.
examples of first minister failure to this day. They are tragedies that Shakespeare surely would have honoured as subjects of his plays, had he been a Canadian alive in this century. Promising at first, the failed accords unraveled in spectacular fashion and tarnished everyone who participated. Even if Quebec and what remained of Canada were able to come up with a tentative agreement, the fear is that it may never survive the ratification process. It makes sense that future negotiators, would have to be students of history in order to avoid a similar fate.\(^{122}\)

The Constitution does not dictate the negotiation process. That is to say, there is no formal outline, or mention even, of how the relevant actors should begin or what content should be discussed. The only constitutional demand of the negotiation process is who should be present. The constitution states that any first minister’s conference formed to discuss an amendment to the Constitution referring to Aboriginal peoples should include the representatives of the Aboriginal peoples. Other than that, the Constitution remains silent and it is considered a matter of political judgment.\(^{123}\)

Throughout its history, as Russell and Ryder correctly point out, Canada has made use of “executive federalism,” whereby the senior ministers of both the federal and provincial governments initiate and draft proposals amongst themselves for future constitutional ratification.\(^{124}\) The Charlottetown Accord went even farther and included territorial ministers and Aboriginal representatives. Furthermore, along with the ratification at the legislative level, The Charlottetown Accord added a nationwide referendum as an additional requirement. Suffice to say, an amendment process that

\(^{122}\) Russell and Ryder, “Ratifying a Postreferendum Agreement on Quebec Sovereignty.”

\(^{123}\) Ibid.

\(^{124}\) Ibid.
seeks to remove a province from the constitutional order would have at least as many steps to arrive at final ratification as The Charlottetown Accord.

### 3.11 The Need for Good Faith

According to Russell and Ryder, laws can govern the structure in which negotiations take place, but they cannot perform the negotiations. Ultimately, the negotiators themselves are responsible for the outcome of any agreement. Therefore, neither side would be interested in trying to negotiate a deal where the only objective was to be uncooperative in order to ensure a dubious result. Consequently, it is necessary for both sides to understand that a non-agreement is detrimental to their own cause.\(^{125}\)

According to the Quebec Secession Reference, a clear majority would obligate both sides to enter into negotiations in good faith. In fact, secessionists point to the obligation to negotiate as confirmation that the partition of Canada is possible. This is precisely the point that Bouchard seizes upon because he believes the federal government is bound to negotiate secession. Consequently, it is possible for a province to secede from Canada. The Court ruled that these negotiations would have to be undertaken in good faith and in accordance with the principles of democracy, federalism, the rule of law and the protection of minorities.\(^{126}\) Having reiterated what the Court opined, Dion again

---

\(^{125}\) Russell and Ryder, “Ratifying a Postreferendum Agreement on Quebec Sovereignty.”

\(^{126}\) Ibid.
states that the federal government would enter into these negotiations in the spirit and to the letter of what the Court rendered necessary.

This obligation to negotiate is reciprocal. In fact, it would be just as binding on the Quebec government as it would be on the federal government. However, instead of being a political argument designed to deter the separatist option within, this argument is now placed within the context of the Quebec Secession Reference. Effectively, it is the defined legal rights of both the Yes and the No sides.

3.12 Removing Quebec from Existing Constitutional Arrangements

Perhaps it is an obvious point, but the main challenge to secession would be the removal of constitutional power from the federal and provincial institutions affecting the territory and people of Quebec. Amendments to the Constitution would be necessary to redefine boundaries and annul any constitutional provisions referring to the various branches of government as they relate to the province of Quebec.

This process of effecting the secession of Quebec is more involved than simply removing every mention of Quebec from the Constitution. The Canadian government would be tasked with ensuring that the constitutional amendments that allow for secession do not harm the workability of the Constitution for the remainder of Canada.127

Of course, the most obvious amendments would remove Quebec from federal institutions like the House of Commons, the Senate and the Supreme Court of Canada.

3.13 Borders

127 Russell and Ryder, “Ratifying a Postreferendum Agreement on Quebec Sovereignty.”, 6.
Immediately after the 1995 Quebec Referendum, there was a severe aversion to dealing with the possibility of Quebec seceding and what would happen if they did. Many questions surrounded what the federal government would do. For precisely this reason, Chrétien recruited Dion into his cabinet. He shocked the old guard of the Liberal Party by voicing his assertion that if Canada was divisible, then surely Quebec was as well. To some of the Liberal politicians who had been through two referenda on Quebec secession, this sounded like unnecessary provocation. To Dion, it made perfect sense because it made Quebecers aware that the path to statehood did not guarantee that a new republic would exactly mirror Québec’s geography within Canada. For Dion, this was not a scare tactic. Instead, it was meant to make separatists conscious that such an undertaking had unexpected consequences. In other words, Quebec could not attain independence without first negotiating the when and the how with the rest of Canada.\footnote{Dion, “Stop this Game of Light and Shadows”, A15.}

3.14 Defining and Removing Quebec (Borders)

Perhaps the first, and most politically obvious, amendment that the “7/50” formula could contend with is removing the territory of Quebec from the influence of the Constitution. Of course, this would also be one of the most contentious issues concerning the secession of Quebec. The debate relevant to the future political boundaries of Quebec would have to draw upon an array of legal sources. For example, section 6 of the Constitution Act, 1867 defines the borders of the province of Quebec as being those of Lower Canada. This would mean Quebec’s borders would fall within the boundary between Lower and Upper Canada, as described in a 1791 order in council. In 1851, \footnote{Russell and Ryder, “Ratifying a Postreferendum Agreement on Quebec Sovereignty”, 15.}
British Legislation defined Quebec’s boundaries as being set between New Brunswick and Lower Canada. The Boundary between Quebec and Ontario was defined by British legislation in 1889, while its northern boundary was twice enhanced by federal legislation in both 1898 and 1912, along with the definition of the Quebec-Labrador boundary in accordance with a 1927 Privy Council decision.\textsuperscript{130}

Under section 3 of the Constitution Act, 1871, Quebec’s boundaries can only be modified if the province concedes to do so. However, the Act provides for changes to be made within Canada. Quebec therefore, could not automatically assume that the existing borders would be maintained post-secession. This would be a matter for the negotiators to deal with.\textsuperscript{131}

As has been previously mentioned, there would be many parties at the negotiation table that would be keen to see their own interests secured. Ontario, the Atlantic Provinces, and the Aboriginal peoples would all be affected by either a change in boundaries or the status quo. For many of the Aboriginal peoples living within the boundaries of Quebec, it would be difficult, if not illogical, for them to leave Canada: a country in which they have a vested interest in terms of treaties, acts and various other agreements that would all have to be renegotiated with a newly formed Quebec state.

\subsection{3.15 Northern Quebec: Borders}

It is easy to imagine how these negotiations could get very complex surrounding the issue of borders. For example, primarily aboriginal people who declared their wish to

\textsuperscript{130} Russell and Ryder, “Ratifying a Postreferendum Agreement on Quebec Sovereignty.”, 15.

\textsuperscript{131} Russell and Ryder, “Ratifying a Postreferendum Agreement on Quebec Sovereignty.”, 15.
remain with Canada in 1995 inhabit Northern Quebec. Therefore, it is not a foregone
conclusion that Canada’s continued existence would be able to be partitioned along the
existing provincial boundaries of Quebec. Of course, this would be a very important
point to consider when one casts his or her vote in any future secession referendum.

In a Vancouver speech given after the 1995 Referendum, Prime Minister Jean
Chrétien seized on an important point, one that details a severe impediment to the
Separatist cause in terms of practicalities. He stated, “if Canada is divisible, Quebec is
divisible too.” This is a reference to the partition movement, which advocates
referenda in three areas of Quebec: the north, the Outaouais, and the west island of
Montreal. Were such a vote take place, the impact that it would have in the
negotiations concerning the borders alone is obvious. In fact, the James Bay Cree
illustrated the uncertainty involved, despite Quebec secessionist’s affirmation that
Quebec’s borders are perpetually non-negotiable, by holding their own Referendum in
1995. In it, they expressed their desire to remain as a part of Canada and not as a part of
a separate Quebec.

The issue of what the proposed border may be, meaning whether or not it would
remain intact in the event of secession, is something that secessionists have been hesitant
to discuss. Dion cites an interesting international example based on the partitioning of
the island of Mayotte from Comoros when the residents of Mayotte expressed their desire
to remain as part of France. The obvious parallel in Canada would be the above-
mentioned Aboriginal people in northern Quebec who expressed their wish by way of

---

132 Ibid.
133 Martin, Iron Man, 143.
134 Ibid.
135 Russell, Constitutional Odyssey, 236.
referendum in 1995 to remain with the rest of Canada if indeed the province of Quebec decided to separate. Dion is of the opinion that it is impossible to predict what the borders of an independent Quebec would be.\textsuperscript{136}

3.16 Minorities

In one of Lucien Bouchard’s more ironic moments, he recalled how the Court speaks of the necessity to protect the rights of English-speaking minorities and that it is necessary to take into account the interests of aboriginal peoples. He said, referring to the Bill 1, \textit{Act respecting the future of Quebec}:

The new constitution [of a sovereign Quebec] shall guarantee the English-speaking community that its identity and institutions will be preserved. It shall also recognize the right of the aboriginal nations to self-government on lands that they have full ownership and their right to participate in the development of Quebec; in addition, the existing constitutional rights of the aboriginal nations shall be recognized in the constitution.\textsuperscript{137}

The obvious point that emerges is, if he has so much faith in a rights document’s ability to protect minorities, why then is the Canadian Charter not sufficient to protect his rights or Quebec’s for that matter? If he has or had concerns about Quebec potentially being threatened, culturally or linguistically, by a clause in the Charter, surely he should have been placated by Bob Rae’s observation that “the notwithstanding clause…gave more powers to Quebec than anything proposed in either the Meech Lake or Charlestown accords.”\textsuperscript{138}

\textsuperscript{137} Schneidermann, \textit{The Quebec Decision}, 98.
The Bouchard argument must overcome two contradictions. The first is that referendum procedure is a purely political matter and that the law is not relevant. Second, the separatists use the law to demonstrate that their procedure is sound and that those who disagree are wrong.139 The critical point in the secession movement arguments, is their desire to select the parts of the law that favour the ease of the process of what they want to achieve and deny the relevance of the law when it does not suit them.140 The secessionist movement continues to accept favourable rulings and deny unfavourable ones.

After the Supreme Court delivered the Quebec Secession Reference, Bouchard’s legal selectiveness was in contrast to the Chretien government’s approval of the Quebec Secession Reference. On the other hand, the secessionists only recognized its legal validity for federalists while arbitrarily recognizing it themselves.141

Northern Quebec is a particularly contentious issue as it is governed under the auspices of the James Bay and Northern Quebec Agreement (1975) and the Northeastern Quebec Agreement (1978), signed by the governments of Quebec and Canada, and the Cree, Inuit and Naskapi peoples. These agreements can only be changed if all of the signatories are in agreement. Because these agreements are protected by section 35(1) of the Constitution, any amendment towards Quebec secession would require the agreement of all the signatories on the aforementioned agreements in order for the Quebec boundaries to even approximate the current arrangement. It is understood that these multi-lateral negotiations would find it difficult to achieve a consensus considering the

141 Dion, “Stop this Game of Light and Shadows”, A15.
stakes involved for all parties. It is also difficult to imagine that the Quebec delegation would be willing to form a new Quebec without these territories.\textsuperscript{142}

Of course, according to Russell and Ryder, if section 35 were to be dealt with independent of any considerations for the agreements protected under the section, it would be possible to remove the constitutional protection of any treaty or agreement pertaining to the aboriginal peoples. The removal, or amendment, of section 35 would not require any act of ratification by Aboriginal peoples, because the Constitution Act, 1982 does not give them a formal role in the amendment process. However, convention would almost certainly require that they have a role or veto regarding amendments that so clearly affect their rights. Any attempt to amend section 35 without the consent of Aboriginal peoples would certainly be inconsistent with what the Supreme Court of Canada described as the four fundamental tenets of the Canadian Constitution: Democracy, Constitutionalism and The Rule of Law, Federalism, and Protection for Minorities. To ignore these tenets is to violate the fiduciary obligations of the Crown and to risk the court’s possible intervention, in the form of mandated Aboriginal inclusion to the amending process, to temper an overtly repressive exercise of state power.\textsuperscript{143}

**3.17 The Aboriginal Treaty Stage**

Echoed by Russell and Ryder, one of the most difficult parts of the negotiation process would be reaching an agreement over contentious issues between Quebec and the Aboriginal peoples. There is no doubt that Aboriginal peoples would be at the

\textsuperscript{142} Russell and Ryder, “Ratifying a Postreferendum Agreement on Quebec Sovereignty”, 12.

\textsuperscript{143} Russell and Ryder, “Ratifying a Postreferendum Agreement on Quebec Sovereignty”, 12-13.
negotiating table in order to ensure that their constitutional rights remained intact. Section 35.1 of the Constitution Act, 1982, along with the Canada’s legal obligations, would necessitate the agreement of Aboriginal peoples to any ratified document concerning their status, legal or otherwise. For a secession amendment to have any legitimacy, it must ensure the Aboriginal peoples are in agreement with the amendment where it affects them.\textsuperscript{144}

While this is a difficult matter to conclude because of the stakes involved, the best means would involve a treaty that included Quebec, Canada and the appropriate Aboriginal group. This would preserve the history of Aboriginal peoples entering into agreements of this sort as a nation. This approach would be in keeping with the wide-ranging agreements that were signed by the Naskapi, Cree, and the Inuit of Northern Quebec. It is unclear how long a treaty process would take to negotiate, or what the exact result of this would be.

3.18 The Ratification Process

In terms of the ratification process, Russell and Ryder suggest there would be three processes involved in ratifying a Quebec secession agreement.\textsuperscript{145} The first of which would be a national referendum to consult the people of Canada. This idea of popular consultation over institutional changes concerning the Constitution is now seen as a

\textsuperscript{144} Russell and Ryder, “Ratifying a Postreferendum Agreement on Quebec Sovereignty”, 18.

\textsuperscript{145} Russell and Ryder, “Ratifying a Postreferendum Agreement on Quebec Sovereignty”, 10.
conventional requirement to the amendment process, due in large part to the precedent caused in the attempted Charlottetown Accord.\footnote{Ibid.}

The second step, would involve the passage of the secession agreement in the relevant legislatures. The Meech Lake Accord suffered from a lingering ratification period, which was ultimately responsible for its demise; therefore, it would be prudent to exact the ratification of the secession agreement as early as is reasonably possible.\footnote{Ibid.}

The third aspect of the ratification process, and possibly the most contentious of the three, involves obligation that all sides have to ensure that the aboriginal people’s historic right to treaties and other agreements are honoured.\footnote{Ibid.}

### 3.19 The Referendum Stage (Nationwide)

There is no formal requirement for a referendum to take place in any of the amending formulas. However, any agreement that was not ratified by a national referendum would risk jeopardizing the legitimacy of the entire agreement.\footnote{Russell and Ryder, “Ratifying a Postreferendum Agreement on Quebec Sovereignty”, 19.} Certainly, a sovereignist government in Quebec would not proceed with a formal request to enter into negotiations with the rest of Canada if they did not first obtain a winning referendum to do so. This speaks to the issue of the legitimacy of the project itself. Winning an election with secession as part of the platform is not in of itself a mandate to effect secession, because their may have been other factors involved for the electorate when they made the decision to send a sovereignist government to the National Assembly.\footnote{Russell and Ryder, “Ratifying a Postreferendum Agreement on Quebec Sovereignty”, 19.}
The people of Quebec would benefit from a referendum to ratify any agreement on secession because there may be a gap between what was hoped for and what was gained. That is to say, the agreement reached between the first minister, the Aboriginal peoples and Quebec may exceed a threshold of a minimum requirement for Quebec to exist as a state. In fact, the 1980 Quebec Referendum question contained a clause that committed the Quebec government to a second referendum to approve the agreement of would be negotiations with the federal government. The 1995 Quebec Referendum did not contain the same commitment and the electorate was being asked to vote based on the conditions set by Bill 1.\footnote{Russell and Ryder, “Ratifying a Postreferendum Agreement on Quebec Sovereignty”, 20.}

However, many of the sections contained within the bill were outside of the government’s jurisdiction to act unilaterally (e.g. Canadian citizenship and Canadian currency). Quebecers might reject a negotiated agreement in a second ratifying referendum, if it was felt that the Quebec government did not obtain an adequate agreement during the negotiations. In any event, any future agreement on secession would likely have to be ratified by the people of the province of Quebec in a second referendum.\footnote{Ibid.}

3.20 What Counts as a Yes?

As is the case with a referendum on secession, there is no formal consensus as to what would constitute a majority in a nationwide referendum to ratify a secession agreement. The matter of what constitutes a “sizable majority” in terms of a provincial referendum on sovereignty has not been numerically defined by the Court and is
considered a political matter. However, there is the matter of how a nationwide referendum on the entire secession package could be seen as successful if there was not a complete consensus due to the fact that some portions of the negotiated agreement would fall under the unanimity procedure of the amending formula. In fact, there is no formal constitutional requirement for a nationwide referendum to take place as part of the ratification process, and as is the case with a provincial referendum on secession, it is possible to negotiate a threshold, as far as the amount of provinces and what percentage of the vote is required to constitute a popular acceptance of the negotiated agreement. Of course, an agreement, between Quebec and the other negotiators, which did not require a complete consensus in a nationwide referendum, would have to account for the 1996 Constitutional Amendments Act (the five region referendum rule).  

3.21 The Approval of Aboriginal Peoples

The acceptance of a negotiated secession agreement in a nationwide referendum, conforming to the requirements of the 1996 Constitutional Amendments Act, would satisfy the conventions of the amendment process as far as the federal and the provincial governments were concerned. However, it is doubtful that Aboriginal peoples would be satisfied with a referendum arrangement that placed their constitutional rights in the hands of a non-Aboriginal majority. Quite simply, they lack the electorate numbers to have any impact in a nationwide referendum. As Russell and Ryder mention, “Full implementation of the principles agreed to with respect to the position of Aboriginal peoples in a sovereign Quebec would require a trinational treaty process, but with proper

---

safeguards this process need not be completed before recognition of Quebec’s sovereignty.”^{154}

### 3.22 The Unanimity Components

Presumably, those portions of the secession amendments that require the unanimity clause (section 41) would be packaged separately from those amendments that require the “7/50” formula, in order to ensure that ratification of the overall amendment were not rejected on an innocuous point. If, for instance, the various components of The Meech Lake Accord had been voted on separately, then it may very well have been ratified for the most part because every item was, save for an amendment to the amending process requiring unanimity, subject to the “7/50” formula.^{155}

### 3.23 Alternatives to the Constitutional Process

If, as we have discussed, there is no legitimate claim by Quebec to make use of the unilateral declaration of independence, why is it discussed as an option, even a preferred way to obtain sovereignty? It could be that Quebec seeks to negotiate outside of the Canadian Constitution and its amending formula. If Quebec were to make use of the unilateral declaration of independence they may gain international recognition as a state. In fact, Russell and Ryder argue that, if they were to gain status as a state, Canada may have to negotiate with Quebec as an independent country and under the auspices of

---

^{154} Russell and Ryder, “Ratifying a Postreferendum Agreement on Quebec Sovereignty”, 21.
^{155} Russell and Ryder, “Ratifying a Postreferendum Agreement on Quebec Sovereignty”, 22.
international law. Presumably, this would give Quebec greater flexibility in the negotiations over contentious issues like debt and the rights of Aboriginal peoples. Quebec could simply walk away from the negotiation process if they disagreed with the terms. While it is difficult to see how Quebec would be able to receive any meaningful recognition as far as their international status is concerned, it is easy to understand why a unilateral declaration of independence would be preferable to them.

During the 1995 Referendum Campaign, the Canadian government seemed reticent to discuss its plan, assuming they had one, over what course of action they would pursue if the sovereignists won. Perhaps the sovereignists themselves were moved to believe that a UDI was a scenario within their reach. It may even have engendered the belief that Canada may even join a potential list of countries willing to recognize the new Republic of Quebec. Of course, since the Quebec Secession Reference and subsequent Clarity Act, we now know that this is a very unlikely scenario.

3.24 The Limits of Constitutionalism

If Quebec were to win a future referendum on sovereignty and negotiations were instigated as a result, a failure to arrive at an agreement that would allow for the constitutional removal of the province is a very real possibility. It is hard to imagine that

---

156 Russell and Ryder, “Ratifying a Postreferendum Agreement on Quebec Sovereignty”, 23.
157 Russell and Ryder, “Ratifying a Postreferendum Agreement on Quebec Sovereignty”, 23.
158 Russell and Ryder, “Ratifying a Postreferendum Agreement on Quebec Sovereignty”, 7-8.
a Quebec government, after a referendum mandate to begin the secession process, would be willing to end the process altogether because of an impasse at the negotiation stage.\textsuperscript{159}

In this situation, Quebec may be tempted to move towards the option of proceeding outside of a constitutional framework and thereby plunging Canada into a very difficult situation. It is easy to imagine the political acrimony that would be generated by a breakdown in negotiations, and it is not likely that Quebec would accept an end to the process as a result.\textsuperscript{160}

The idea that negotiations could be entered into and conducted in good faith may seem dubious when it is considered that the subject matter of the negotiations would be quite emotional. The breakup of a country could hardly be decided otherwise. The uncertainty caused by failed negotiations may be just the catalyst to create the will to succeed. Armed conflict aside, the economic and political limbo that would exist in the vacuum of failed negotiations would do neither side any good. Even if Quebec were to receive international recognition from countries such as France, the rest of Canada and the United States may be reluctant to extend any kind of political and economic ties; let alone recognition. It is even conceivable that Montreal or Northern Quebec could become “West Berlins” whereby Canada would seek to maintain open transportation channels to regions unsure of their future in an independent Quebec. Whether or not this is a likely scenario illustrates the enormous uncertainties for both sides in the event of failed negotiations.\textsuperscript{161}

\textsuperscript{159} Ibid.
\textsuperscript{160} Russell and Ryder, “Ratifying a Postreferendum Agreement on Quebec Sovereignty”, 25.
\textsuperscript{161} Ibid.
3.25 Aftermath

After the Supreme Court of Canada rendered the Quebec Secession Reference, the response from the secessionist movement was inconsistent and lacked conviction. While continuing to accuse the Supreme Court as having no bearing on what secessionists clearly deemed a matter exclusive to the purview of Quebec, members of the PQ offered comments regarding the ruling. Quebec’s Intergovernmental Affairs Minister believed that the Supreme Court’s decision was a validation of the legal possibility of sovereignty because the Court had recognized the process as possible.\(^{162}\) However, the Quebec Secession Reference’s acknowledgement that secession within the Constitutional order is possible also repudiates the idea that a unilateral declaration of secession is a valid option.

Most of the indignation of secessionists over the Reference was reserved for the requirement by the Court for a qualitative majority in order to have a referendum on secession, which would bind all parties to negotiate to that end. Bouchard cited an interesting precedent regarding the entry of Newfoundland into the Canadian Confederation, which, by any measure, is an undeniably uncomfortable statistic for federalists. He pointed out that Newfoundlanders entered into the Canadian fold with only a 52 percent majority. Obviously, if federalists were to declare that a similar percentage was insufficient for Quebec to remove itself from Canada, what legitimacy did the Newfoundland referendum have in terms of Newfoundland’s entrance to Canada.\(^{163}\)

\(^{162}\) Smith, A.D. *The International Politics of Secession*, 76.

\(^{163}\) Ibid.
However, Prime Minister Chrétien retorted, “the secession of a province is so fundamental that it requires more than a simple majority.” Predictably, the federal government was satisfied with the outcome because it was uniform to their own belief that Quebec, or any province, could not simply remove itself from Confederation without fulfilling certain legal prerequisites. The Canadian Intergovernmental Affairs Minister stated, “After reading the opinion of the Supreme Court, no one can not know that such an attempt at unilateral secession would have no legal basis. International law gives you no legal right to effect independence unilaterally while ignoring Canadian legal order.”

4. CONCLUSION

Clearly, the secession of a province from Canada is a far more complicated matter than a province simply expressing its will to do so. As this thesis has demonstrated, the process of removing a province from the constitutional order requires a consensus from all relevant stakeholders and would require a level of mutual agreement that may be impossible to realize. As it exists today, the amending formula presents a deterrent to secession due to its complexity and requirement of consensus. However, as discussed at length in this thesis, it simultaneously allows for the process of partition to take place if an agreement is ever realized.

The Meech Lake Accord revealed just how easily the delicate balance of concurrence could be undermined, on even the simplest of changes to the Constitution, if the process is allowed to carry on over a long period of time. This delicate balance can, ironically, also be disrupted by constitutional elements such as the Amending Formula.

164 Ibid.
165 Ibid.
In fact, I have argued that the Quebec Secession Reference is born from not only the 1995 Quebec Referendum, but from the amending formula and the failure of The Meech Lake Accord. Collectively, they have led Canada to examine the conditions of its own legal entitlements and jurisdictions in the event of its own deconstruction. This may seem like an extreme position, whereby the country refuses to exist if it cannot do so without contradiction or double standard. However, in fact, it is a realization that Canada cannot exist if the will to do so is not present.

This thesis covered many legal options and boundaries to provincial secession. Most important to this process is the notion that provincial secession may only happen through constitutional amendment, and that a unilateral declaration of independence is not within the jurisdictional power of any provincial legislature. While not wholly vital to the secession process, I suggest the amending formula is the main constraint.

Moreover, Canadian regional differences avert the use of the Amending Formula to force secession. As such, the essential unanimity would be difficult, even unfeasible. In fact, a consensus on partition, given the intricacy of division and allocation of wealth, land and materials, would signify an even more problematic undertaking. Ultimately, the Canadian Constitution and its amending formula actually provides for the possibility of provincial secession.

In Chapter 1, I introduced the amending formula and its relationship to secession, while stressing aspects of the Canadian constitution necessary for any province to secede. In the end, it was determined that the amending formula’s influence on provincial secession, particularly in a dualistic society, is paramount.
Chapter 2 examined patriation as it pertains to the amending formula. The chapter argued that Quebec would have extreme difficulty seceding from the nation, particularly because of a lack of an official endorsement of the Canadian Constitution. In addition, in the second chapter, I was able to demonstrate the need for a constitutional amendment in order to affect partition since its interpretation under the law could only be sourced in the Constitution if it is to be achieved. Finally, the failure of The Meech Lake Accord helps prove the difficulty of provincial secession, while enhancing the importance of the amending formula.

Chapter 3 focused on many amendments including the 7/50 amendment, which means an amendment requires that both houses of parliament and a minimum of seven provincial legislatures representing at least 50 percent of Canada’s population to pass resolutions, the Unanimity Procedure, which would remove much language regarding Quebec in the Canadian Constitution, and others such as the Bilateral Amending Procedure, the Federal Unilateral Procedure and others. Each of these amendments is essential for provincial secession.

Ultimately, the amending formula of the Constitution presents an obstacle to secession in its own right due to the difficulty involved in reaching the required consensus to effect an act of partition. The Meech Lake Accord exemplified how political arbitration on contentious constitutional points can result in the failure of a proposed amendment. Secession would hinge not on the referendum, but the negotiations necessary to create a constitutional amendment to remove a province from the constitutional order. This would suggest that the provinces should try to achieve autonomy goals, short of secession, within the political realm under the existing
constitutional order. Ultimately, decentralization of the Canadian Federation has manifested itself within this model since Confederation. The result has been a highly decentralized federation.
References


_The Clarity Act 2000_, c. 26 C-31.8


---. “’Stop this Game of Light and Shadows’: A Clear Response to a Clear Question on Secession an Absolute Must, Dion Says.” _The Ottawa Citizen_, August 26, 1998, A15.


Smith, A.D. The International Politics of Secession

