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The Supreme Court of Canada:
Reaffirming the Norm through the Veil of Constitutional Neutrality

by
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A thesis submitted to
the Faculty of Graduate Studies and Research
in partial fulfilment of
the requirements for the degree of
Doctor of Philosophy

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ISBN: 978-0-494-33514-7
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ISBN: 978-0-494-33514-7

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ABSTRACT

Since 1867, Canadian constitutional politics has been plagued with competing and often conflicting visions of Canadian federalism: the centralist, the provincialist and the dualist visions. The Aboriginal peoples have also contributed to the debate by adding yet another vision – the multinational vision. In one way or another, these visions continue to influence the actions and decisions taken by Canadian governments. The S.C.C. too, in its role as the guardian of the Constitution, is influenced by and has influenced the different conceptions of the way in which the Canadian nation-state is perceived. Despite this, mainstream Canadian scholarship has shifted away from studying the role of the Court in the understanding of federalism since the abolition of appeals to the JCPC in 1949 and more so since the inception of the Charter in 1982. Rather, attention seems to centre on the judicial review of alleged rights violations. Studying how the Court is influenced by and influences conceptions of federalism continues to offer insight into the role of the Court in Canadian society.

This dissertation examines how different visions of the Canadian federation have an influence on the S.C.C. in the opinions it rendered in four constitutional references: the Senate Reference, the Patriation Reference, the Quebec Veto Reference and the Secession Reference. It is argued that the Court in all four references continued to understand the Canadian federation in mononational terms even when faced with the binational (or multinational) vision. Analyzing the four opinions through the neo-institutional lens of path dependency three claims are made: first, the Court in all four references reinforced the norm and the dominant ideology at any given time; second, the Court was pushed into and readily accepted the role of political mediator; and third, in all

four references, the Court ensured its legitimacy and the legitimacy of its product by framing its opinions in such a way so as to secure that its vision of the Canadian federation went unnoticed. This dissertation concludes by suggesting that the role of different visions of the Canadian nation and of different conceptions of federalism underpinning S.C.C. decisions deserves further study.

ACKNOWLEDGEMENTS

I wish to thank my committee members for all their help and guidance over the years. I would like to especially thank my thesis supervisor François Rocher for being there every step of the way. Thank you François for all your help, your encouragement, and all the advice you have given me over the years (and will continue to give me in the years to come.☺).

To my friends and family, thank you for supporting me and encouraging me throughout this journey. RLTL, without you I don't think I would have had the courage alone to finish. A special thanks to my sister Daniela who has taught me to never give up. Dee, without even knowing it, you give me strength and hope. Thank you all. I love you.

*And the best thing you've ever done for me
Is to help me take my life less seriously
It's only life after all*

Indigo Girls

INTRODUCTION

According to Justice Lamer, “When the country gets into trouble the Supreme Court of Canada has been there to come to the rescue”.¹ Certainly Canadian governments have relied upon the Supreme Court of Canada (S.C.C.) to “rescue” them from the political impasse they find themselves in when we consider the Reference: Re Authority of Parliament in Relation to the Upper House, (the Senate Reference), 1980;² the Reference Re: Amendment of the Constitution of Canada (Nos 1, 2, and 3) (the Patriation Reference), 1981;³ the Reference re Attorney General of Quebec v. Attorney General of Canada (the Quebec Veto Reference), 1982;⁴ and the Reference re the Secession of Quebec (the Secession Reference), 1998.⁵ But we need to ask of Justice Lamer’s comment, has the Court come to the rescue of the country?

In commenting on the role of the Court and the effects of its opinion in these four references, political scientists and legal scholars have, for the most part focused upon the political aspect of the four references. Did the Court reach a ‘balanced decision’? Did it calm the fire between the two orders of government or between the Canadian nation and the Quebec nation? Focus on the political aspect is not surprising. The references were political ones in the sense that in one way or another, the S.C.C. was asked to settle a political dispute between the two orders of government or between the federal government and the Quebec government. I state political dispute because all four

¹ Justice Lamer quoted in Kirk Makin, “Lamer worries about public backlash,” *Globe and Mail* [Toronto], 6 Feb 1999, A4.

² *Reference: Re Authority of Parliament in Relation to the Upper House*, [1980] 102 D.L.R. (3d) 1.

³ *Reference Re: Amendment of the Constitution of Canada, (Nos 1, 2, and 3)*, [1981] 125 D.L.R. [Dominion Law Reports] (3d) 1

⁴ *Reference Re: Attorney General of Quebec and Attorney General of Canada*, [1982] 140 D.L.R. [Dominion Law Reports] (3d) 385.

⁵ *Reference Re: Secession of Quebec*, [1998] 161 D.L.R. [Dominion Law Reports] (4th) 385.

references involved the ability or non ability of the governments to unilaterally amend the Constitution or whether one province could unilaterally veto amendments. Furthermore, all four references resulted from either the federal or the provincial governments' inability to advance their vision of the Canadian federation through the traditional political means of federal – provincial negotiations.

Though analysis focusing on the politics is understandable, we run the risk of underestimating the role an understanding of federalism played in the opinions of the Supreme Court by solely focusing on the political aspect of who has the power to amend the Constitution or how the Court was pushed into a political role. In addition to this, we miss how the four references are connected beyond simply these two matters. In all four references, the Court commented on the nature of Canadian federalism and on the nature of the Canadian nation.

These four references are unique not only because the Court was asked if one order of government has the power to do X,⁶ but if one order of government has the unilateral power to change fundamental features of the Canadian Constitution or unilaterally veto amendments. In arguing either for or against the unilateral power, the governments, including the interveners, present distinct visions of the Canadian federation to the Court; the centralist vision, the provincialist vision or the dualist vision, all informed by different understandings of Canadian federalism. The Court then, in being asked to diffuse the conflict between the federal government and the provincial governments in the first two references, or between the federal government and the

⁶ Typically, the Court is asked to determine if a law is valid (*intra vires*), that is, the government is or would be acting within its jurisdiction, or invalid (*ultra vires*). If the Court rules the government to acting outside its jurisdiction (*ultra vires*), then it is inferred that the power falls within the jurisdiction of the other order of government. This however, was not the case in the four references under review. It was not argued by the provinces or the federal government that if one order of government cannot, the other can.

Quebec government in the second two references, was asked to choose between the conflicting visions with which it was presented. It is only logical then that in rendering its opinion, the Court endorsed one vision over another, and in turn, a particular conception of federalism. In light of this, instead of simply asking, has the Court come to the rescue, we should ask, how did the Court understand federalism? Did a particular understanding of federalism play a role in the decision making process of the Court when deciding who has the power to amend the Constitution? Is there a recognizable pattern in the decisions of the S.C.C. when the Court was faced with different and conflicting visions of the Canadian federation and with distinct views regarding Canadian federalism vis-à-vis the ability to amend the Constitution?

It is my intention in this dissertation to focus on the S.C.C. as an institution which is influenced by a particular conception of federalism when rendering decisions dealing with jurisdictional disputes concerning the ability to amend the Constitution. As the S.C.C. is Canada's last court of appeal having final say on disputes involving, for our purposes the Constitution, and as its rulings act as a basis for political action in the context of the wider political arena, it is important to understand *how issues of federalism come before the courts and how the institution constructs the nature of federalism.*

This examination is based on four constitutional references: first, the Senate Reference, 1980; second, the Patriation Reference, 1981; third, the Quebec Veto Reference, 1982; and fourth, the Secession Reference, 1998. These four references continuously appear in law and political science research as cases which have had and continue to have an impact on Canadian constitutionalism and/or examples of how the S.C.C. was used by the political actors as a means for diffusing conflict around federal-

provincial relations.⁷ Furthermore, all four references involve and speak to pressing constitutional issues dealing with the fundamental nature of the Canadian federation and Canada's federal identity.

Identifiable in almost every court decision is a theory of federalism which the S.C.C. endorses. This is especially true in these four references. Therefore, I argue that the S.C.C., when rendering decisions in cases dealing exclusively with the division of powers concerning the ability to amend the Constitution, has been influenced, either implicitly, explicitly or sometimes both, by a particular conception of federalism. This has the ultimate effect of re-affirming the norm, while not upsetting either the neutrality or the legitimacy of the Court. In other words, the S.C.C., in rendering its opinion, is influenced by and does promote a particular vision(s) of how Canada, as a federation, ought to operate. This endorsement has had and continues to have implications for both the Canadian political environment and constitutional politics in that the S.C.C. has sustained and/or promoted a particular conceptualization of the way in which the Canadian federation ought to operate, under the veil of constitutional neutrality.

⁷ Literature which has listed these cases as important include, but is not limited to: Garth Stevenson, *Unfulfilled Union*, (Canada: Gage Educational Publishing Company, 1989); Patrick Monahan *The Politics and the Constitution: The Charter, federalism, and the Supreme Court of Canada* (Toronto: Carswell Thomson Professional Publishing, 1987); Macklem et al *Canadian Constitutional Law* (Toronto: Emond Montgomery Publishing Ltd., 1997); Peter Hogg, *Constitutional Law of Canada* (Toronto: Carswell Thomson Professional Publishing Ltd., 1997); John Saywell and George Vegh, *Making the Law* (Toronto: Copp Clark Pitman Ltd., 1991); Russell, Peter H., et. al., *Federalism and the Charter: Leading Constitutional Decisions: A New Decision* (Ottawa: Carleton University Press, 1989). Peter Meekison, *Canadian Federalism: Myth or Reality?* (Toronto: Methuen Publications, 1968) in particular Martha Fletcher, "Judicial Review and the Division of Powers" and Louis-Philippe Pigeon, "The Meaning of Provincial Autonomy".

STUDYING THE JUDICIARY

Underestimating the federalism factor in S.C.C. decisions is not unique to the analysis of these four references. Within both constitutional law scholarship and Canadian political studies, there has been a gradual decline of scholarly interest away from judicial review of federalism since the abolition of appeals to the Judicial Committee of the Privy Council (JCPC) in 1949, and a more decisive movement since the 1982 patriation of the Constitution.

Up until this point in Canadian constitutional history, there was a healthy debate amongst Canadian legal scholars and political scientists concerning the JCPC and its understanding of Canadian federalism. The literature specifically focused upon how the Committee, in its activism, distorted the original intentions of the Fathers of Confederation.

THE JCPC EFFECT

Constitutionalists and fundamentalists commonly argue that the JCPC, specifically Lord Watson and Viscount Haldane, misinterpreted the BNA Act; this subsequently led to the decentralization of the Canadian federation. John Saywell holds that Lord Watson and Viscount Haldane destroyed the original intentions of the BNA Act by severely narrowing the powers of POGG and trade and commerce and expanding the provincial power of property and civil rights.⁸

The position of JCPC critics is three fold: one, according to fundamentalists, the Fathers of Confederation, intended to create a centralized federal state; the proof is in Sir

⁸ John Saywell, *The Lawmakers: Judicial Powers and the Shaping of Canadian Federalism* (Toronto: University of Toronto Press, 2002).

John A. Macdonald's sentiments. Two, this intent was clearly embodied in the BNA Act; it is obvious in the role assigned to each level of government that the federal government was superior to the provincial governments. Third, the way in which fundamentalists define the role of the judiciary supports their position; the judicial role is to provide a technically correct interpretation of the Act in order "to bring out the meaning deliberately and clearly embodied in it by the Fathers."⁹ Therefore, the JCPC did a *bad job* in interpreting the BNA Act.

At first glance, this theory seems to offer a good explanation for the decentralization of the Canadian federation. A closer look at this position, however, proves this theory inadequate. First, it privileges the role of the JCPC in the development of Canadian federalism. Second, these arguments are premised on the idea that Macdonald's views on Canadian federalism were the only intention(s) of the fathers and in turn accept this as historical fact. In reality, other, and often conflicting, intentions were present at the time of Confederation. The implication of both is that the JCPC critics discount any role the changing social-economic conditions in Canada played in the decentralization of the nation. More specifically, these JCPC critics do not consider the social reality; that is, what was going on in Canada during the time in which any given case was working its way through the court system.

Murray Greenwood,¹⁰ Alan Cairns,¹¹ Fredrick Vaughn,¹² J. R. Mallory¹³, and Peter Russell,¹⁴ acknowledge the shortcomings of this position and add to the debate by

⁹ Alan Cairns, "The Judicial Committee and its Critics," in *Constitution, Government, and Society in Canada: selected essays by Alain Cairns*, ed. Doug Williams (McClelland and Stewart, Toronto, 1998), 45.

¹⁰ Murray F. Greenwood, "Lord Watson, Institutional Self Interest, and the Decentralisation of Canadian Federalism in the 1890s," in *Making the Law: The Courts and the Constitution*, ed. John Saywell and George Vegh (Copp Clark Pitman Ltd., Toronto 1991), 70-101.

considering the social environment. All note that the use of the centralizing features of the BNA Act, including the power of disallowance and reservation, fell into disuse, mainly because they were inconsistent with the federal principle of self-government and incompatible with the development of Canada. At the time of Confederation, a centralized state seemed reasonable and necessary to establish a new polity. However, we need to recognize that a central state is “inappropriate for the regional diversities of Canada.”¹⁵ As such, the evolution of Canadian federalism was also facilitated by politically conscious actions. As Russell points out, in Canadian political history, the provincial Premiers, not the Official Opposition, were the strongest opponents to the Prime Minister. The objective of the provincial rights movement was to “resist and overcome a hierarchical version of Canadian federalism,”¹⁶ for a more balanced federation.¹⁷ This conceptualization of the Canadian federation was not necessarily created, but was reinforced by the Committee through its decisions. We must recognize, therefore, that the JCPC did not initiate nor create the sentiments of the provinces; their

¹¹ Alan Cairns, “Comment on ‘Critics of the Judicial Committee: The New Orthodoxy and an Alternative Explanation,’” in John Saywell and George Vegh ed. *Making the Law: The Courts and the Constitution*, 183-191.

¹² Fredrick Vaughn, “Critics of the Judicial Committee: The New Orthodoxy and an Alternative Explanation” in John Saywell and George Vegh ed., *Making the Law: The Courts and the Constitution*, 162-182.

¹³ J. R. Mallory, *Social Credit and the Federal Power in Canada* (Toronto: University of Toronto Press, 1954).

¹⁴ Peter H. Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?* 2nd ed. (Toronto: University of Toronto Press, 1993).

¹⁵ *Ibid.*, 59.

¹⁶ *Ibid.*, 37.

¹⁷ A.R.M Lower, “Theories of Canadian Federalism: Yesterday and Today,” in *Evolving Canadian Federalism*, ed. Lower and Scott (Durham: Duke University Press, 1958) 28:

Lower points out that “shortly after the new Dominion had been formed, some of the provincial governments began to assert their rights and powers.” This assertion, which came to be known as the provincial rights movement, was backed by the decisions of Viscount Haldane and Lord Watson in their encouragement of a wider understanding and applicability of section 92 subsections 13 and 16.

decisions merely reflected that which was going on in the Canadian political environment.

Greenwood acknowledges this dimension and adds the notion of institutional self-interest. The “main motivation influencing Lord Watson and his colleagues was a desire to preserve intact the appellate jurisdiction of the Judicial Committee.”¹⁸

Greenwood argues that the desire to end appeals to the JCPC was quite prevalent beginning in the 1880s and taking shape beginning in the 1930s – both in the academic and political circles.¹⁹ If the JCPC simply reiterated the decisions of the S.C.C., it would seem that the JCPC was ‘quite superfluous’.²⁰ Thus, it was in the best interest of the JCPC, in order to maintain its *job*, to ensure that it was viewed as necessary and legitimate, to rule as it did.

Fredrick Vaughn attempts to offer a different explanation from Greenwood, Cairns and Russell, of “why the Judicial Committee emasculated the centralizing terms of the British North America Act”²¹ and thus adds another dimension to this debate. For Vaughn, the actions of the JCPC were rooted in how it regarded its function, which was political and not judicial. This is clear in the statements of the law lords in both Russell and the Local Prohibition cases. Vaughn, upon analysis of these two cases concludes that “there was a clear disposition on the part of all members of the boards to side with the

¹⁸ Murray F. Greenwood, “Lord Watson, Institutional Self Interest, and the Decentralisation of Canadian Federalism in the 1890s,” 80.

¹⁹ *Ibid.*, 81.

Three points are offered in support of his position: one, Haldane understood Watson’s “thinking of Canadian constitutionalism” as the two were not only colleagues but personal friends. Greenwood thus infers that Haldane knew that “Watson was aware that correcting the Supreme Court’s centralist interpretation of the constitution would be popular in Canada and would demonstrate the virtues of judicial imperialism.” Two, the position of the JCPC as the final court of appeal was in question in the 1880s and the 1890s; Canada remaining content with judicial subordination was in definite doubt – their Lordships were well aware of this. Three, it is clear in the decisions of the JCPC that it had a bias against the S.C.C..

²⁰ *Ibid.*, 82.

²¹ Vaughn, Fredrick, “Critics of the Judicial Committee: The New Orthodoxy and an Alternative Explanation,” 176.

provinces against the claims of the federal government.”²² Furthermore, “the transcript of proceedings in both Russell and Local Prohibition discloses that almost all the law lords viewed the federal dominance as a priori to be resisted, as essentially a threat to viable provinces.”²³ In addition, there was “a complete disregard to the intention of the [Imperial] Parliament as contained in the language of the BNA Act.”²⁴ Essentially then, the JCPC endorsed a theory of federalism contrary to what was intended by the Fathers as seen in the BNA Act. From this, Vaughn deduces that the JCPC regarded its role as a political one as it became evident that they viewed their function as aimed “to correct the deficiencies of the BNA Act.”²⁵

The discussions of Cairns, Russell, Greenwood, and Vaughn remain important in that they identify other reasons for the decisions of the JCPC. However, they do not give the other positions the importance that they deserve. Cairns in fact downplays the role the JCPC played by excusing their actions with the sociological justifications he offers, Russell does so by arguing that the decisions of the JCPC mirrored the political environment of Canada. Greenwood is mainly concerned with the desire of the JCPC to remain Canada’s final court of appeal. Vaughn submits to the traditional JCPC critics’ arguments by accepting Sir John A Macdonald’s intentions as historical fact. What is also important to note is that neither Cairns nor Russell account for the political biases, nor any biases for that matter, the JCPC may have held. And this extends to the perceived neutrality of the S.C.C. as well. Though I agree with Cairns that the political

²² Ibid., 177.

²³ Ibid., 177.

²⁴ Ibid., 177.

²⁵ Ibid., 177.

reasons alone cannot explain the actions of the JCPC, the sociological justification alone cannot either.

Referring to the work of Mallory, Simeon and Richardson and Cairns, Miriam Smith points out that the implication of their findings “is that the decisions of the courts and the work of judges in making judicial decisions must be placed within a broader sociological context that takes into account the economics, political and social environment in which litigation occurs”.²⁶ Decisions of the JCPC were not isolated occurrences, thus we must consider the relationship between the environment in which the cases unfolded and the rulings of the cases.

THE S.C.C. EFFECT?

Since the patriation of the Constitution, studies of the S.C.C. have focused less around the issue of Canadian federalism. Rather, Canadian political scientists and Canadian legal scholars, when examining the judiciary, have centred their studies on the legitimacy of judicial interpretation vis-à-vis individual rights guaranteed in the Canadian Charter of Rights and Freedoms (CCRF) and not necessarily on the role of the judiciary vis-à-vis the shape and understanding of Canadian federalism. For instance, Rainer Knopff and Ted Morton examine the increase of judicial power in the post Charter period;²⁷ Michael Mandel focuses his studies on the justice system vis-à-vis democracy.²⁸ In short, they have focused on the debate between judicial restraint or interpretivism and

²⁶ Miriam Smith, “Ghosts of the Judicial Committee of the Privy Council: Group Politics and Charter Litigation in Canadian Political Science.” *Canadian Journal of Political Science*, 35 (1) (March 2002): 3-29, 20.

²⁷ Rainer Knopff and F.L.Morton, *Charter Politics* (Nelson Canada, Scarborough, 1992); Rainer Knopff and F.L.Morton, *The Charter Revolution and the Court Party*. Peterborough, Ontario: Broadview Press, 2000.

²⁸ Mandel, Michael. *The Charter of Rights and the Legalization of Politics in Canada (updated and expanded ed)*. Toronto: Thompson Educational Publications, 1994.

judicial activism or non-interpretivism. From this, the focus opens up to the correctness of interpretations; that is whether or not the Court rendered the *right* decision.²⁹

Most, if not all, students of Canadian politics seem to agree that the language of the Constitution was intentionally left broad by the framers, in order to ensure its adaptability to an ever changing society; this idea is informed by the living tree concept. In this light, “it is an important function of [the judiciary] to periodically update the Constitution.”³⁰ Therefore the debate is centred around, as Knopff and Morton phrase it, “what kind of updating is appropriate;”³¹ ergo, the argument between interpretivism and non-interpretivism.

Broadly speaking, non-interpretivism is understood as judges applying or adhering to the original intent of the Fathers “while acknowledging the need to enable it [the Constitution] to adapt to new and unforeseen circumstances”.³² Essentially, supporters of non-interpretivism, advocate a narrow exercise in judicial power. Interpretivism, on the other hand, is understood as the judiciary attributing new meaning to traditional concepts or principles so as to ensure that the Constitution will always remain in tune with contemporary society.³³ According to J.H. Ely, courts should enforce norms that cannot be discovered within the four corners of the [Constitutional] document.³⁴ Interpretivists advocate a broad use of judicial power.

²⁹ For an in depth review of this debate please see Radha Jhappan, “Charter Politics and the Judiciary,” in *Canadian Politics in the 21st Century* ed. Michael Whittington and Glen Williams (Scarborough: Nelson Thompson Learning, 2000), 217-50; and Richard Sigurdson, “Left- and Right-Wing Charterphobia in Canada: A Critique of the Critics,” *International Journal of Canadian Studies* 7-8 (1993), 95-116.

³⁰ Rainer Knopff and F.L.Morton, *Charter Politics*, 108.

³¹ *Ibid.*, 108.

³² *Ibid.*, 109.

³³ *Ibid.*, 110.

³⁴ J.H. Ely, , *Democracy and Distrust* (Boston: Harvard University Press, 1989).

Miriam Smith in “The Ghosts of the Judicial Committee of the Privy Council: Groups Politics and Charter Litigation in Canadian Political Science”, demonstrates that an analysis as such is misleading as it ignores the dynamic relationship between political institutions and society.³⁵ She demonstrates that S.C.C. decisions are reflective of change going on in society. So, rather than focusing on the normative role of the Court, “we should seek to understand the decisions of courts in their larger social, political, and economic context.”³⁶

Such an analysis, however, also seems to be missing in the law literature. When looking at federalism cases and analyzing judicial decisions, students of law have concentrated upon theories of judicial review. More specifically, and distinct from their political scientist counterparts, legal scholars, David Beatty,³⁷ Peter Hogg,³⁸ Katherine Swinton,³⁹ to name a few, focus on whether or not the Supreme Court engages in a principled approach when reaching a decision regarding the division of powers.

In looking at federalism analysis, legal scholars have agreed upon a two step analysis that justices engage in when deciding upon the constitutionality of a challenged law or government action. In step one, judges focus on the impugned legislation or government action to determine the pith and substance. In step two, judges focus on the Constitution to determine the scope of powers of the government whose legislation or action is under review. They, however, part in their explanation of the guides/aids

³⁵ Smith, “Ghosts of the Judicial Committee of the Privy Council: Group Politics and Charter Litigation in Canadian Political Science,” 7.

³⁶ *Ibid.*, 29.

³⁷ Beatty, David. *Constitutional Law in Theory and Practice*. Toronto: University of Toronto Press, 1995.

³⁸ Hogg, *Constitutional Law of Canada*.

³⁹ Katherine Swinton, “The Supreme Court and Canadian Federalism: The Laskin Dickson Years.” *In Canadian Constitutional Law (2nd edition)*, ed. P. Macklem et al. (Toronto: Emond Montgomery Publications Limited, 1997).

available and used by the Court in giving meaning to the Constitution. More specifically, there is a debate amongst legal scholars on whether or not courts follow a principled approach when reaching their decisions.

While exploring and questioning the legitimacy of constitutional interpretation is a worthwhile examination, in its own right, it does not offer insight into how the courts conceptualize federalism. Instead, these two, somewhat distinct, debates focus on how justices go about dealing with federalism cases and their task of judicial review. It would not be accurate to assert that no scholar has studied judicial review vis-à-vis federalism. Gerald Baier,⁴⁰ John Saywell,⁴¹ and Eugenie Brouillet⁴² have in their various works reintroduced federalism into the study of the Court.

Gerald Baier has taken the constitutional interpretation dilemma, more specifically, the ‘principles debate,’ one step further, by adopting it to federalism analysis. In his dissertation, he looks at the judicial doctrines, (concurrency, for instance), and how they can aid us in understanding judicial reasoning in federalism cases.⁴³ His main focus or goal is to revive the importance and utility of judicial doctrines in understanding federalism in Canada, Australia, and the United States.⁴⁴ In “Judicial Review and Canadian Federalism,” he demonstrates that “judicial review of the division of powers remains an important part of the federalism landscape in Canada.”⁴⁵

⁴⁰ Gerald Baier, “In defence of doctrine: the review of Canadian federalism in comparative Perspective.” Doctoral Dissertation. Dalhousie University, 1999; Baier Gerald, “The Law of Federalism: Judicial Review and the Division of Powers,” in eds., *New Trends in Canadian Federalism: 2nd edition*, in Francois Rocher and Miriam Smith (Peterborough, On: Broadview Press, 2003).

⁴¹ John Saywell, *The Lawmakers: Judicial Powers and the Shaping of Canadian Federalism*.

⁴² Eugenie Brouillet, “The Federal Principle and the 2005 Balance of Powers in Canada.” *Supreme Court Law Review* (2006) 34 S.C.L.R. (2d).

⁴³ Gerald Baier, “In defence of doctrine: the review of Canadian federalism in comparative Perspective.”

⁴⁴ Ibid.

⁴⁵ Gerald Baier, “The Law of Federalism: Judicial Review and the Division of Powers,” 24.

His work is insightful in that he does bring the judiciary back into the study of federalism.

Saywell has also looked at the relationship between the judiciary and federalism in Canada. In *The Lawmakers: Judicial Power and the Shaping of Canadian Federalism*, he studies the role the Supreme Court played in the shaping of modern day federalism. More specifically, he looks at how the “courts defined their [federal and provincial] respective powers in reaching a decision.”⁴⁶ His basic argument is that the S.C.C. restored the balance of Canadian federalism after its erosion by the JCPC. In his analysis of the cases, Saywell looks at how the S.C.C. viewed federalism and how this view differed from that of Lord Watson and Viscount Haldane. According to Saywell, the S.C.C., through various decisions, rebalanced “the structure of the federation by expanding the field of activity of the federal government without narrowing the traditional enclaves of provincial powers.”⁴⁷

This is in contrast to the recent study conducted by Brouillet. In her analysis of cases decided in 2005, Brouillet found “an absence of a federal theory that prevents the High Court from establishing and maintaining a sound federal balance in the Canadian context.”⁴⁸ This she finds to be especially true in cases dealing with the distribution of powers between the two orders of government.⁴⁹ Her study is important as she recognizes that the Court can and has in the past turned to the federal principle in deciding cases. Thus she recognizes that a theory of federalism underpins S.C.C. decisions.

⁴⁶ John Saywell, *The Lawmakers: Judicial Power and the Shaping of Canadian Federalism*, xv.

⁴⁷ *Ibid.*, 302.

⁴⁸ Eugenie Brouillet, “The Federal Principle and the 2005 Balance of Powers in Canada,” 9-10.

⁴⁹ *Ibid.*, 332.

While the work of Baier, Saywell, and Brouillet are worthwhile in that they bring the judiciary back into the study of federalism, they neglect to study how a specific understanding of federalism and/or vision of Canada influenced their decision and/or use of judicial doctrine and how this understanding was influenced by the dominant ideology of the time. Furthermore, they, like their political scientist colleagues, seem to overlook how the Court through its endorsement of a particular understanding of federalism ensured both its legitimacy and neutrality.

Baier for instance does not seem to consider how an understanding of federalism underpinned the scope of the doctrine employed by the Court in deciding cases dealing with the division of powers. Saywell and Brouillet, though they consider federalism as a variable in the decision making process of the S.C.C., simplify the understanding of federalism and the federal principle. When analysing the Court's decision, Saywell focuses only on which order of government the Court favoured in its ruling and how it restored the balance. So his conception of federalism begins and ends with the idea of decentralization versus centralization. This is similar to the work of Brouillet. In her analysis she limits 'theory of federalism' to mean the balance between unity and diversity which she conceptualizes as finding a balance between the powers and interests of the two orders of government. This is not necessarily the only existing vision of the Canadian federation amongst the political players. The three distinct visions evident in the four references to be studied in this analysis do not necessarily accord with the way the federal theory was conceptualized by either Saywell or Brouillet. Thus it is important to expand our understanding of the federal principle to recognize conceptions which do not necessarily fit with the idea of a balance between the two orders of government. This

does not necessarily render Brouillet's findings incorrect. However, we need to recognize the limits of her (as well as Saywell's) understanding and application of the federal theory.

In contrast to these three academics, I seek to engage in a substantive analysis of the meanings and influence of the notion of federalism that can be identified in the rulings of the Supreme Court. For aid in this I turn to the work of Andrée Lajoie⁵⁰ who argues that the political context of any given case cannot be ignored when giving meaning to and understanding the decisions of the Court. S.C.C. decisions are influenced by the politics of the day. This is similar to Miriam Smith's finding in her work concerning S.C.C. decisions in Charter cases.⁵¹ When studying judicial decisions as such, Lajoie asserts, rendering herself distinct from her political and legal scholars, that not only is political context important, but a pattern emerges where we recognize that the S.C.C., in its decisions seem to support and endorse the agenda of the day, of the federal government. Adopting this analysis of political context and this concept that the Court's understanding of the Canadian Constitution remains regardless of the issue at hand and the time elapsed will in turn provide insight into how the institution has interpreted and interprets the implicit obligations inherent in the various conceptions of federalism and whether or not its thoughts on the Canadian federation change with changing and/or different matters. Miriam Smith argues "in order to protect its own legitimacy as a political institution, a legitimacy which is crucial to the exercise of judicial power, it

⁵⁰ Andrée Lajoie, *Jugements de valeurs: le discours judiciaire et le droit*, (Paris : Presses universitaires de France, 1997).

⁵¹ Smith, "Ghosts of the Judicial Committee of the Privy Council: Group Politics and Charter Litigation in Canadian Political Science":

Miriam Smith, *Lesbian and Gay Rights in Canada: Social Movements and Equality-Seeking, 1971-1995* (Toronto: University of Toronto Press, 1999): 86.

might be argued that courts will tend over time to produce a pattern of judicial decisions that reflect [these] social changes.”⁵²

In order to uncover such a pattern in the Court’s understanding of federalism, we need to analyse the four references in one study under the theme of federalism rather than as distinct decisions. All four references deal with relatively the same issue – which government(s) needs to agree to a proposed amendment in order to secure a legitimate amendment to the constitution? The answer to this rests in a particular vision of the nation informed by a particular theory and application of federalism.

HISTORICAL INSTITUTIONALISM

When looking at how the Court adopted one vision, and in turn one conceptualization of federalism over another, and how the Court endorsed the dominant ideology of the time, I will be adopting a neo-institutional approach, more specifically, the historical institutional approach. Historical institutionalism spawned from criticisms of society-centred approaches, which seemed to ignore the role of institutions in explaining state/society relationships.⁵³ The focus of historical institutionalism, however, is not solely on state institutions; it also incorporates some degree of state/society linkages. Essentially, historical institutionalism deals with macro explanations as it looks at the environment surrounding institutions. It takes into account cultural tendencies, class structures, and access to power; it then compliments this account with empirical analysis.

⁵² Smith, “Ghosts of the Judicial Committee of the Privy Council: Group Politics and Charter Litigation in Canadian Political Science,” 21.

⁵³ Leslie Pal, “From Society to State: Evolving Approaches to the Study of Politics,” in *Canadian Politics, 2nd edition*, ed. James Bickerton and Alain Gagnon (Peterborough, On: Cambridge Press, 1994).

As with any theory or approach to the study of politics, there are many schools, which inevitably mean many definitions, of historical institutionalism. In general, any definition of historical institutionalism includes “formal organizations, and informal rules and procedures that structure conduct.”⁵⁴ Historical institutionalists argue that institutions, both state and societal, shape how political actors define their interests and how they exercise power over groups. Thelen and Steinmo, relying upon the work of G. John Ikenberry, broadly define historical institutionalism as “an attempt to illuminate how political struggles are “mediated by the institutional setting in which [they] take place”.”⁵⁵ Rhodes describes this approach as “making statements about the causes and consequences of political institutions and it espouses the political values of liberal democracy.”⁵⁶ Howlett and Ramesh point out that institutionalists acknowledge the crucial role institutions play in political life; institutions, in the political sense, are important because “they constitute and legitimize political actors and provide them with consistent behavioural rules, conceptions of reality, standards of assessment, affective ties and endowments and thereby with a capacity for purposeful action.”⁵⁷

Leslie Pal, in his look at institutions, focuses upon the broad structure of state institutions; the state is viewed as a matrix of organizations and as a normative order.⁵⁸

Michael Atkinson reiterates this idea as he states that structural theory (historical

⁵⁴ Kathleen Thelen, and Sven Steinmo, “Historical Institutionalism in Comparative Perspective,” in Sven Steinmo, Kathleen Thelen, and Frank Longstreth, eds., *Structuring Politics: Historical Institutionalism in comparative analysis*, ed. Steinmo et. al. (New York: Cambridge University Press, New York, 1992), 2.

⁵⁵ *Ibid.*, 2.

⁵⁶ R.A.W. Rhodes, “The Institutional Approach,” in *Theory and Methods in Political Science*, ed. David Marsh and Gerry Stoker (New York: St Martin Press, 1995), 46.

⁵⁷ Michael Howlett and M. Ramesh, *Studying Public Policy: Policy Cycles and Policy Subsystems* (Don Mills, Ontario: Oxford University Press, 1995), 20.

⁵⁸ Pal, “From Society to State: Evolving Approaches to the Study of Politics,” in *Canadian Politics*, 2nd edition, 46.

institutionalism) argues that organizations have the capacity to transform the values and preferences of those who work within them and those who are subjected to them. It focuses upon the structure of the organization as it is an important key to its functioning; this is in conjunction with norms and informal rules.⁵⁹ Alan Cairns, in his contribution to the macro-institutional theory (historical institutionalism), does not distinguish between state and society; instead, he uses the concept of embeddedness, which he defines as “a simultaneous process wherein the state increasingly penetrates and organizes civil society, even though this binds the state and constrains its manoeuvrability.”⁶⁰

Despite the multiple definitions and schools of historical institutionalism, it is imperative to note that all the definitions remain loyal to the belief that institutions are important in that they “constrain and refract politics, but they are never the sole *cause* of an outcome.”⁶¹ It is not enough, however, to look at the role of institutions in state/society relations. For this particular project I want to test first, whether the S.C.C. is informed by a particular vision of the federation; and second, whether the implicit definition of federalism at the core of the first two references had an effect on how the S.C.C. understood federalism and subsequently how it dealt with the claims of the Quebec government, and to a lesser extent the Aboriginal Peoples, in last two references. For this I turn to the notion of path dependency as it can provide us with “the necessary

⁵⁹ Michael Atkinson, “Public Policy and the New Institutionalism,” in *Governing Canada*, ed. Michael Atkinson (Toronto: HBJ, 1993).

⁶⁰ Alan Cairns quoted in Leslie Pal, “From Society to State: Evolving Approaches to the Study of Politics,” in *Canadian Politics*, 2nd edition, 47.

⁶¹ Thelen and Steinmo, “Historical Institutionalism in Comparative Perspective,” 3.

insights upon which decision makers can make the critical choice between the ranges of alternatives they are faced with.”⁶²

Path dependency⁶³ emerged from economic historians who challenged the commonly held belief that “real time and history can be safely ignored.” Essentially, they challenged the idea that the market will sort out inefficient technologies and equilibrium will be maintained.⁶⁴ This idea can be adapted to the study of politics. “Politics like technology, involve some elements of chance (agency, choice), but once a path is taken, previously viable alternatives become increasingly remote, as the relevant actors adjust their strategies to accommodate prevailing pattern”.⁶⁵ In other words, “path dependent processes exemplify ‘historical causation’ in which dynamics triggered by an event or process at one point in time reproduce themselves, even in the absence of the recurrence of the original event or process.”⁶⁶

In order to uncover a pattern in S.C.C. decisions when the Court was faced with conflicting visions of the nation and when it was asked to diffuse conflict between the federal government and the provinces, we need to look at the past choices of the Court when it was faced with a similar dilemma. Further, we need to examine the past and present political context in which the issue of the references played out. In light of this, we need to look beyond simply the final opinion. More importantly, we cannot look at

⁶² Jos C.N. Raadschelders, “Evolution, institutional analysis and path dependency: an administrative-history perspective on fashionable approaches and concepts,” *International Review of Administrative Sciences* 64:4 (1998), 565.

⁶³ For a more succinct review of path dependency, please see Kathleen Thelen, *How Institutions Evolve: The Political Economy of Skills in Germany, Britain, the United States, and Japan* (Cambridge: Cambridge University Press, 2004) and Paul Pierson, *Politics in time : history, institutions, and social analysis* (Princeton, N.J. : Princeton University Press, 2004).

⁶⁴ Thelen, *How Institutions Evolve: The Political Economy of Skills in Germany, Britain, the United States, and Japan*, referring to the work of Hodgson 1993: 204.

⁶⁵ *Ibid.*, 27.

⁶⁶ Paul Pierson, *Politics in time : History, Institutions, and Social Analysis* (Princeton, N.J. : Princeton University Press, 2004) 7.

the decision as an isolated event. Nor can we look at the causes leading up to the references as isolated events. Rather, we must recognize that the four are all connected by the idea of the power to amend the Constitution, but more profoundly on the nature of the Canadian nation.

Adopting such an approach can help us uncover if the S.C.C. tends to favour one order of government over the other or if tends to favour one vision of Canada over another. The concept of path dependency thus becomes important to this study as it can help us put into perspective the underpinning understanding of federalism informing S.C.C. decisions in matters dealing with the ability to amend the Constitution which has led to a political impasse amongst the leaders of Canada.

For this particular project, history is important. As Sait argues:

... The study of history does more than furnish the facts and enable us to make or test generalizations. It enlarges the horizon, improves the perspective; and it builds up an attitude towards events that may be termed the historical sense. We become aware of a relationship between apparently isolated events. We appreciate that the roots of the present lie buried deep in the past, and that history is past politics and politics is present history.⁶⁷

Yes, history matters, but how does it matter? Looking at preceding events leads us to recognize that they are “part of the chain of necessary events.”⁶⁸ Focusing solely on the current events and issues at play leads us to view the outcome as an isolated occurrence rather than “one link in the chain of events.”⁶⁹

In order to situate the case within the political context of the time, I will be looking at the arguments put forth, via the submitted factums, by the political actors

⁶⁷ Sait, 1938, quoted in Rhodes, *The Institutional Approach*,” 44.

⁶⁸ Paul Pierson, “Increasing Returns, Path Dependence, and the Study of Politics,” *The American Political Science Review*, Vol. 94, No. 2. (Jun., 2000): 251, 263.

⁶⁹ *Ibid.*, 263.

concerned to the Court. This will provide insight into the mindset vis-à-vis Canadian federalism of the governments of the day as well as, where applicable, the mindset of other political actors, viewed through individuals and/or interest groups who submitted factums. In addition to the factums, I will gauge the political environment through the opinions and perspectives expressed by various media pundits published in the *Globe and Mail*, the *Toronto Star*, the *Calgary Herald*, *Le Devoir* and to some degree, where the opinion differed from that of the *Calgary Herald*, the *Montreal Gazette*⁷⁰.

THESIS OVERVIEW

Through this neo-institutional lens of path dependency, I try to demonstrate that the S.C.C. has tended to assert the role of the federal government vis-à-vis the ability to amend the Constitution. Such a tendency may have paved the road for the S.C.C. to embrace a particular understanding of federalism to deal with internal diversity. Adopting this particular perspective enables me to reach beyond the old federal – provincial jurisdiction conflicts as it helps to bring into light that the Court's opinions in all four references are affected by and do affect more than simply the Canadian Constitution. The Constitution plus the arguments of the parties involved presented to the Courts, plus perceptions held by society, plus the way in which the Courts constructed the nature of federalism may have influenced the justices to decide the cases the way they

⁷⁰ I had originally intended on choosing one newspaper from each province based on circulation numbers. However, in my review of the various newspapers, I soon came to realize that most of the papers espoused similar, if not identical points of views. In fact, the same news columns and opinion pieces often appeared in different newspapers. This of course is due to the fact that most newspapers around the nation are owned by the same publisher with authors and columnists writing for different papers. In light of this, I decided to review one newspaper from each publisher.

did, having the ultimate effect of reinforcing the norm and the dominant ideology at the time.

To test this argument, an analytical approach, that is, a workable framework is needed in order to reveal the S.C.C.'s conceptualization of federalism. Therefore, the first half of this thesis is dedicated to theory. In the first chapter, I provide a literature review of the relationship of the judiciary vis-à-vis the Constitution. Drawing mainly from Canadian literature, I engage in a critical review of the various theories in contemporary Canadian scholarship explaining judicial review. The general purpose of this exercise is to provide for a broad-spectrum understanding of the different theories that exist. The overall and important goal of this chapter is to indicate that missing and/or terribly understated in these theories is the federalism element.

As indicated above, traditional understandings of judicial review centre on a two-step process engaged in by the courts when assessing the constitutional validity of an impugned legislation. Further they focus on debate between subjectivity and objectivity. As a result, the Courts' understandings of federalism as an important variable in the decision making process is terribly underestimated. It is my contention that the S.C.C., in giving meaning to the Constitution (step 2), is influenced by a particular vision of federalism which in turn helps shape the legal reasoning leading to its final opinion. Thus this chapter calls for an expansion of the traditional two-step approach to include the federalism factor. This leads directly into the second chapter where I analyse the three distinct visions of Canadian federalism presented to the Court using Kymlicka's

two models of federalism⁷¹ and Hueghlin's two traditions to the understanding of federalism.⁷²

There is no one vision of the Canadian federation or of Canada. Consequently, there is no one theory of Canadian federalism. This is most evident in the traditional theories of Confederation, the provincial compact theory, the dual compact theory and the no compact theory. These conflicting theories have manifested into different, often conflicting, but sometimes overlapping visions of the federation, which include, the centralist, the provincialist and the dualist. Where the centralist vision asserts the primacy of the federal government in the federation, the provincialist vision emphasizes the equality of the two orders of government. Both visions are rooted in the belief that Canada is made up of one nation comprised of ten constitutionally equal provinces. The dualist vision in contrast, begins upon the claim that Canada is made up of two nations, English Canada and French Canada. The former is represented by the federal government and nine provincial governments (excluding Quebec). The latter is represented by the government of Quebec.

Each of the three visions, the centralist, the provincialist, and the dualist, falls under one of the two models identified by Kymlicka, territorial/mononational and multinational and is informed by one of the two traditions identified by Hueghlin, constitutional/institutional and sociological. The purpose of this section is to critically analyze the multiple visions of federalism in order to arrive at a workable typology which can be applied when attempting to understand how the Court conceptualized federalism in its opinion. In other words, the aim is to demonstrate that there are two traditions or

⁷¹ Will Kymlicka, *Finding Our Way* (Toronto: Oxford Press, 1998).

⁷² This idea of two traditions of federal thought is borrowed from Heuglin, Thomas, "Federalism," http://www.wlu.ca/docsnpubs_get.php?doc_id=5373#14. [June 10, 2005]

models to the understanding of federalism: a constitutional/institutional or territorial model and the sociological or the multinational model.

The first two visions are rooted in what Kymlicka has termed as the territorial or mononational model and Hueghlin has classified as the constitutional/institutional approach. The third vision is rooted in the sociological model. According to Kymlicka, the second model of Canadian federalism is the multinational model. Considering that the cases to be analysed in this study do not consider the Aboriginal nation, I have reservations in referring to the vision of Canadian federalism presented by the Quebec government in the Quebec Veto Reference and by Joli-Coeur, the amicus curiae, in the Secession Reference as a multinational view. It is not; rather, it is a bi-national view. As such, the second model of Canadian federalism shall be referred to as the bi-national view.

This by no means diminishes the importance of the Aboriginal nation(s). Nor is this an assertion that there are no cases which speak of the Aboriginal nation and/or force the Court and political players to consider the Aboriginal nation and treaty rights. In fact, key cases including the *R. v. Calder*, [1996]⁷³, *R. v. Van der Peet*, [1996]⁷⁴, *Delgamuukw v. British Columbia*, [1997]⁷⁵, and *R. v. Marshall*; *R. v. Bernard*, [2005]⁷⁶, touch upon these very issues. The first step of this project, however, is to see if the S.C.C. has the inclination to acknowledge first, an equal relationship between the two orders of government, and second, the existence of different nations outside the nation-state within Canada's constitutional order.

⁷³ *R. v. Calder*, [1996] 1S.C.R. 660.

⁷⁴ *R. v. Van der Peet*, [1996] 2 S.C.R.

⁷⁵ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.

⁷⁶ *R. v. Marshall*; *R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 S.C.C. 43.

It is important to note that the two first cases chosen for this study are mainly concerned with the relationship between the two orders of government while the two last are taking into account the debate between the Canadian nation and the Quebec nation.⁷⁷ I have decided to begin with the Quebec nation as it is both a nationality based nation evident in its own culture, language and history, distinct from the Canadian nation-state, and a region based nation as it has its own provincial government which tends to represent its claims to nationhood.

The second half of this project then deals primarily with S.C.C. references and how Canadian federalism was understood by a unanimous Court in the Senate, Quebec Veto and the Secession References and how it was understood by the majority and minority in the Patriation Reference. The cases are analysed in chronological order starting with the Senate Reference, proceeding with the Patriation Reference, the Quebec Veto Reference and ending with the Secession Reference. I begin each of the four chapters with a review of the issues leading to the reasons the reference was taken by the government(s) and how society understood the struggle between either the federal government and the provincial governments or between the federal government and the Quebec government. I then proceed to provide a review and analysis of the arguments put forth to the S.C.C. by the governments and the interveners involved. In the final section of each chapter, I provide a critical analysis of the Court's opinion. In this section I not only look at how the S.C.C. reached its decision using the two-step approach, but I also look at how a particular conception of Canadian federalism underpinned its understanding of the issues, the Constitution, and the constitutional powers under review. It is in this section where I test whether a pattern in the S.C.C.'s conception of federalism

⁷⁷ I will be looking at the term nation and its definition in the second chapter.

is evident. In other words, did the S.C.C., through the opinions rendered in the Senate and Patriation References pave the way to the opinions rendered in the Quebec Veto and the Secession References? Does the S.C.C. favour one vision of Canada over another?

Finally, in the concluding chapter, I provide a re-evaluation of the approach developed in the first two chapters according to the evidence provided in the third to sixth chapters. In this final chapter, I will also suggest the implications of my findings on both the understanding of federalism and the role of the Court in shaping and legitimizing contemporary understandings of federalism.

These four References set the parameters for how the Court understands the Canadian Constitution and subsequently Canadian federalism and the Canadian nation. If the Court can recognize Quebec, having its own provincial government representing its interests as a nation, to be a nation, then it may be more inclined to recognize the Aboriginal nation(s), predominately a sociologically based, stateless nation, as nation(s) with a right to self-determination and self government.

The uniqueness of these cases rests in first, they were references, so the Court was pushed into a proactive role of determining the validity of an action or legislation before the action occurs or the legislation is in place; and second, the Court was asked not simply whether one order of government can amend the Constitution (typically, if one cannot, the other can), but if one order of government has the unilateral power to change fundamental features of the Constitution. If such a power exists, it speaks volumes vis-à-vis Canadian federalism, its understanding and the role of the two orders of government in the federation.

As such, analysing and revealing how the Supreme Court of Canada understood and understands the concept of federalism and how this understanding affected its final ruling becomes important. As the umpire of federalism, the Court is responsible for interpreting the provisions of the Constitution. This, in turn, empowers the Supreme Court to establish the informal and formal rules of the *constitutional game*.

Russell, in “The Supreme Court and Federal – Provincial Relations: The Political Use of Legal Resources”, points out that Supreme Court decisions do affect federal-provincial relations in two ways: legal and political. The former is obvious; by declaring an action or legislation either *intra vires* or *ultra vires*, the Court affects the constitutional capacity of a government by preventing it from enacting the reviewed legislation or acting in a certain manner. Consequently, it forces the government to change its course of action.⁷⁸ The second, political effects, is more convoluted; ‘how the capacity is used’ determines or shapes federal-provincial relations.⁷⁹ Utilization of the capacity is determined by the political actors. That is, how governments interpret the Court’s ruling and how they use this interpretation can and certainly does have an effect on federal-provincial relations.

By pointing out this second consequence of Supreme Court rulings, Russell acknowledges and recognizes that development of federal-provincial relations is not determined or shaped by this institution alone. Other players factor into this game. The Supreme Court may lay the groundwork, which I believe it does, but it is the interpretation of the rules or the constitutional parameters which ultimately affects the

⁷⁸ Russell, Peter H, “The Supreme Court and Federal-Provincial Relations: The Political Use of Legal Resources,” in *Perspectives on Canadian Federalism*, ed. R.D. Olling and M.W. Westmacott (Scarborough: Prentice-Hall Canada Inc., 1988) 91.

⁷⁹ *Ibid.*

dynamics between the federal and provincial first ministers. For this reason, it is important to review judicial decisions dealing with the division of powers in general and the ability to amend the Constitution in particular. However, simply looking at the final result of the case, as Russell did in this paper, is not enough. We need to look deep into the Court's reasoning leading up to its decision, in order to expose how it conceptualized federalism and how this conceptualization informed its decision.

If it is true that underpinning Canadian constitutional politics is a conception of federalism, and if it is also true that the Court's decisions have political effects, then this exercise of looking at the Supreme Court's conceptualization of federalism proves pivotal as it is, indirectly, this conceptualization that is open for interpretation by the political actors once the final decision is rendered.

CONCLUSION

The legal and political actors in the Senate Reference, the Patriation Reference, the Quebec Veto Reference and the Secession Reference were essentially struggling with a variation of the same dilemma: does a certain order of government have the power to unilaterally change the fundamental provisions of the Canadian Constitution or unilaterally prevent a fundamental amendment to the Constitution? In the Senate Reference, the federal government, under Pierre Trudeau, inquired as to whether or not it had the constitutional power, under s.91(1) of the British North America Act, 1867 (the BNA Act), to unilaterally change the fundamental make-up of the Senate. In the Patriation Reference, the provincial governments of British Columbia (BC), Alberta, Manitoba, Saskatchewan, Quebec, Nova Scotia, Prince Edward Island (PEI), and

Newfoundland challenged the federal government's claim that it alone, without the prior consultation and/or consent of the provincial legislatures, can patriate the Constitution and adopt an amending formula binding on both orders of government. In the Quebec Veto Reference, the Quebec government claimed that, by way of convention, the process the federal government and the nine provinces adopted when patriating the Constitution was politically and constitutionally illegitimate as the Quebec government had not consented to the changes. Finally, in the Quebec Secession Reference, the federal government questioned whether or not a provincial government or legislature, Quebec in particular, has the right and ability to effect a unilateral declaration of independence (UDI).

In short, all four references speak to the heart of Canadian federalism, as they all force political society to question and define the very foundations of Canadian federalism and of the federation, and the obligations of both orders of government to each other and most importantly, to the *spirit of Canadian federalism*. In all four references, as we shall see, the political players on both sides of the issue, as well as the Justices of the Court, both sitting in the majority and in the minority (in the Patriation Reference) attempted to define the rules of the game; in doing so, they all spoke to and subsequently endorsed a particular conception of Canadian federalism.

It is not only important to recognize that the S.C.C. was used by governments to settle disputes they were unable to in the political arena. We must consider the implications of the Court's opinions beyond this role of mediator. My goal is to deconstruct the legal reasoning of the Court in order to show that the S.C.C. does in fact have an opinion on how the Canadian federation ought to operate which was and is

influenced by political society. The S.C.C., in cases dealing with the ability to amend the Constitution and ultimately diffusing the *political fight* between the governments, has endorsed a particular understanding of federalism. In turn, it ultimately sustained and/or endorsed the dominant ideology and contemporary understanding of Canadian federalism of the time. All the while, the Court was able to maintain its neutrality and the legitimacy of the Constitution by framing its opinions within the parameters of constitutional values. That is, the Court, by locating its decisions within the technical language of the Constitution – duties, obligations, and responsibilities emanate from the Constitution – it was able to present its arguments and in turn its conception of Canadian federalism and the nation-state as neutral. As it will become clear through the analysis of the four references, not only does the Court re-affirm the nation-state to be made up of one nation, but also, it legitimizes arguments within this one nation-state discourse.

CHAPTER 1: THE WHEEL IN SPIN: JUDICIAL REVIEW AND THE FEDERALISM FACTOR

INTRODUCTION

Since the abolition of appeals to the JCPC in 1949, and more so, since the entrenchment of the Canadian Charter of Rights and Freedoms in 1982, mainstream Canadian scholarship has shifted away from studying the role of the judiciary vis-à-vis the shape and understanding of Canadian federalism. Instead, Canadian political scientists and to a lesser degree, legal scholars have focused upon the impact of judicial review and the power of the judiciary in the post Charter era. Judicial review of alleged rights violations through public measures has largely displaced attention to judicial review of federalism.

Although there appears to be this general decline of scholarly interest in judicial review of federalism, the current state of scholarship in this area can be characterized in the following way. Embracing either legal formalism or realism, academics have centred their studies on the legitimacy of judicial interpretation and whether or not the Supreme Court engages in a principled approach when reaching a decision regarding the division of powers.

More specifically, scholars have explored the debate between judicial restraint or interpretivism (objectivity) and judicial activism or non-interpretivism (subjectivity). Those adopting legal formalism insist upon “strict adherence to narrow principles of statutory interpretation [and stare decisis], particularly the literal rendering of the text or

the *plain* meaning rule;” aspiring to objectivity in the interpretation of the law.¹ Those adopting realism on the other hand, suggest that subjectivity is in fact inevitable. From this, the focus opens up to the correctness of interpretations; that is, whether or not the Court rendered the *right* decision. While this is a worthwhile endeavour, it does not offer insight into how the S.C.C. conceptualizes federalism and how it uses this conceptualization, either implicitly or explicitly or sometimes both, as an aid when deciding cases dealing with the powers of the two levels of government.

In fact, looking at the process of judicial review within the strict framework of subjectivity and objectivity leads us to miss or terribly underestimate the role of socio-political factors, which informs the Court’s conceptualization of federalism, and its influence on the decision making process. Acknowledging this element enables us to recognize that judicial review of impugned legislation or government action and the application and understanding of constitutional powers does not only concern the idea of objectivity and subjectivity. As such, our study of judicial review should not be confined to this debate alone. As William Lederman points out, the Constitution relates to economic, social, and cultural factors.² It is only logical then that the interpretation, the understanding, and the application of the values and principles underpinning the Constitution, relate to these very factors. Consequently, it is not solely a matter of subjectivity or objectivity, but realizing that, socio-political factors play a role, not only in how judges understand and interpret the Constitution, but also in how the S.C.C. constructs and conceptualizes the nature of Canadian federalism.

¹ John Saywell, *The Lawmakers: Judicial Powers and the Shaping of Canadian Federalism*, 70.

² William Lederman, “Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation,” *Canadian Bar Review* Vol. 53[1975]: 600.

Peter Russell argues that “the judiciary is an integral part of a country’s political system.”³ Essentially then, we need to acknowledge that the reviewing of impugned legislation and the interpreting of the Constitution, through resolving jurisdiction disputes or constitutional references, is not simply a technical and non-political action of the S.C.C. The courts in general and the S.C.C. in particular, “do promote change in public policies and assist individuals and groups who are challenging the activities of other branches of government.”⁴ The decisions of the Supreme Court are not isolated, nor do they occur in a vacuum. In deciding cases, justices do consider socio-political factors, even if they are not conscious of it; these decisions inevitably affect the wider political society. As such, an analysis of judicial review of the Constitution in general and federalism cases in particular should reject as Bora Laskin does, the notion of *mechanical jurisprudence* – the idea that general and objective principles decide cases.⁵

The purpose of this chapter is to introduce a different way of understanding the judicial review process of constitutional issues, one that embraces the idea that the justices of Supreme Court of Canada, sitting both in the majority and in the minority (in the Patriation Reference) had a particular conception of federalism that they use as an analytical tool when deciding upon the constitutionality of an impugned legislation and/or action. With this in mind, I begin the chapter with a general discussion of judicial review and the role of the S.C.C. where I address the debate between subjectivity and objectivity mostly in cases involving jurisdictional disputes. I then proceed to look

³ Peter H. Russell, *The Judiciary in Canada: The Third Branch of Government*, (Toronto: McGraw-Hill Ryerson Ltd. 1987) 3.

⁴ *Ibid.*, 3.

⁵ Denise Reaume, “The Judicial Philosophy of Bora Laskin,” *University of Toronto Law Journal*, vol. 35[1985]: 442.

briefly at the different methods, with particular focus on the two-step process that the Court can assume when reviewing legislation.

More attention is paid to the two-step analysis as it is this particular framework that I adopt when analyzing the four reference cases in search of the Court's understanding of federalism and their use of it in the decision making process. As such, in the third part of this chapter, I take a detailed look at how Peter Hogg, Katherine Swinton, Bora Laskin and William Lederman describe the judicial two-step. In analyzing this method, I will be juxtaposing the thoughts of the four theorists in order to, first, attain a better grasp of this two-step method adopted by the Court and second, to begin to build a workable framework to be used in subsequent chapters where I analyze the four references. In looking at the thoughts of the various theorists, we recognize that all four contribute substantially to a better understanding of the analytical steps judges engage in when reviewing federalism cases.

In the fourth part of this chapter then, I will be looking at Lajoie to see how she adds to the theories presented in the previous section. Her study is beneficial in that she goes one step further than the others by bringing to our attention how socio-political factors play a role in judges' thought process and in their decisions. She also raises the issue of how the judges are able to maintain both their legitimacy and neutrality through the decisions they render. I intend on taking these considerations one step further by considering specifically how socio-political factors, that is, the political environment, play a role in the S.C.C.'s conceptualization of federalism and how this conceptualization was used as an analytical tool in deciding the four references to be reviewed.

JUDICIAL REVIEW OF FEDERALISM DISPUTES AND REFERENCES CASES

Judicial review is understood as “the power of the courts to veto legislation or executive activities which, in the judiciary’s view, violate the law of the Constitution.”⁶ It is important for two reasons. First, the courts, through judicial review, can either expand or narrow the powers of government; second, it gives an indication of how the courts view the role of both levels of government in the Canadian federation; this in turn can be a clear insight into how they conceptualize federalism. As Strayer notes, “constitutional decisions of the courts have profoundly influenced the common understanding of government as to their respective powers and responsibilities.”⁷

When adjudicating disputes over the division of powers and deciding on the constitutionality of a law or government action, the courts structure “their decisions in accordance with the categories set out in sections 91 and 92 [of the BNA Act, 1867].”⁸ In addition to this, “judicial review of statutes challenged on constitutional grounds imposes on the courts the necessity to determine the *pith and substance* of the legislation in question in order to locate it within federal or provincial jurisdiction.”⁹ That is, when a federalism case is put to the courts, the question addressed by the justices is “which level of government is entitled to regulate and set standards in the different areas of social policy?”¹⁰ Accordingly, the courts determine if the impugned legislation or government action comes within the federal or provincial class of powers. This is slightly different with regard to references.

⁶ Russell, *The Judiciary in Canada: The Third Branch of Government*, 93.

⁷ Barry, L. Strayer, *The Canadian Constitution and the Courts: The Function and Scope of Judicial Review, 2nd Edition*, (Toronto: Butterworths, Toronto, 1983) 2.

⁸ Patrick Monahan, *The Politics and the Constitution: The Charter, Federalism and the Supreme Court of Canada*, 204.

⁹ John Saywell, and George Vegh, *Making the Law: The Courts and the Constitution*, 4.

¹⁰ David Beatty. *Constitutional Law in Theory and Practice*. 20.

The Reference Case

Generally speaking, a reference is “a procedure whereby a government can request an opinion on the constitutionality of an actual or even a hypothetical statute or action, without waiting for it to be challenged by private litigants”.¹¹ The Court then renders an advisory opinion and “gives reasons for it”.¹² The ability or legal jurisdiction of the S.C.C. to hear a reference is located in s.53 of the Supreme Court Act: “the Governor in Council may refer to the Court for hearing and consideration, important questions of law or fact, [...]; it is the duty of the Court to hear and consider it and to answer each question so referred”.¹³ Since s.3 states that the *Governor in Council may refer*, the federal government is the only body that can refer a matter, in the form of a reference, directly to the S.C.C. Provincial governments can direct references to their respective superior courts and then appeal those decisions, if they so please, to the Supreme Court. The provincial governments cannot, however, by-pass their superior courts to directly refer a matter to the S.C.C.¹⁴ Nonetheless, the provinces do enjoy a right to appeal the opinion rendered from the provincial superior court without leave from the S.C.C. In effect this means “that the provincial governments enjoy the same privilege as the federal government in being able to secure a ruling from the Supreme Court of Canada on a controverted point”.¹⁵

References are outside the norm of court cases for two reasons: first, they lack a genuine adversarial procedure; and second, unlike other cases, a reference is essentially,

¹¹ Stevenson, *Unfulfilled Union*, 47.

¹² Department of Justice Canada, *Quebec Secession Reference*, canada.justice.gc.ca/en/ps/const/fichm98.html, [June 23rd, 2003].

¹³ Supreme Court Act quoted in Peter Hogg, *Constitutional Law of Canada*, 210.

¹⁴ Further to this, private individuals do not have the authority to ask a court to render an opinion on a legal matter in the form of a reference.

¹⁵ Hogg, *Constitutional Law of Canada*, 211.

an action taken by the executive branch of government.¹⁶ Governments that seek the advisory opinion of senior judges prior to possible legal actions in the courts are not a matter without constitutional controversy. It is associated with *extra-judicial* opinions, a practice avoided in many modern common law jurisdictions because of experiences with executive and colonial abuses, and the potential compromising of judicial independence and neutrality in subsequent legal actions. *Both* the High Courts of the United States and of Australia have refused to perform the functions of rendering an advisory opinion ‘on the ground that it is not a judicial function.’¹⁷ The JCPC in the *Reference Appeal, 1912* on the other hand, found that though it is not a typical judicial function it “could be conferred by statute on the Court.”¹⁸ However, the opinions are advisory ones bearing no legal weight.¹⁹

The reference procedure can be used for constitutional and non-constitutional matters. Nevertheless, it is more often than not used for constitutional issues and in some cases, as is evident in the four cases to be analysed in this study, for political issues masked as strictly constitutional matters. Essentially, the purpose of directing a reference to either the Supreme Court of Canada or a provincial superior court is for a government to “obtain an early (and for practical purposes) authoritative ruling on the constitutionality of a legislative program”.²⁰

In referring a case to the Court, the government is seeking an advisory opinion; the Court does render its opinion in the typical form of a judgment. Consequently, because the advisory opinion “is a legal pronouncement from the highest Court in the

¹⁶ *Ibid.*, 211

¹⁷ *Ibid.*, 211.

¹⁸ *Ibid.*, 212.

¹⁹ *Ibid.*, 212, Hogg referring to the *A.G. Ontario v. A.G. Canada (Reference) Appeal [1912] A.C. 571*.

²⁰ *Ibid.*, 214

land, it has always been treated as binding,”²¹ despite what the JCPC ruled in the *Reference Appeal*. As such, provincial and federal governments alike are fully aware of the weight an advisory opinion carries with regard to constitutional law and constitutional ability and respond to such an opinion accordingly.²² According to Russell, the idea that opinions rendered in reference cases are not legally binding or do not create precedents “has turned out to be a legal fiction: courts and governments have continued to accord as much weight to judicial decisions rendered in reference cases as to decisions resulting from ordinary cases.”²³

ORIGINS OF JUDICIAL REVIEW

According to Jennifer Smith, the origins of judicial review can be traced back to the British colonial system and the processes of review of colonial legislation.²⁴

Although the common law traditionally deferred to parliamentary supremacy, judicial review of delegated administrative authority and regulations also developed in the 19th century.²⁵ Such review, based on questions of jurisdiction and by means of common law doctrines of “natural justice,” is associated with the rise of the modern interventionist state, and marks a significant intrusion by the courts into parliamentary powers.

However, the more direct influence on judicial review for our purposes is a product of the colonial system. Colonies under the British Empire were granted limited powers under

²¹ Department of Justice Canada, canada.justice.gc.ca/en/ps/const/fichm98.html, [June 23rd, 2003].

²² Controversy over the reference procedure is not typically explored in any substantial manner. The Amicus Curiae, Joli-Coeur, in the Quebec Secession Reference did however, question the legitimacy of the federal government’s ability to direct issues to the S.C.C. as well as the ability of the S.C.C. to hear such references. This issue will be explored in full detail in the sixth chapter of this project.

²³ Russell, Peter, *Constitutional Odyssey: Can Canadians Become a Sovereign People?* 2nd ed., 13.

²⁴ Jennifer Smith, “The Origins of Judicial Review in Canada,” *Canadian Journal of Political Science*, vol.16 [1983]: 117.

²⁵ Strayer, *Canadian Constitution and the Courts: The Function and Scope of Judicial Review*, 2nd ed., 2.

the royal instructions, charters or Imperial statutes which created the colonial government. Clauses stipulating that any law of the colonial government viewed as repugnant to Imperial laws would in fact be void were included in such documents.²⁶

Imperial review of colonial laws developed into three forms in the early 19th century. The Colonial Office reviewed all colonial legislation and could recommend disallowance by the British government (a practice that continued past Confederation when the Dominion of Canada assumed a controversial disallowance power) and imperial legislation prevailed over local legislation (remnants of this power continued until the Statute of Westminster, 1931). From 1833 the decisions of colonial governments could be appealed to the Judicial Committee of the Privy Council, a form of supervision that continued for Canada until after the Second World War, as we shall see. The modern basis of judicial review in Canada²⁷ can be located primarily in the Colonial Laws Validity Act, 1865. The Act stipulates that “laws would be void only for repugnancy to any Act of Parliament, order or regulation made under authority of such Act of Parliament, or having in the colony the force or effect of such Act.”²⁸

The BNA Act, 1867, embraced this principle of judicial review – essentially the idea that legislative power was granted to the constituent units and to the Dominion government; however the power was limited and the courts would enforce the limits of this power.²⁹ The authority of the JCPC to hear appeals from Canadian courts was

²⁶ Ibid., 5;

²⁷ This was true of other colonies under the British Empire as well.

²⁸ Strayer, *Canadian Constitution and the Courts: The Function and Scope of Judicial Review*, 2nd ed., 7: The Statute of Westminster, 1931, was essentially supposed to repeal this Act; however, a clause was put into the Statute of Westminster excusing Canada from taking full ownership of her Constitution. In essence then, when a Canadian court or the JCPC found a law enacted by either the federal government or the provincial government to be ultra virus, it was in fact invoking the Colonial Validity Act, 1865, which stayed into effect in Canada until 1982, when Canada’s Constitution was patriated.

²⁹ Ibid., 15.

secured after 1867 as per s127 of the Constitution Act, 1867.³⁰ The ability of the S.C.C. to hear appeals was established in 1875 when the federal government under s101 of the B.N.A. Act passed the Supreme and Exchequer Courts Act, 1875.³¹

Smith argues that judicial review is inherent in federalism as a form of government. “The inner logic of federalism, with its distribution of legislative powers pointed to the need for something like the kind of judicial enforcement that pre-Confederation practice has established.”³² Thus, in a federation, it is both necessary and inevitable for three reasons. As a result of the necessity of judicial review, the power and the ability of the judiciary to review legislation and government action have come to be viewed as fundamental.³³

First, the language of the Constitution is broad so as to ensure that it is not stifled and that it is adaptable to changing society. However, the broadness of the language leads to the overlapping and the ambiguity of powers. Thus the courts, through the act of judicial review, ensure the adaptability of the Constitution, the clarity of powers, and that one order of government does not usurp the other. Second, in a federation, judicial review of a constitution by a third impartial body is necessary as one order of government cannot be both judge and jury. Third, it is up to the courts, through the judicial review process, to determine which aspect of the impugned legislation is the most important one; the government cannot tell them this.³⁴ In short, judicial review helps give practical

³⁰ Peter Hogg, *Constitutional Law of Canada*, 99.

³¹ *Ibid.*, 198.

³² Smith, “The Origins of Judicial Review in Canada,” 118.

³³ Strayer, *The Canadian Constitution and the Courts: The Function and Scope of Judicial Review*, 2nd ed., 4-5:

This is especially so since 1982, the entrenchment of the Charter. Prior to this, judicial review was mainly concerned with the “protection of federalism” and not necessarily with “wisdom or fairness of legislation or abuse of a legislative power [vis-à-vis human rights].”

³⁴ William Lederman, “The Balanced Interpretation of the Federal Distribution of Legislative

meaning to the words and concepts of the Constitution, which are otherwise vague and ambiguous; this task does not, however, come without its controversy.

Implicit in this discussion of the necessity of judicial review is the impartiality of a third party, in this case the judiciary in general and the S.C.C. in particular. An independent and impartial court is necessary to the vitality of liberal democracy. One such way of securing the establishment and maintenance of an independent and impartial judiciary is the assurance that the court, “in its evaluation of disputes [is] free from partisan influences and governmental influences.”³⁵

Despite this and other guarantees³⁶, it is often believed that because the federal government is in charge of appointing and dismissing Supreme Court Justices, the Court will be more sympathetic towards central concerns when federal-provincial issues are raised. This argument is premised on the belief that, first, the judges are appointed on the basis of their political ideology and once they sit on the bench, they rule strictly according to their ideology; second, justices will be removed if they do not rule in favour of the federal government³⁷; and third, “the federal government has either a direct or indirect influence on the Supreme Court of Canada.”³⁸ However, Russell points out,

Powers in Canada (The Integrity Process of Interpretation),” in *The Future of Canadian Federalism*, ed. P-A. Crepeau and C.B. Macpherson (Toronto: University of Toronto Press 1965), 110.

³⁵ Hugh Mellon, “Introduction: Appreciating the Supreme Court’s National Significance,” in *Political Dispute and Judicial Review: Assessing the Work of the Supreme Court of Canada*, ed. Mellon and Westmacott (Scarborough: Nelson Thompson Learning 2000), 3.

³⁶ Other guarantees include: one ‘the protection of judicial tenure’ (Mellon, “Introduction: Appreciating the Supreme Court’s National Significance,” 3); this ensures that judges cannot be and will not be arbitrarily dismissed. Two, there is a ‘limitation on the public political involvement of judges’ (Mellon, “Introduction: Appreciating the Supreme Court’s National Significance,” 3).

³⁷ It should be noted that this second position is rather weak when considering that Supreme Court Justices, once appointed have tenure until the age of 75.

³⁸ Peter H. Russell, *The Supreme Court of Canada as a Bilingual and Bicultural Institution*, (Ottawa: Queen’s Printer for Canada, 1969), 44.

“there is the larger possibility of the judges’ outlook being shaped by the federal environment in which they work and live,” rather than the threat of being removed.³⁹

SHEDDING JUDICIAL DEPENDENCY AND ESTABLISHING THE S.C.C.

The ongoing questioning of the S.C.C. and its legitimacy is not a new phenomenon. In fact, the vitality, need and benefits of the S.C.C. have been an ongoing source of contention since its creation in 1875.⁴⁰ Able to hear appeals from Canadian courts until 1949, the JCPC retained jurisdiction in Canada. In fact, it was customary for the S.C.C. to be bypassed in the appeal process. Viewed as a discredited institution by provincial rights sympathizers, the S.C.C. was regarded as an instrument of the federal government to continue the subordination of the provincial governments. Also, it was believed that the expertise of the provincial superior courts rendered their decisions more credible. Thus it was not uncommon for provincial governments and other appellants, suspect of the intentions of the S.C.C., to appeal directly to the JCPC. Further, “Those who favoured strong provincial rights and those who feared any impairment of ties with the mother country viewed the Court with distrust if not

³⁹ Ibid., 45.

⁴⁰ Stevenson, *Unfulfilled Union*, 46:

There seemed to be no real necessity or sense of urgency to establish a supreme court for the Dominion of Canada. First, the existence of the JCPC and the reality that Canadian political authorities would often rely on this advisory body, meant that the government of Canada did not need to establish a final court of appeal, as one already existed in the form of the JCPC. Second, the federal powers of disallowance and reservation armed the federal government with “a first line of defense against unconstitutional actions by provincial legislatures.”

Snell, and Vaughn, *The Supreme Court of Canada: History of the Institution*, 5:

The federal government would ensure that the provisions of the BNA Act would be respected, thus establishing a final court of appeal was not a pressing matter. Apparently, it was not thought that such a court was needed to protect the provincial jurisdiction of power from federal encroachment. However, the need to create or establish a central court of appeal did loom in the horizon; “such a court was seen as an essential element in establishing the credibility, authority and status of the polity of the new nation.”

disdain.”⁴¹ They “cherished the Privy Council’s constitutional handiwork as a vital bulwark of provincial autonomy against the onslaught of centralizing forces.”⁴² As a result, ending appeals to the JCPC and coincidentally, the S.C.C. becoming Canada’s final court of appeal did not come easily; rather, it occurred in incremental steps.⁴³

The debate concerning the termination of appeals to the JCPC centred on the idea of legitimacy versus neutrality and underpinned by two distinct visions of Canada, centralist and provincialist. On the one hand, centralists insisted that a strong central government and institutions were required to ensure unity of the nation and a sense of direction. “Detractors argued that the committee did not understand Canadian needs or conditions and made poor decisions and that until the Supreme Court became

⁴¹ Snell and Vaughn, *The Supreme Court of Canada: History of the Institution*, 23.

⁴² Russell, *The Judiciary in Canada: The Third Branch of Government*, 593;

Russell, *The Supreme Court of Canada as a Bilingual and Bicultural Institution*, 25:

Adding to this, before the 1950s, the credibility of the Supreme Court of Canada was constantly questioned by the provincial governments. The S.C.C. was widely regarded as a creature of the federal government; it was created as a part of Macdonald’s centralizing agenda. As a result, it was often bypassed, by the provinces, in the appeal process. Furthermore, under certain conditions an automatic right of appeal was granted to the provinces. This was mainly due to the legal and technical reality that “the right of appeal from the Supreme Court of each province to the Privy Council was much larger than that which lay from the Supreme Court of Canada.”

Saywell, *The Lawmakers: Judicial Powers and the Shaping of Canadian Federalism*, 63:

In fact, between 1879 and 1899, Saywell further notes that “67 appeals went directly from provincial courts to the Judicial Committee and 50 were affirmed;” the S.C.C., during this time was “not even a necessary intermediate court.”

⁴³ Snell and Vaughn, *The Supreme Court of Canada: History of the Institution*, 178-179:

There was an attempt in 1875 to add an amendment that would ensure that S.C.C. decisions “shall be the final [Court].” However, Fournier, then Justice Minister, met some opposition by Sir John A. Macdonald, Cairns, then Lord Chancellor (Britain) and the JCPC amongst others in both Canada and Britain. So the proposal died.

An 1887 provision banned appeals in criminal cases. Though this was overturned by the JCPC in 1926, it was re-enacted soon thereafter.

In 1877, the JCPC, in *Johnston v Andrew* established that appeals to the JCPC would be denied in matters dealing with a small amount of money and no general principle.

In 1883, the JCPC decided that appeals would only be granted if the issue was of a grave nature; if the matter was petty, the S.C.C. decision would be final. (The JCPC ruled as such in both *Canada Central Railway v Murray* and *Prince v Gagnon*.)

truly supreme, it could not command the authority and respect normally due a country's highest court."⁴⁴

This was challenged by provincialists who asserted the need for the continued existence of the JCPC so as to ensure the autonomy and independence of the constituent units. As Snell and Vaughn succinctly articulate:

The opponents of the Supreme Court argued repeatedly and correctly that the institution was intruding into provincial fields of jurisdiction and was imposing centrally made decisions on the various provincial communities. Some things, the critics suggested, were better dealt with at the local level, and the law was one of them.⁴⁵

Pointing to the high calibre of its personnel and to its neutrality on emotive Canadian issues, supporters of the JCPC held that the Committee was a more able body than the S.C.C.

Despite such support for the continued existence of the JCPC, coupled with the distrust of the S.C.C., the federal government decided to move ahead in making the S.C.C. Canada's final court of appeal. In June of 1939, the S.C.C. reviewed the constitutionality of a bill proposing the abolition of appeals to the JCPC. The Court ruled that the bill was in fact *intra vires* – within the jurisdiction of the federal government to end appeals to the Committee.⁴⁶ This decision was appealed to the JCPC in 1946.⁴⁷ The appeal of this decision and subsequently the opinion of the JCPC

⁴⁴ Ibid., 182, 183:

In the early 1900's, Snell and Vaughn remark that an increase to appeals to the JCPC was partly due to the Committee itself encouraging appeals to it and bypassing the S.C.C.. The Committee did so by stating that it will not assist those appeals from the S.C.C.. "The Judicial Committee was laying down rules whereby appeals to London was being presented, perhaps even encouraged as an alternative to the Supreme Court."

⁴⁵ Ibid., 32.

⁴⁶ The minority however ruled that with such an amendment, the federal government would in fact be affecting the relationship between the provinces and the Crown – this was beyond its scope of powers under the BNA Act.

For a full analysis of the Court's ruling, please see Snell and Vaughn, *The Supreme Court of Canada: History of the Institution*, 186-188.

⁴⁷ The appeal of this decision was delayed due to the Second World War.

was a *big deal*, the magnitude of which was recognized by both the British government and the JCPC. In fact, “the Judicial Committee viewed the issues involved as being of ‘*transcendent constitutional importance*’”⁴⁸

Upon reviewing the proposal, the JCPC found that the federal government, because of the Statute of Westminster, 1931, which affirmed Canada as a self-governing nation, did have the authority to make the S.C.C. the final court of appeal in Canada, under s101 of the BNA Act. It ruled that “the power of establishing a final, ultimate court of appeal was an aspect of self-government.”⁴⁹ Despite the opinion of the JCPC, most provincial leaders continued to oppose such unilateral action. They wished to retain their autonomy and pre-Confederation right of appeal to the JCPC. Legislation to end appeals to the JCPC was finally introduced and passed in June of 1949; and it was given royal assent on December 10, 1949.⁵⁰

So, in 1949, the S.C.C. became Canada’s final court of appeal; no longer was it supreme only in name, but also in judicial status.⁵¹ As Snell and Vaughn bleakly point out, “this new position had been acquired, not because of the Court’s own merit, but

⁴⁸ Snell and Vaughn, *The Supreme Court of Canada: History of the Institution*, 188.

⁴⁹ *Ibid.*, 189.

⁵⁰ *Ibid.*, 294;

13 Geo. VI c. 37, s.3 quoted in Snell and Vaughn, 1985, *o cit.*, 190:

The statute provided that the Supreme Court of Canada “shall have, hold and exercise exclusive ultimate appellate civil and criminal jurisdiction’ in Canada and that its judgments ‘shall, in all cases, be final and conclusive.”

⁵¹ Saywell, *The Lawmakers: Judicial Powers and the Shaping of Canadian Federalism*, 239:

Upon the end of appeals to the JCPC, a debate ensued on whether or not the S.C.C. ought to be bound by the precedents established by their Lordships. W.M. Kennedy, quoted by Saywell, argued that “unless we get rid of the past decisions of the Judicial Committee, they will hang around the necks of the judiciary [...] in that uncanny reality with which stare decisis seems doomed to rob the law of creative vitality.” Others, however, argued, Lapointe, Minister of Justice in 1938, and then Prime Minister St. Laurent, to name a few, for the necessity of maintaining the precedents established by the JCPC in order to avoid confusion vis-à-vis constitutional and federal principles in Canada.

Ibid., 241:

Further, it “was believed that strict adherence to JCPC precedents was essential to the preservation of provincial autonomy and Canadian federalism,” as scepticism of the S.C.C.’s neutrality continued to be questioned by provincialists. Despite the debate and controversy, the S.C.C. continued to abide by the precedents established by the JCPC.

because of national developments;” the increase belief of Canada’s self worth and the beginnings of the building of Canadian nationalism brought about partly by Canada’s role in the second world war, helped to pave the way for Canada to have its own court of final resort.⁵²

Over the years, the S.C.C. has been able to carve itself as an institution distinct from the JCPC and its legacy. “This was surely a sign that despite all its problems, the new institution had become an important cog in the judicial machinery.”⁵³ In fact, as Russell points out, “from the mid 1970’s on [and specifically in the post Charter era], the Supreme Court of Canada has been moving closer to the centre stage in Canadian government. It was [and is] becoming of much greater importance in the life of the nation.”⁵⁴

THE ROLE OF THE S.C.C.

Before proceeding with the analysis of how the Court determines whether or not legislation is valid, we need to first look at the role of the S.C.C. as either arbiter, umpire of federalism or policy maker.⁵⁵ In reviewing the role of the Court, we should keep in mind that such a role is not confined to the adversarial nature of a case or court procedure. As indicated above, the Court is often asked directly by the federal government or by the provincial governments upon appeal from their respective provincial superior courts to hear references and render an opinion usually dealing with a

⁵² Snell and Vaughn. *The Supreme Court of Canada: History of the Institution*, 195.

⁵³ *Ibid.*, 44.

⁵⁴ Russell, *The Judiciary in Canada: The Third Branch of Government*, 354.

⁵⁵ We need to note that the Canadian judiciary and more importantly, the S.C.C. is not, by Constitution, established as a separate branch of government. As such, its role is not clearly defined or articulated in the Constitution. Despite this however, ‘it has become increasingly separate in practice’ and has carved out a role for itself, even if this role has not always been nor is always clear (Russell, *The Judiciary in Canada: The Third Branch of Government*, 99).

constitutional matter. Such reference cases do not, however, subtract from the role of the Court as either an arbitrator or umpire.

Generally speaking, the S.C.C. as an institution is understood to be an arbiter or an umpire of federalism; this understanding embraces the idea that a final court of appeal is needed to provide for a neutral, non-partisan body to settle disputes that may arise between the two orders of government.⁵⁶

More specifically, however, the Supreme Court of Canada can be seen as either the adjudicator or the policy maker. As the adjudicator, the Court resolves disputes between two parties. As the policy maker, the Court conducts itself as a political actor by making policy choices and giving these choices the force of law.⁵⁷ “In deciding the appeal, judges move gradually, but inevitably from applying the law to interpreting the law to creating the law.”⁵⁸ The S.C.C. performs both functions as the two roles are interconnected in the sense that reviewing the impugned legislation or interpreting certain powers enumerated in the Constitution, leads to a new understanding of either the law or the power. More often than not, this leads to a blueprint for new policies.

The Court as Adjudicator and Policy Maker

In “Two Models of Judicial Decision Making,” Paul Weiler discusses two models of judicial review which shed light on how judges do and ought to behave, *the adjudication of disputes model* and the *judicial policy maker model*.⁵⁹ Spawning from

⁵⁶ Rainer Knopff, “Federalism, the Charter and the Court: Comment on Smith’s ‘The Origins of Judicial Review in Canada’,” *Canadian Journal of Political Science*, vol. 16[1983]: 586.

⁵⁷ Paul Weiler, *In the Last Resort: A Critical Study of the Supreme Court of Canada*, (Toronto: The Carswell Company Ltd., 1974), 6

⁵⁸ *Ibid.*, 7

⁵⁹ Paul Weiler, “Two Models of Judicial Decision Making,” *Canadian Bar Review*,” vol.46[1968]: 406.

Anglo-Canadian idea of legal formalism, both models reject the central argument of legal formalism – the idea that judges objectively and passively apply legal principles.

Similar to the Anglo-Canadian model, however, the adjudication of disputes model is premised on the idea of a limited and distinctive role for judges. Nonetheless, advocates of this model do reject the idea of the blind passivity and objectivity of judges while still acknowledging that judges cannot be completely subjective or arbitrary in their application of the Constitution.

The adjudicative function is defined as the “responsibility for providing authoritative settlements in disputes about the law.”⁶⁰ As an adjudicator, the judge is the third party, the neutral arbiter; he/she is there to settle disputes between two parties by applying both the law and legal principles. These laws and principles are mainly determined in the political arena. However, the judiciary does have a role in establishing them.⁶¹ The adjudicator is different from the mediator whose task is not to decide which party is right, but to come to a solution upon which both parties will be able to agree. The role of the court as the adjudicator is “to determine which of the disputants is legally right;”⁶² it is the idea of winner takes all.

Though judges focus on and adjudicate the narrow issue that is brought before them, their decisions, rarely if ever, have an effect on the issue before them alone. This is particularly so with reference cases. As noted earlier in the chapter, the seeking of advisory opinions of senior judges was controversial for some 19th century constitutional theorists precisely because of the dangers of pre-judging issues and compromising judicial independence. Most conflicts have dimensions that extend well beyond the legal

⁶⁰ Russell, *The Judiciary in Canada: The Third Branch of Government*, 4.

⁶¹ Weiler, “Two Models of Judicial Decision Making,” *Canadian Bar Review*,” 410.

⁶² Russell, *The Judiciary in Canada: The Third Branch of Government*, 6.

points at issue; social conflicts are polycentric. According to Laskin, the argument that the JCPC and the S.C.C. have looked at cases on their own merit and have tried to avoid speculation on the future is a naïve one;⁶³ court decisions are not given in a vacuum. Whether or not they are conscious of it, judges, in their decisions, always affect other aspects of political society.

This idea of polycentricity raises a related issue: is there room for the living tree principle, both desirable and necessary, in this model? Advocates of the adjudication of disputes model definitely acknowledge that principles need to evolve; however, the subjectivity of judges needs to be contained. Judicial creativity, the idea that courts establish new legal standards, is frowned upon by those who support the idea that the proper role of the court is to be the neutral and impartial arbiter.

In response to legal positivists, Laskin argues, the law must change in order to adapt to evolving society.⁶⁴ However, the changes cannot be so radical so as to upset the system in place or so radical that they do not reflect society. This is known as the principle of growth. For Laskin, judicial creativity is necessary to fill in gaps of the law. Gaps arise because society changes in a way that the Fathers of Confederation could not have imagined. So it is the duty of the courts to ensure that the law is in tune with society.⁶⁵ Judicial creativity is also necessary to correct mistakes.⁶⁶ Sometimes a rule is, simply put, wrong. Thus, it becomes necessary for the courts to re-evaluate and re-assess law, making it acceptable, in certain situations, for the courts to overrule precedents as strict adherence to them may lead to the stifling of law. Serving social ends should be

⁶³ Bora Laskin, "Tests for the Validity of Legislation: What's the Matter?," *University of Toronto Law Journal*, vol. 11[1955-56]: 115.

⁶⁴ Reaume, "The Judicial Philosophy of Bora Laskin," 447.

⁶⁵ *Ibid.*, 449.

⁶⁶ *Ibid.*, 448.

guiding the courts. Nonetheless, they need to be attuned to the present Canadian system of representative democracy and the reality that their views may be different from that of the government.

The creation of new legal standards by the courts may be more palatable if it were established in collaboration with government. In fact, Laskin advocates a partnership between the legislatures and the courts. For Laskin, it is the role of the courts to update and correct, as legislatures are “preoccupied with more pervasive problems.”⁶⁷ For legal positivists, the legitimacy of the Court rests upon the idea that it applies set and already established principles to the case in front of them;⁶⁸ anything that deviates from this ideal, which judicial creativity encourages, hinders the Court’s legitimacy.

But what if a case arises to which the already established rules do not apply? If a court were to establish new rules, would its actions be consistent with its role as the adjudicator? According to Laskin, judicial creativity is constrained. First and foremost, change brought about by court decisions should be gradual; judges should only develop principles that are already in the process of developing in society. Thus, judges ought to work within already existing principles. Second, in restricting the sources used by the courts, judicial creativity is contained. For instance, Laskin proposes that sources should be limited to social consensus. This would limit change to that which society is ready to accept.⁶⁹ Third, if a statute is ambiguous, the courts should then refer to the policy behind that statute with a focus on parliamentary discussion and legislative history. If this is of no help, then the judges “would have to use his or her knowledge of the trend of

⁶⁷ Ibid., 450.

⁶⁸ Weiler, “Two Models of Judicial Decision Making,” *Canadian Bar Review*,” 426.

⁶⁹ Reaume, “The Judicial Philosophy of Bora Laskin,” 459

social forces.”⁷⁰ Judicial creativity does not necessarily mean that the law is what judges say it is, but it is a recognition that judicial review is not simply about the objective application of already established principles. In the end, judicial creativity is necessary in order to ensure that the law evolves in tune with society’s ends and interests. A problem, however, arises when we begin to question how the courts know what these ends and interests are. Sociological jurisprudence is premised on the idea that social values underpin the law.⁷¹ But, how do we know what these values are and to whom they belong? In essence then, the courts are forced to rely upon the argument put forth by the parties involved in the case to decide such issues. If this is the case, then the courts rely on value judgments: who put forth the most legally convincing argument? Laskin points out that “the line between validity and invalidity of a statute may be drawn not according to the truth of an allegation but according to judicial acceptance or rejection of opinion that the challenged legislation embodies an object within the power of enacting legislature.”⁷² This raises yet another question: what underpins a judge’s value judgment? I would suggest that, in cases dealing with the division of powers, ideas of Canadian federalism underpin value judgments.

Advocates of this adjudication model hold that the acceptance and legitimacy of the Court establishing new rules would depend on whether or not the court is imposing new standards on society or acknowledging or articulating new ‘aspirations of society.’⁷³ If it is the latter, then the court is not acting outside its ascribed role and its legitimacy is maintained. However, we must question whether or not this line drawn between

⁷⁰ Ibid., 461.

⁷¹ Ibid., 464.

⁷² Bora Laskin, *Canadian Constitutional Law: Cases, Texts and Notes on Distribution of Legislative Power*, 2nd edition, (Toronto: The Carswell Company Ltd., 1960), 184.

⁷³ Weiler, “Two Models of Judicial Decision Making,” *Canadian Bar Review*,” 427.

imposing and *acknowledging* is a false one; does it not simply reduced to how the courts phrase this ‘new’ principle or how they justify it within their decision? Is the rhetoric not a key element used by the courts in legitimizing their articulation of principles and values of both the Constitution and of society? When we look at the four references, we see that the S.C.C. justified the pronouncements of either constitutional values and principles or constitutional conventions by arguing that they can be located within and are inherent to the federal principle which underpins the Canadian Constitution. The ‘new’ principles and values, the Court argued, have always been present and have always guided the action of both orders of government and of Canadian political society. Was the S.C.C. stating the obvious, or was it going beyond its role as the adjudicator and making policy choices as a political actor? The answer is not as clear as we would like it to be.

So, is this [idea of the living tree with all its implications] consistent with the adjudication model? To a certain extent it is, as the model does recognize the need for the Constitution to be able to adapt to changing society. In theory, the judiciary “settles disputes according to pre-existing laws or upholds rights that exist under the law;”⁷⁴ and does so in an objective and rational manner. The reality is that judges, because of the generality of the law and the ambiguity of rights or powers and the broadness of the language, shape the substance of the law, and influence the conceptualization and understanding of key principles, rights and powers. This reality has two dimensions: First, the way in which rights and powers are enjoyed and exercised is affected by court decisions;⁷⁵ this is inevitable as a new understanding or a clarification of rights or powers by the Court will alter the way in which government exercises its powers or the citizens’

⁷⁴ Russell, *The Judiciary in Canada: The Third Branch of Government*, 13.

⁷⁵ *Ibid.*, 14.

understanding of their rights and subsequently the treatment or service owed to them by the state. Second, it is a known fact that “decisions of the Court become rules of law.”⁷⁶ As discussed previously, the language of the Constitution is both broad and ambiguous. As such, the vague powers, POGG and property and civil rights, the two most notorious examples when considering Canadian federalism, depend on judicial interpretation. Without such interpretation, the powers and rights enumerated in the Constitution would be just words. How the Court interprets these rights and powers ultimately becomes a part of the common understanding of these very rights and powers.

Essentially, this ability of the Court to shape the substance and understanding of the Constitution raises the ubiquitous issue of subjectivity; is the law what judges say it is? For Allan Hutchinson⁷⁷ and other critical legal theorists, there is no such thing as the rule of law, but a rule of five. Radical realists, Rainer Knopff and Ted Morton for example, go one step further and argue that the simple truth of the matter is that judges are political actors. David Beatty, on the other hand, argues that judicial review is informed by principles, which he assumes to be neutral; thus, judicial review is objective. Traditionally, this central question has geared the legal and political community to focus upon the debate between judicial activism and judicial restraint.

Aside from the theorists briefly mentioned, there are three other broad responses which attempt to address the dilemma related to the ‘subjectivity’ of judicial review: First, judges do not make the law, but declare it; this justification however, masks the power of the judiciary.⁷⁸ Second, judicial law making is limited because it is interstitial

⁷⁶ *Ibid.*, 15.

⁷⁷ Allan Hutchinson, *Waiting for Coraf: A Critique of Law and Rights*, (Toronto: University of Toronto Press, 1995).

⁷⁸ Russell *The Judiciary in Canada: The Third Branch of Government*, 15.

(occurs within the limits of clearly established rules of law) and it only occurs in some, not all cases. As Russell argues, this second response, similar to the first, also masks the full ability of the courts. In addition, this response falls short of explaining the subjectivity of judges in some cases.⁷⁹ Third, it is argued that judges are informed by legal principles underpinning the law. In applying the law therefore, judges ought to consider the reasons for which the laws exist; that is, what motivated the government in enacting the impugned legislation. This third approach is very similar to the first in that the crux of the argument rests in the belief that judges remain within the confines of the law. Again, this ignores the true power and ability of the courts to shape the understanding of key principles informing the Constitution.

The problem with these approaches, including the Critical legal studies response, is that they are all rooted in the debate between subjectivity and objectivity or judicial interpretivism and non-interpretivism. We need to move beyond this particular aspect of judicial review as it stifles any real analysis and insight of judicial decision making process. The issue or debate is not or should not be about the subjective or objective application of constitutional principles. Instead, we should work within a framework that embraces the idea of interdependency or interconnection between the government, the judiciary, and the political environment.

Russell argues that we should distance ourselves from legal formalism in general, and from the idea that power rests with one in particular. The relationship between the executive (and other branches of government) and the courts should not necessarily be “understood in terms of constitutional precepts;” that is, the idea that the relationship is

⁷⁹ *Ibid.*, 16.

governed by either legislative supremacy or constitutional supremacy.⁸⁰ The two bodies are interdependent. “The process of adjudication influences and shapes the public policies that are given effect through law. For this reason the adjudicative work of judges itself is of political significance”;⁸¹ the two are not separate.

More important than the debate over whether or not the law is what judges say it is, is the legitimacy of the court’s role and the court’s products. How do we reconcile the idea of a non-elected body, indirectly empowered to alter and shape the substance and understanding of the Canadian Constitution, with the concept of democracy? In order to legitimize its adjudicative function and maintain the confidence of the public, the Court must be a genuine independent and impartial third party; this is a normative requirement.⁸² However, this does not mean that the independence and impartiality are unquestionable or absolutes in reality. The judiciary, and more specifically the Supreme Court of Canada, is tied to the political system: first, the appointment of judges is dependent on the political system; second, the enforcement and effectiveness of court decisions is dependent on the acceptance of other branches of government; third, a cooperative relationship is needed between the judiciary and the other branches of government in order to ensure the maintenance of judicial institutions; and fourth, judges are aware of the particular ideological leanings of the laws and adjudicate accordingly.⁸³ This tie of the judiciary to the political system can never be eliminated or avoided.

Essentially, this means that there is a tension between judicial independence and judicial impartiality. However, it does not mean that these two concepts are meaningless

⁸⁰ Ibid., 10.

⁸¹ Ibid., 13.

⁸² Ibid., 21.

⁸³ Ibid., 21.

in the real world of politics.⁸⁴ A degree of impartiality, or at least the illusion of it, must be in place in order to sustain the legitimacy of the judiciary and in turn the laws of the state.

This realization of the tension between judicial impartiality and independence as well as the recognition that judicial review does not solely concern the absolute objective application of principles does not colour the role of the Court, the importance of it, or its legitimacy in performing this function. The main challenge to the Court's legitimacy in performing its function is that the decisions which tend to shape the law and give meaning to vague terms are based on "the most reasonable application of our law" and not arbitrary rules.⁸⁵ As Marc Gold argues, "our courts are acutely aware of the principal role that they have assumed in Canadian society and they want their decisions to be deemed acceptable to the society."⁸⁶ So how does the Court perform such a formidable task when reviewing federalism cases?

THE TWO-STEP APPROACH

Edward McWhinney argues that "constitutional law is shot through with such verbal formulae masquerading as legal guidelines that these individual judges apply in some mysterious fashion to produce a result which they tell us is the law or at least the law for the time being."⁸⁷ So what is this mysterious fashion that McWhinney refers to?

⁸⁴ Ibid., 22.

⁸⁵ Ibid., 26

⁸⁶ Marc Gold, "The Rhetoric of Constitutional Argumentation," *University of Toronto Law Journal*, vol.35[1985]: 154.

⁸⁷ Edward McWhinney, *Judicial Review*, 4th edition, (Toronto: University of Toronto Press, 1969), 161; It should be noted that McWhinney made such comment 37 years ago. Since the entrenchment of the Charter in 1982, the 'mysterious fashion' is arguably more pronounced. This is certainly the argument advanced by Mandel, 1994 in *The Charter of Rights and the Legalization of Politics in Canada*, Knopff and

It would be beneficial to begin any inquiry of judicial review by considering the necessity of constitutional validation. In order for a law to be constitutionally valid, “it must have its ultimate justification in the [Canadian Constitution].”⁸⁸ In light of this, the first test of validity is framed, generally speaking, within a constitutional analysis, but more specifically, within a section 91 and section 92 framework where the division of powers or the powers of either order of government is at issue. This analysis is inescapable as it indicates to us whether or not a certain order of government has the “power to legislate in relation to matters⁸⁹ falling within the classes of subjects.”⁹⁰

So, in determining the constitutional validity of the impugned legislation, what do the courts rely on with regard to the process of judicial review? According to Laskin, the Court has the tendency to: first, “express a preference for avoiding a decision on constitutional grounds if the case can be otherwise disposed of;”⁹¹ second, narrow the reasoning for the decision to the case at hand in that it avoids broad, overarching replies that may affect other aspects of constitutionalism and political society; and third, with regard to federalism, the Court will refuse to answer overly abstract and general questions or those questions based solely on hypothetical cases.⁹² At times, however, the Court has deviated from this path. When looking at the four References in the subsequent chapters,

Morton, 1992, *Charter Politics*, Hutchinson, 1995, *Waiting for Coraf: A Critique of Law and Rights*, amongst other Charterphobes of both the left and the right (as categorized by Richard Sigurdson, “Left- and Right-Wing Charterphobia in Canada: a Critique of the Critics”, *International J. of Can. Studies*, 7-8 (Spring-Fall 1993).

⁸⁸ Laskin, *Canadian Constitutional Law: Cases, Texts and Notes on Distribution of Legislative Power*, 2nd edition, 77.

⁸⁹ *Ibid.*, 76:

Laskin regards *matters* as *constitutional values* ‘inhered in class of subjects and expressed through legislation.’

⁹⁰ *Ibid.*, 76:

Classes of subjects “represent capacity for legislative action”; for one level of government they can extend their ability to legislate, for the other they can limit their ability.

⁹¹*Ibid.*, 145.

⁹² *Ibid.*, 145.

we will see how in fact the Court did not adhere to these guidelines, guidelines which it itself, as an institution, established.

In addition to this tendency of the Court, two propositions are associated with constitutional interpretation: first, the Court is only concerned with whether or not the legislation is constitutional; and second, the courts are concerned with the right here and right now and not necessarily with the policy and where it could lead or what it may enable a government to do some time in the future.⁹³ With regard to the first approach, the Court is concerned only with whether or not the government has the jurisdiction (and to outline this jurisdiction) under the Constitution to enact the legislation under review. It does not concern itself with the idea that a government may abuse that jurisdiction. If there is an abuse, recourse can be taken later via the democratic process or through the court system. The main idea informing the second approach is the concept that *you cannot do indirectly what you do not have the power to do directly*.⁹⁴ According to Laskin, these two propositions along with the guidelines discussed above “reveal attitudes [of the Court] towards constitutional interpretation even if they disclose nothing about the process.”⁹⁵

A second issue we need to explore before proceeding with our analysis in any more depth is the aids the Court uses in the testing the constitutionality of a legislation. The task of determining if a government legislation or action is constitutionally valid is inherently problematic as the words and the terms of the Constitution, infamous for their broadness and ambiguity, are not very helpful. As such, in determining which level of

⁹³ Ibid., 187.

⁹⁴ The federal government trying to legislate in provincial jurisdiction by deeming it (the action which otherwise ought to be governed by the provincial government) a criminal offence is one example of a colourable device.

⁹⁵ Laskin, *Canadian Constitutional Law: Cases, Texts and Notes on Distribution of Legislative Power*, 2nd edition, 188.

government has the power to do X, the courts can choose between different methods, including, precedents, the plain-meaning approach, external aids, and internal aids.

Judicial aids

According to Hugh Mellon, judges cannot rely solely on precedent in making a decision for two important reasons: first, new laws arise all the time; this compels judges to rethink past decisions and practices. Second, society is always evolving; therefore, laws and the Constitution must reflect the changes.

Taking into account the number of aids available to the Court, what approach should it adopt when interpreting the Constitution? This choice rests on the age-old debate between original intent and the living tree principle. Original intent is the idea that judges enforce the terms of the original social contract.⁹⁶ One advantage of the principle of original intent is that it limits the possibility of extravagant judicial creativity. The problem with it, however, is threefold: first, it privileges the voice of the legislatures and the executive; second, it assumes that at the time of Confederation, only one unanimous intent existed; and third, it stifles the constitution as the principle of original intent may prevent the Court from dealing with situations that the Fathers of Confederation did not and would not have been able to imagine.⁹⁷

The principle of the living tree, which embraces the idea of an ongoing social contract, is basically an analogy which “suggests growth and vitality where in the courts and other elements of the political system carry on with the process of adaptation to new

⁹⁶ Gold, “The Rhetoric of Constitutional Argumentation,” 155.

⁹⁷ Mellon, “Introduction: Appreciating the Supreme Court’s National Significance,” 19.

and changing circumstances.”⁹⁸ This approach is beneficial in that it provides a measure for the Constitution to adapt to evolving society. Nevertheless, it does facilitate both the Constitution and the changing principles and values of society to be open to many interpretations. This raises the questions of whose interpretation is the correct one and how flexible should the judges be both in their interpretations and their recommendations.⁹⁹ In the end, both approaches seem to offer an incomplete or unsatisfactory insight into judicial review.

Aside from this debate between original intent and the living tree, Marc Gold and David Beatty note other methodologies or approaches that the Court adopts when reviewing legislation. These include, but are not limited to: first, a literal reading of the text or the plain-meaning approach which limits diverse and conflicting interpretations of the values underpinning the Constitution. This approach involves the justices looking at the words of the Constitution for meaning, and direction. Relying entirely on the plain-meaning approach is, however, problematic as any law or activity can be understood as both (or either) a federal power, belonging in section 91, or a provincial power, belonging in section 92, due to the possibility of multiple understandings of any one phrase or power. As Beatty argues, “there is no one settled meaning for phrases such as *property and civil rights* or *trade and commerce* that would be decisive in any case. Read literally and according to their common meaning, each of the more sweeping allocations of powers enumerated in sections 91 and 92 could be read as justifying either federal or provincial control.”¹⁰⁰

⁹⁸ Ibid., 19.

⁹⁹ Ibid., 19.

¹⁰⁰ Beatty, *Constitutional Law in Theory and Practice*, 22.

The second and third approaches are similar in that both appeal to the idea of looking within the Constitution or at the original intent when interpreting the Constitution. The former is underpinned by the idea that the meaning of the Constitution is “found in the structures of the government;’ this, then, should guide the Court when interpreting the Constitution.”¹⁰¹ The latter centres on the notion that a theory of justice informs the constitutional order; when settling disputes; justices should appeal to this particular theory. Similar to the first approach, these two other methods are unreliable for the simple reason that, arguably, “there was no common consensus amongst those who drafted the document.”¹⁰² And such is the assumption underpinned by these first three approaches.

The fourth approach, external aids, similar to the former three, is not of much help to justices. Resorting to an ordinary dictionary simply provides judges with general and incomplete definitions.¹⁰³ As such, one cannot be guided by dictionary definitions in giving meaning to the Constitution.

Legal dictionaries may be of more assistance as justices look for precedents to guide them in giving meaning to the words of the Constitution. In fact, “looking for precedents is one of the basic analytical methods in almost every area of law.”¹⁰⁴ However, as Hugh Mellon points out, judges cannot rely solely on precedent in making a decision for two important reasons: first, new laws or constitutional agreements arise all the time; this compels judges to rethink past decisions and practices. Second, society is always evolving, therefore, laws and the Constitution must reflect the changes. An

¹⁰¹ Gold, “The Rhetoric of Constitutional Argumentation,” 157.

¹⁰² Beatty, *Constitutional Law in Theory and Practice*, 24.

¹⁰³ *Ibid.*, 22:

As Beatty points out, looking at the Concise Oxford Dictionary, crime is simply defined as ‘evil acts punishable by law.’

¹⁰⁴ *Ibid.*, 23.

additional predicament arises when it is the first time an issue is directly addressed and there are no precedents. Furthermore, this approach offers the student limited insight into how the precedents were first established. That is, what analytical tools did the justices apply when they first ruled on a particular issue and thus established the precedent that subsequent justices are referring to and applying?

Regardless of the some of the benefits associated with these methodologies, essentially they are all unreliable: first, they are based on the assumption that there is only one correct and legitimate way of giving meaning to the Constitution and second, it is implied through these approaches that value judgements render the process of judicial review illegitimate. Judicial review is not a simple straightforward process. Therefore, our analysis of the process should reflect its complexity.

The complexity as well as the importance of the Court as arbiter or umpire of federalism is best captured by Bora Laskin:

The pivotal factor in constitutional adjudication is the elaboration of the content of the heads of legislative power conferred by the British North America Act. It is the judicial view of this problem that governs the real inquiry into the validity of some particular piece of legislation. It sets the limits within which the inquiry will proceed. For a court to say that certain legislation is in relation to [a certain power, for example, criminal law, property and civil rights] means very little except as it either articulates or presupposes certain views on the scope of those heads of power within which the characterization of the legislation takes place.¹⁰⁵

Simply put, judicial review is a two-step process; both these steps are interlocked as they react to one another; both are equal in importance. The terms of the B.N.A. Act, more specifically, sections 91 and 92, which clearly state that “legislative authority in relation to *matters* coming within the *classes of subjects* is given to the two levels of

¹⁰⁵ Laskin, “Tests for the Validity of Legislation: What’s the Matter?,” 125.

government”, informs judicial review.¹⁰⁶ It is this very statement that the judicial two step process in reviewing federalism cases emerges.

It would be safe to say that most, if not all, constitutional writers, in looking at either federalism or Charter analysis, hypothesize a two- step approach in which judges engage in when deciding the constitutionality of a challenged law or government action. The justices first focus on the impugned law or government action where they decide the pith and substance, or matter, as understood by Hogg and Swinton, or constitutional value, as understood by Laskin of the challenged law (step one);¹⁰⁷ following this, judges focus on the Constitution to determine whether or not the challenged law or government action is constitutionally valid (step two). In federalism cases, this second step translates into the Court assigning the matter or constitutional value to one of the classes of subjects. In other words, the Court decides the “scope or content of the heads of power in the [Constitution].”¹⁰⁸ In Charter cases, the second step decides whether or not the government’s infringement of a particular constitutionally protected right was justified¹⁰⁹. In short, in step one the justices characterize the challenged law; in step two they define

¹⁰⁶ Hogg, *Constitutional Law of Canada*, 328.

¹⁰⁷ Katherine Swinton, “The Supreme Court and Canadian Federalism: The Laskin Dickson Years,” 151; Hogg, *Constitutional Law of Canada*, 328;

Laskin, *Canadian Constitutional Law: Cases, Texts and Notes on Distribution of Legislative Power*, 2nd edition, 148;

¹⁰⁸ Laskin, *Canadian Constitutional Law: Cases, Texts and Notes on Distribution of Legislative Power*, 2nd edition, 148.

¹⁰⁹ Rainer Knopff and F.L., Morton, *Charter Politics*, 35:

Rainer Knopff and Ted Morton also reduce judicial review to a two staged procedure which they dub the *Charter two step*. In step one, justices define the scope of the right. In defining the scope of the right, the Court simultaneously decides whether or not the right has been violated. If the right has been violated, the Court then proceeds with the second step, within which two forms exist.

First, justices question whether the right has been violated and if it should stand. The claimant first has to demonstrate that the right has been violated. If it has been, then the onus shifts to the government, where it must demonstrate that the infringement is in fact a reasonable one. The impugned legislation will stand if it can be proven by the government that the infringement of the right is reasonable and demonstrably justified in a free and democratic society.

The second form deals with the admissibility of evidence in a trial. If while acquiring evidence, a law enforcement agent violates an individual of his/her Charter guaranteed right, the Court would deem the evidence inadmissible.

the boundaries of the classes of subjects by interpreting the power distribution provisions of the Constitution to determine which level of government has the power to enact the impugned legislation.¹¹⁰ The challenged action or legislation cannot be analysed on its own; the Constitution must be considered in order to fully recognize the scope and limits of government's powers.¹¹¹ Thus, it is not necessarily important to decipher which is done first. Instead, it is more significant to recognize that analysis of the two go hand in hand.

Reducing judicial review to this seemingly simple two-step process is not a contentious issue. In fact, all seem to agree on this process adopted by the Court. Where theorists part is on the issue of socio-politics; that is, what role, if any, do socio-political factors play in the thought process of the Court when it gives meaning to both the impugned legislation and/or the Constitution? For example, Hogg and Swinton, in their interpretation of the two-step process, have different and sometimes opposing views of how the courts analyze and give meaning to the Constitution and to the impugned law or government action; essentially, however, they both concentrate on whether or not the Court is informed by subjective or objective principles in their analysis. By focussing on this debate, the two theorists emphasize how the courts use judicial doctrines and principles of the Constitution or constitutional democracy in reaching their decisions. In turn, Hogg and Swinton fail to explicitly acknowledge and account for the weight which the concept of federalism and socio-political factors has in the judicial review process. On the other hand, Lajoie and to a certain extent, Laskin and Lederman do acknowledge that socio-political factors are key to the process of judicial review and in fact distance

¹¹⁰ Hogg, *Constitutional Law of Canada*, 328;
Swinton, "The Supreme Court and Canadian Federalism: The Laskin Dickson Years," 151.

¹¹¹ Laskin, "Tests for the Validity of Legislation: What's the Matter?," 115.

themselves from the narrow confines of the subjectivity versus objectivity debate by adopting more of a critical and functionalist approach. It should be noted that Lederman and Lajoie do not specifically speak of judicial review within this two-step framework. However, their analysis of the process, like Laskin's, does add to the discussion enabling us to broaden the reach of this traditional framework to consider the politics of judicial review in more detail.

Step one: Characterizing the legislation

In properly characterizing the impugned legislation or government action, the judges ask, "What is the matter of the law?"¹¹² In order to answer such a question, the justices "identify the dominant or most important characteristic of the challenged law," and in turn, determine whether or not the impugned legislation is constitutional.¹¹³ In addition, Laskin points out that it is important for the Court to look at both the purpose and effect (direct and indirect) of the law.

The impugned legislation rarely has just one aspect to it, so rendering this first step difficult. Consequently, one aspect of the law may fall within the federal jurisdiction and another aspect may fall within the provincial jurisdiction. The difficulty rests in deciding which aspect is the most important one. For Hogg, this exercise is crucial as the answer in this step dictates the direction taken in the second step. In deciding what *the* matter is, Hogg argues that "logic offers no solution."¹¹⁴ Instead, justices rule on which, based on their discretion, is the dominant feature of the impugned law. This dominant feature is then taken to be the matter or pith and substance of the legislation. The other

¹¹² Hogg, *Constitutional Law of Canada*, 329.

¹¹³ *Ibid.*, 328.

¹¹⁴ *Ibid.*, 331.

aspect or aspects of the law are then considered to be incidental.¹¹⁵ As such, the pith and substance doctrine “enables one level of government to enact laws with substantial impact on matters outside its jurisdiction.”¹¹⁶

In determining or characterizing the impugned legislation, the courts tend to look at the purpose and effect of the law, where the courts may look at the intentions of the statute of the government when enacting the law. This, according to Hogg, can be misleading if the language is taken too literally. One cannot say that a statute has an *intention*. Furthermore, the legislative body that enacted the law may have had many intentions, and not necessarily just one, when it enacted the legislation.¹¹⁷

Legislative history may in fact be more valuable in determining the purpose of the law. Hogg argues that the legislative history of the law is useful in that “it places the statute in its context, gives some explanation of its provisions, and articulates the policy of the government that proposed it.”¹¹⁸ Strayer, however, is not as convinced as Hogg when considering the weight and benefits of extrinsic evidence in general and legislative history specifically. According to Strayer, part of the legitimacy in the admissibility of extrinsic evidence rests on the availability and clarity of such evidence. For example, debates leading up to Confederation were ambiguous, thus they did not, nor could they,

¹¹⁵ Ibid., 331:

In the case where one subject matter cannot be identified as the most dominant feature of the impugned legislation, the courts can in fact invoke the double aspect doctrine. This doctrine recognizes that one aspect of the law falls within the federal jurisdiction and the other aspect falls within the provincial jurisdiction. The double aspect doctrine is invoked by the courts when it finds that both aspects of the challenged law are equal in importance. The courts, however, have not stipulated when it is appropriate to use such a doctrine.

¹¹⁶ Ibid., 331;

Ibid., 334:

When the courts find that the federal and provincial characteristics of a law are roughly equal in importance, then the conclusion is that laws of that kind may be enacted by either the Parliament or the Legislature.

¹¹⁷ Ibid., 336.

¹¹⁸ Ibid., 336.

provide much insight into the intentions of the Fathers. For the Charter, on the other hand, debates have been well documented and are readily available. The same is true of the debates concerning the Statute of Westminster. Such debates may provide some insight. Nonetheless, a debate still surrounds the issue of how much weight ought to be accorded to such evidence.¹¹⁹

The courts tend to be hesitant in admitting statements and the debates of the legislatures as they tend to be saturated in partisan politics. As a result, they may not necessarily aid in deciding the purpose of the impugned law or of the Constitution. However, courts may be inclined to admit such evidence if it can be shown to be proper, clear, and non partisan.¹²⁰ It remains controversial to accept legislative history as evidence simply due to the fact that the court or an attorney cannot, in good conscience argue that any one statement reflects a general agreement of all those sitting in government. Statements are subjective thoughts on what a person may think the purpose of legislation or of the Constitution may be.¹²¹ Nonetheless, as Saywell points out, the S.C.C. is more open to extrinsic aids, including legislative history and scholarly work.¹²²

In identifying the matter, the courts may also look at the effects of the legislation. So, the courts “will consider how the statute changes the rights and liabilities of those who are subject to it.”¹²³ Identifying the effects of the law, “simply involves

¹¹⁹ Strayer, *The Canadian Constitution and the Courts: The Function and Scope of Judicial Review*, 2nd Edition, 230-231.

¹²⁰ *Ibid.*, 241-242.

¹²¹ *Ibid.*, 247.

¹²² Saywell, *The Lawmakers: Judicial Powers and the Shaping of Canadian Federalism*, 243-245

Saywell discusses how the S.C.C. has begun to refer to scholarly work and legislative history in attempting to give meaning to the Constitution. Similarly, Strayer on pages 243-244, indicates that the S.C.C. has fluctuated on whether or not it would admit statements in giving meaning to the Constitution and/or legislation. Since the Reference, Re Anti-Inflation, the Court is more inclined to refer to legislative history. In fact in the first three references to be reviewed in this analysis, the Court did refer to legislative history and statements of government officials in giving meaning to convention and to the Constitution.

¹²³ Hogg., *Constitutional Law of Canada*, 337.

understanding the terms of the statute and that can be accomplished without going beyond the four corners of the statute.”¹²⁴ However, we must keep in mind that determining the effect may not be as simple as it seems. An impugned law can and usually has indirect effects. This, in turn, may and can inform the characterization of the law.

According to Laskin, when determining both the direct and indirect effects of the legislation, extrinsic aids at times may prove to be helpful. These include: first, other statutes deemed relevant, second the preamble of the impugned legislation, third, material considered to be *legal material* and forth, social and economic reports. With regard to the fourth item, we must be cautious with the weight which these reports are given as they can be very biased. Furthermore, we should consider these reports not necessarily as known fact but as expert opinion so as to enable an open dialogue as the latter invites an exchange of opinion whereas the former does not.

Considering these extrinsic aids listed by Laskin, certain key questions arise: what extrinsic aids are beneficial? What criterion is used in deciding this? Finally, do we run into biased material when resorting to extrinsic aids? Laskin does not address these issues. It must be noted however, that it was not his intent to focus on this aspect of the debate. Instead, his aim was to reject the idea, espoused by legal formalists, that law is deductive. Blind and passive objectivity does not guide the Court when characterizing the legislation.

So, if law is not deductive, what then guides the Court when reviewing legislation and determining the matter or constitutional value? For Swinton, the courts use statutory context as the starting point when determining the meaning of the legislation. She, unlike

¹²⁴ *Ibid.*, 337.

Hogg, believes that the purpose and the effects of the impugned legislation offer the courts the principled guidelines it needs to determine the pith and substance. In looking at the purpose of the legislation, the courts rely on the legislative history or on government reports “identifying a problem which triggered the legislation.”¹²⁵ Examining the effects of the law may also be relevant in determining the pith and substance of the challenged statute. If there is a conflict between the two, the purpose tends to override the effects of the legislation in federalism analysis.¹²⁶

Swinton points out that this first step is controversial as there is no uniformity amongst the justices on which approach will be adopted; it is not clear if the justices will be looking at the purpose or the effects of the law in characterizing the impugned legislation. Some judges tend to place greater weight on purpose, whereas others focus on the effects of the legislation. Nevertheless, “the dominant form of inquiry is into the purpose.”¹²⁷ The focus is, however, dependent on “judicial attitudes of deference to legislatures and concerns about the balance of powers in the federal system.”¹²⁸ We must keep in mind though that prioritizing the purpose of the legislation, without regarding the effects it may or may not have on the other order of government, enables the first order of government to expand their scope of power.

So what criteria of choice are used by the courts in determining what the most dominant feature, thus the pith and substance, of the law is? According to Hogg, there are three factors that guide the courts when determining the matter of the law. First, “full understanding of the legislative scheme, will often reveal one dominant feature. Second,

¹²⁵ Swinton, “The Supreme Court and Canadian Federalism: The Laskin Dickson Years,” 151.

¹²⁶ *Ibid.*, 151.

¹²⁷ *Ibid.*, 151.

¹²⁸ *Ibid.*, 151.

precedents will often offer a guide.”¹²⁹ When neither of the two proves to be of aid, the choice is one of policy. “Thus [the criteria of choice] is guided by the concept of federalism.”¹³⁰ Essentially the courts ask, “Is this the kind of law that should be enacted at the federal or the provincial level?”¹³¹ In answering this federalism question, the justices should be free of any political bias. Further the approval or disapproval of the matter should neither be a factor or determinant in identifying the matter of the impugned legislation. The only politics allowed are those with a *constitutional dimension*.¹³²

So how do the courts decide? Hogg believes that, due to the inherent disagreement in Canada’s federal system¹³³, there is no principled way of clearly identifying the matter of the impugned law. Since judges have little to guide them, they may assume “that his or her personal preferences are widely shared, if not implicitly embodied in the Constitution.”¹³⁴ If this is the case, then judicial review is not neutral. As such, Hogg advocates that judicial restraint be a governing precept in federalism cases. “In other words, where the choice between competing characterizations is not clear, the choice which will support the legislation is preferred.”¹³⁵

¹²⁹ Hogg, *Constitutional Law of Canada*, 341.

¹³⁰ *Ibid.*, 341.

¹³¹ *Ibid.*, 341.

¹³² *Ibid.*, 341:

By constitutional dimension Hogg means ‘values that may be reasonably asserted to be enduring considerations in the allocation of power between the two levels of government.’

In French Canada, the prevailing belief is to strengthen the provincial government in order to enable it to promote and enhance the community.

¹³³ Resting in different views and interpretations of Canada’s history, political science, economics and sociology, this inherent disagreement stems from the struggle between how English Canada views federalism versus how French Canada views federalism. More specifically, which level of government ought to be the stronger of the two with regard to promoting the interests of its citizens? In English Canada, the prevailing belief is to strengthen the federal government in order to maintain such universal programs as health care. In French Canada, the prevailing belief is to strengthen the provincial government in order to enable it to promote and enhance the community.

¹³⁴ *Ibid.*, 342.

¹³⁵ *Ibid.*, 342.

The answer for Laskin is functionalism, which is an insight into the purpose of the law. That is, by adopting this methodology, the judge is able to take into account how the law serves the goals of society “that express the character of our society.”¹³⁶ So, in interpreting or characterizing the legislation, the Court ought to and needs to consider society, this includes social, economic and political factors. These factors are considered in the judicial review of constitutional issues; it is inescapable.

Step two: Giving meaning to the Constitution

This step is understood as the justices identifying thus determining the scope of the classes of the legislative subjects. In other words, they focus on and interpret the language of the Constitution.¹³⁷ According to Laskin this exercise remains central to constitutional adjudication.¹³⁸ Similar to the previous step, Hogg and Swinton insist that in this step, judges have discretion. This discretion stems from the extensive overlapping regulation in the Constitution, as it stipulates jurisdiction over classes of subjects “rather than jurisdiction over facts, persons or activities.”¹³⁹ As such, the matter, identified in the first step, can fall into either federal or provincial jurisdiction.

In cases where the activity can fall into either jurisdiction, the law can be upheld under the *double aspect doctrine*.¹⁴⁰ Swinton points out that, by invoking this doctrine, the justices are in fact negating the possibility of *watertight compartments*.¹⁴¹ Swinton,

¹³⁶ Reaume, “The Judicial Philosophy of Bora Laskin,” 445.

¹³⁷ Hogg, *Constitutional Law of Canada*, 356.

¹³⁸ Laskin, *Canadian Constitutional Law: Cases, Texts and Notes on Distribution of Legislative Power*, 2nd edition, 76.

¹³⁹ Swinton, “The Supreme Court and Canadian Federalism: The Laskin Dickson Years,” 151.

¹⁴⁰ For Hogg, this doctrine is used in the first step, when the matters of the law are found to be of equal in importance.

¹⁴¹ *Watertight compartments* is understood as exclusivity of legislative powers, with no overlap between the two levels of government.

however, points out that it became clear, especially since the second half of the twentieth century, that there is and must be overlap in regulation, as both levels of government may have good reason to regulate the same activity¹⁴². According to Lederman, however, the double aspect theory is central to judicial review of constitutional issues.

For Lederman, the challenge for the Court is to interpret the Constitution in a way that ensures that it maintains a balanced federal Constitution. Implicit in the judicial review of division of powers is the concept that “essential elements must be respected if we are to have a balanced federal Constitution – one that maintains and develops reasonable equilibrium between centralization and provincial autonomy in subject after subject of public concern.”¹⁴³ According to Lederman, in order to ensure that the Constitution remains balanced, the Court applies the aspect theory¹⁴⁴ when assigning the matter to one of the classes of subjects.

Lederman goes on to argue that clarity of the legislation as well as the question put before the Court is necessary to ensure clarity of the decision and subsequently a clear understanding of the scope of powers. Thus, clarity becomes significant to the principle of federalism for Lederman. As he states, “laws of a federal country must be specific and detailed enough that they make sense in relation to the categories of the system for the distribution of law making powers.”¹⁴⁵ Clarity of aspect does not necessarily mean that overlapping will not or does not occur; multiplicity of features

¹⁴² This recognition of overlap in regulation is known as the modern paradigm. The former that of water tight compartments, is known as the classical paradigm.

¹⁴³ Lederman “The Balanced Interpretation of the Federal Distribution of Legislative Powers in Canada (The Integrity Process of Interpretation),” 92.

¹⁴⁴ Ibid., 92:

Aspect theory: ‘subjects which in one aspect and for one purpose fall within section 92, may in another aspect and for another purpose fall within 91’ (Lord Fitzgerald in *Hodge v the Queen*, (1883-84) 9AC 117 at 130)

¹⁴⁵ Ibid., 96:

This was the essence of J Rand’s comments in the *Saumer* case.

which leads to multiple classification of which aspect law can fall under, tends to be a natural occurrence. In addition to this, powers enumerated in sections 91 and 92 overlap; this is inevitable because the language is broad.¹⁴⁶

At this point then, the judge is charged with the responsibility of interpreting aspects in order to maintain a balanced federalism. That is, one aspect of either section 91 or section 92 does not overshadow another aspect of the other section, rendering it inconsequential. Maintaining a balanced Constitution is not an easy task, thus mutual limitations of powers and further analysis or another step to determine which aspect of the law prevails are needed.¹⁴⁷

In dealing with this challenge of maintenance, Lederman notes that the Court has not defined a power so broad so as to nullify another power; this is understood as the mutual modification of definitions. However, relying on this does not eliminate or solve all the problems; “the ambivalent character of particular laws or statutes persist.”¹⁴⁸ In addressing this predicament, the Court has a tendency to construe the law so that all features, including the effects, are exposed and considered. If the overlapping of powers continues to exist, the Court then proceeds to list all the aspects of the impugned legislation according to degrees of importance. Essentially, the Court asks and answers, what is the most important feature. This exercise can be problematic if it is not clear which aspect of the law is the main one. It is possible that features of a provincial and a federal law can overlap; both can remain functional providing that the two laws do not

¹⁴⁶ *Ibid.*, 97.

¹⁴⁷ Laskin, *Canadian Constitutional Law: Cases, Texts and Notes on Distribution of Legislative Power*, 2nd edition, 100.

¹⁴⁸ Lederman, “The Balanced Interpretation of the Federal Distribution of Legislative Powers in Canada (The Integrity Process of Interpretation),” 102.

conflict. If they do, then the Court employs the doctrine of concurrency in which the federal law is considered to be paramount.¹⁴⁹

Lederman points out that a trend is developing where increasingly, the courts are adopting the concurrency doctrine. The danger may be that if the concurrency doctrine (where federal law is paramount) is adopted for almost everything, the balance of federalism may be upset.¹⁵⁰ In order to avoid such erosion in balance, the Court must be careful when determining which of the two doctrines should be invoked, mutual exclusion or concurrency. In resolving which doctrine is applicable, Lederman argues that the Court resorts to federalism concerns; more specifically, it asks, is it better for the people that this aspect be exercised at the federal level or the provincial level? In answering this, the judges consider or ought to consider “the relative value of uniformity and regional diversity, the relative merit of local versus central administration; as well, the justice of minority claims would have to be weighed.”¹⁵¹ In short, Lederman argues that the classification of legislation and in essence, judicial review of constitutional issues, involves the consideration of both societal and justices’ beliefs as well as precedents. Logic plus social fact are key elements of the thought process of the Court when deciding upon the constitutionality of an impugned law or government action.

According to Swinton, the courts look at precedents and history when defining the scope of the subjects in the Constitution. In other words, they focus on the meanings of

¹⁴⁹ Ibid., 104:

For the doctrine of concurrency doctrine to be invoked, three criteria must be met:

“(1) the provincial and federal categories of power concerned must overlap logically in their definitions; (2) the challenged law must be caught by the overlap, that is, it must exhibit both provincial and federal aspects of meaning; and (3) the provincial and federal aspects of the challenged law must be deemed of equivalent importance or value.”

¹⁵⁰ Ibid., 106.

¹⁵¹ Ibid., 106, first quoted in Laskin, “Classification of Laws and the British North America Act”, in *Legal Essays in Honour of Arthur Moxon*, (Toronto, 1953), 183 at 197-198.

the words. Precedent and history may or may not “indicate whether a law should come within one class rather than another.”¹⁵² In the case where precedent and history prove to be of no aid, the courts resort to federalism concerns. As such, the courts are guided by “beliefs about the optimal balance of power between the federal and provincial governments.”¹⁵³ Similar to Hogg and Lederman, Swinton asserts that the courts ask which level of government is better equipped to enact the matter in question. Adopting her arguments from Lederman, Swinton posits that “the courts should reach their decisions by weighing the values of uniformity and diversity and by following *widely prevailing beliefs*.”¹⁵⁴ As pointed out by Hogg, if this be the case, then judicial review is in fact not neutral, but biased as this step is basically based on the discretion of judges.

Hogg, in describing this second step, takes a simplistic approach; he views this step to be *a little more than a mere formality*. Once the courts have identified the matter or pith and substance of the law, the next step is to assign the matter to either the federal or the provincial government, according to sections 91 and 92. In interpreting the Constitution, thus assigning the power to the proper head of legislative power, courts are guided by the principles of exclusiveness,¹⁵⁵ concurrency,¹⁵⁶ exhaustiveness,¹⁵⁷ legislative history, precedent and progressive interpretation. For Hogg, however, this

¹⁵² Swinton, “The Supreme Court and Canadian Federalism: The Laskin Dickson Years,” 152.

¹⁵³ *Ibid.*, 152.

¹⁵⁴ *Ibid.*, 152.

¹⁵⁵ Hogg, *Constitutional Law of Canada*, 357:

“Each list of classes of subjects in s.91 or s. 92 of the Constitution Act, 1867 is exclusive to the Parliament or Legislature to which it is assigned. This means that a particular *matter* will come within a class of subjects in one list.”

¹⁵⁶ *Ibid.*, 358:

Concurrency is defined as a power shared by both levels of government. If two laws come into conflict, the federal law is paramount.

¹⁵⁷ *Ibid.*, 364:

Exhaustiveness is defined as, “the totality of legislative power is distributed between the federal Parliament and the provincial Legislatures.” However, justices, when interpreting the Constitution, are aware of the fact that the Fathers could not, thus did not foresee “every kind of law which has subsequently been enacted.”

step is highly subjective. The courts apply a large discretionary judgment to their constitutional decisions, because “the scope of potential government activity that the rules address is so enormous.”¹⁵⁸

The doctrine of progressive interpretation is the doctrine most advocated by Hogg in the interpretation of the Constitution. This doctrine enables the evolution of the Constitution so as to ensure that it is in tune with the changing nature of society and the changing nature of the government. The doctrine of progressive interpretation “stipulates that the general language used to describe the classes of subjects is not frozen in the sense in which it would have been understood in 1867.”¹⁵⁹ Furthermore, this statute implies that the Constitution, though it is a statute, is one unlike the others. It is organic in nature in that “it has to provide the basis for the entire government of a nation over a long period of time.”¹⁶⁰ Inflexibility in the interpretation of the Constitution would in fact disable the governments. Hogg also points out that, because the Constitution cannot be easily amended, the responsibility rests with the courts to allow the Constitution to adapt to the changing times. This doctrine of progressive interpretation is very similar to the living tree doctrine. As such, when considering this doctrine, we must also consider the questions and controversy surrounding the living tree doctrine.

Basically put, there are no explicit guides in the Constitution to aid the Court in deciding the content or scope of powers. Thus Laskin argues that, similarly to characterizing the legislation, the Court may use extrinsic aids. Determining which

¹⁵⁸ Ibid., 120:

The discretion of the justices is enormous, according to Hogg, because many problems have “been inevitably overlooked by the framers of the text. Moreover, the passage of time produces a social and economic change which throws up new problems which could not have been foreseen by the framers of the text.”

¹⁵⁹ Ibid., 367.

¹⁶⁰ Ibid., 367.

material is admissible is simply the prerogative of the Court. In essence, constitutional adjudication is “distillation of the constitutional value represented by the challenged legislation, (the matter in relation to which it is enacted) and its attribution to a head of power (or class of subject).”¹⁶¹ Classes of subject, according to Laskin, must be understood by the Court in a manner that considers and embodies the social or economic or political policy which is expressed. For this very reason, the Court cannot rely on the doctrine of original intent alone. In addition to those mentioned previously, one problem with relying strictly on this doctrine is the reality that there is no verbatim document, accounting for all the intentions, the discussions leading to the Constitution. As such, the Court has to rely upon external materials; this includes thoughts on federalism and how the system ought to operate.¹⁶² Nevertheless, Laskin emphasizes the need to place more weight and importance on the purpose and effects of the impugned legislation.

Hogg and Laskin point out that the examination of the impugned law is more important than focusing on the Constitution. Over time, the focus of judicial review is less on the meaning of the Constitution, as the principles established over the years have been embedded, thus becoming part of the common judicial understanding of the Constitution. According to Hogg, “the identification of the matter of a statute will often effectively settle the question of its validity, leaving the allocation of the matter to a class of subject little more than a formality.”¹⁶³

Minimizing the significance of this step enables both Hogg and Laskin to ignore how justices formulate and then use the concept of federalism in the judicial review

¹⁶¹ Laskin, *Canadian Constitutional Law: Cases, Texts and Notes on Distribution of Legislative Power*, 2nd edition, 76.

¹⁶² *Ibid.*, 150.

¹⁶³ Hogg, *Constitutional Law of Canada*, 330.

process. For example, in both the Senate Reference and the Secession Reference, it is in *giving meaning to the Constitution* that the Supreme Court speaks of the legal and constitutional responsibility of one order of government, (in these two references, the federal government), to the other order of government and to the federal principle. In the Patriation Reference and the Quebec Veto Reference, on the other hand, this responsibility emerges from convention and not from the Constitution. The interpretation of constitutional principles is not merely a formality, as both Hogg and Laskin seem to espouse. Instead, it can result in a new understanding of constitutional obligations and, possibly, of federalism. In actuality, the understanding of the principle of federalism has evolved, not only in the courts' jurisprudence, but also in the minds of society. In light of this, we must ask, is the conceptualization of federalism embedded in the Constitution? If not, does that mean that the understanding of federalism and in turn, of the Constitution, is susceptible to socio-political factors? It is in this step, defining or setting the limits of the Constitution, where justices have the discretion to either expand or narrow the powers of the two orders of government. Also, and more importantly, it is in this second step where we are able to locate the Supreme Court's conceptualization of federalism. From this, we are then able to see how the Court uses this conceptualization as a tool in arriving at its decision. Hogg, Swinton, and to a lesser degree, Laskin and Lederman, do not explicitly or extensively account for this in their explanation of the two-step analytical process of judicial review.

This does not mean that characterizing the legislation is a less important step. In fact, as Hogg argues, the way in which the impugned legislation is understood by the Court, can shape the way in which it assigns the matter to the heads of power. What is

crucial to keep in mind when analyzing a court decision is that both steps are of equal importance; the theorists do in fact acknowledge that alone each step is insignificant.

Despite this recognition, however, these theories of judicial review underplay the federalism factor. Neither Hogg, who offers an overly simplistic theory, nor Swinton, who goes beyond Hogg to recognize that judicial review involves both the discretion of judges and constitutional principles in the explanation of the two step process, recognize the role socio-political factors play in the decision making process. This is not to say that Hogg and Swinton would go so far as to say that context is irrelevant. They do, however, fail to look at it in a systematic way and consequently such issues and questions are not a central part of their analysis. Lederman and Laskin do consider the influence of socio-political factors. However, they merely touch upon the issue without exploring in detail the degree of the influence. That is, in constructing the theories, the authors fail to account for the fact that justices in giving meaning to the Constitution, in fact construct the meaning of federalism which in turn is used as an analytical tool when deciding cases dealing specifically, but not exclusively, the nature of Canadian federalism, or federal-provincial powers in general. In light of this, we need to consider the work of Andrée Lajoie, who offers a current version of a more critical approach and introduces this reality to the study of judicial review. As Lajoie so succinctly argues in *Jugements de Valeurs*¹⁶⁴, court rulings are infused with politics. Thus in analyzing or devising a theory of judicial review the socio-political environment must be considered.

¹⁶⁴ Andrée Lajoie, *Jugements de valeurs: le discours judiciaire et le droit*.

INCLUDING THE SOCIO-POLITICAL FACTOR

In her study of the S.C.C. and its role of interpreting the Constitution, Lajoie looks at “the political factors which are inscribed in the S.C.C.’s decision making process in the post World War Two period. Three conceptions of federalism, (unilateral centralization, conversational federalism, and centralized federalism), materialize despite the lack of change in the text of the Constitution; the reasons for this must be the political environment.”¹⁶⁵ In short, Lajoie argues that Judges have their own ideas that they incorporate when interpreting the Constitution.

¹⁶⁵ Ibid., 24-28 [my translation];

Ibid., 30:

According to Lajoie, the ‘will’ of the Court gave way for three interpretations of the division of powers and subsequently, Canadian federalism:

- (a) post WW2 – 1960 - - unilateral centralization;
- (b) 1960 – 1975 - - conversational federalism;
- (c) beginning in 1975 - - centralized federalism (from now on normalized)

Ibid., 32:

(a) unilateral centralization

The centralizing nature of the S.C.C. is not surprising as the National Assembly was the only government, during this period, concerned with provincial autonomy. In court decisions, this lean towards a centralized federation was evident in the Court’s restricted understanding of provincial competency, which implicitly benefited the federal government, and by the expansion of federal powers, relying on the judicial doctrines of federal paramountcy, residual power, the national dimension test, and the emergency doctrine, in areas of criminal law, development of the territories, and trade and commerce.

Ibid., 33:

(b) conversational federalism

This period, notable for the Quiet Revolution in Quebec, was marked by co-operative federalism, which enabled Quebec to strengthen its powers vis-à-vis the federal government through intergovernmental arrangements, particularly the ability of a province to opt out of federal government programs with compensation. The Quebec government also gained leverage with the federal government in court rulings. It was, however, qualitative, not quantitative victories; the most notable, according Lajoie, was the ruling on the anti-inflation legislation, which restricted, to a certain measure, the power of the federal government.

Ibid., 35-36:

(c) Normalized federalism

The two-culture interpretation of federalism, evident in the previous period, disappears from 1975 and on. This trend was heightened by the Quebec Veto Reference and the Patriation Reference. The Court’s decisions in these cases favoured the provinces; however, the implication of the two References put the power in the hands of the federal government and tied the hands of the Quebec government.

[For further readings on the three different conceptions of the division of powers, please refer to part one of Lajoie, *Jugements de valeurs: le discours judiciaire et le droit*.

Lajoie is able to show that institutional and interpretation shifts reflected political changes.¹⁶⁶ This claim definitely disputes legal positivists' assertion that the role of the S.C.C. is not political. Legal positivists argue that the Supreme Court, in determining whether or not a law is ultra vires, has a positive outlook of the laws as it simply decides whether the government has the power to enact such laws. They proceed to argue that the Court takes an objective view of the matter as well as the motive which informed the government enacting the legislation; politics has no role.¹⁶⁷ As Laskin argues, it is naïve of us to think that constitutional law is "divorced from social or economic or political views."¹⁶⁸

In testing the validity of legislation, judges do not simply and only ask, *did or does Parliament have the power to enact X?* Other factors, including social, political and economics are also considered and factored into the decision making process. Also, by looking at matter and motive in the objective way, as is suggested by legal positivists, it is not clear that decisive facts will emerge; "what it [does] yield are legal conclusions that are merely professional judgments."¹⁶⁹ If judicial review were straightforward and simple as legal positivists claim, we would not have judgements that are conflicting in nature. Essentially, if it was as obvious, then analysis would yield one answer or viewpoint, but such is not the case.

Adding to this, Lajoie argues that we cannot ignore the political dimension embedded in court rulings when we attempt to theorize the role judges play in the

¹⁶⁶ *Ibid.*, 30.

¹⁶⁷ Laskin, *Tests for the Validity of Legislation: What's the Matter?* 115-116.

¹⁶⁸ *Ibid.*, 117.

¹⁶⁹ *Ibid.*, 123.

interpretation of the Constitution and subsequently, the production of rights.¹⁷⁰ The Court's constitutional decisions are clearly linked to the dominant political ideas.¹⁷¹ In the external camp¹⁷², this translates into support of the state's ideology and agenda. By the state, she refers to, in the Canadian case, the central government. Thus, the S.C.C. favours a centralized federation. Essentially, this favouring of a centralized federation is comprised of two dimensions: ideological and concrete/practical. This first dimension, ideological, concerns the legitimization of the state (in light of the decline of credibility of the political class vis-à-vis society); this is evident when the Court validates the state's laws and actions.¹⁷³ The second dimension, concrete/practical, manifests itself in the form of state support. The Court, via its judicial review power, is able to respond to the evolution of society when the Constitution seems to forbid it and when the state's hands are tied. This is the very act engaged in by the S.C.C. to centralize the state when interpreting the division of powers. Thus the government is no longer blocked; it needs only the positive and sometimes the negative support of the Court¹⁷⁴. At this point then,

¹⁷⁰ Lajoie, *Jugements de valeurs: le discours judiciaire et le droit*, 175-176.

¹⁷¹ Ibid., 110.

¹⁷² Ibid., 167:

Lajoie in looking at the courts' role looks at them in the context of internal and external camp: the internal camp is understood as the production of a text subject to interpretation (production of normative direction); the external camp is understood as the production of state support and its (state's) reproduction methods.

¹⁷³ Ibid., 176

¹⁷⁴ Ibid., 187:

Negative support is understood as refusing to side with the State for the benefit of the State. That is, the negative contribution or support of the Court could be seen as the S.C.C. warning the central government of the implications that it is not aware of. (Lajoie 86) Lajoie offers the Patriation Reference as a good example: the federal government wanted the Court to declare that provincial consent is not needed when patriating the Constitution. The Court however, decided to divide the victory between the two parties by ruling that, legally, consent is not needed, however, by convention, the federal government ought to obtain a substantial measure of provincial consent. 'This not only permitted the State to proceed as it intended and provided indispensable support of its maintenance in the circumstances, but it protected it from the potential harmful effects of a too bright victory; it conceded Quebec [and the other provinces] an apparent symbolic gain of which the net ideological result was nevertheless to strengthen the apparent neutrality of the Court and to strengthen the central government.' [My translation].

“the State has the ideological and the practical support, from the S C C , of its actions and the material realization of its politics ”¹⁷⁵

Nevertheless, the Court, by invoking judicial doctrine, is able to maintain the appearance of neutrality. That is, it continues to feed the myth that the Court is free from bias and political views, especially views on how the Canadian federation ought to operate, when in fact these views are influenced by the political environment. As such, any theory on judicial review must consider the role of socio-politics, which Lajoie and others consider, but also, and more specifically for the purposes of this project, that the S C C does have a particular understanding of federalism, which is influenced by and influences the political environment, furthermore, it uses this conceptualization as an analytical tool when dealing with cases concerning the constitutional powers and responsibilities of the two levels of government.

Federalism as a variable

As Laskin points out, we need to ask why the Court decided a case in a certain way. We must recognize that cases could have very well been decided in a different way. Cases are decided differently based on the Court’s views of federalism.¹⁷⁶ Laskin does not explore this point in detail in that he does not look at how federalism is understood and how it influenced and determined the various decisions and opinions of the Court. This is an angle of the issue that needs to be explored in order to fully grasp the process and the impact of judicial review of constitutional issues. It is important that we embrace the reality that the S.C.C., through its decisions has “a significant bearing on the meaning

¹⁷⁵ Ibid., 178 [my translation].

¹⁷⁶ Laskin, “Tests for the Validity of Legislation: What’s the Matter?,” 124.

and impact of laws,¹⁷⁷ as well, it has a similar impact on the understanding of key concepts, specifically federalism.

The four references to be analysed in this study all deal with relatively the same issue – that is who has the power to amend the Constitution? Is it the sole power of the central government or, is it a shared power – if so, is unanimity required? Despite the similarity of the basic issue of each of the four cases, the S.C.C., in a span of eighteen years rendered a fluctuating understanding of this power. The reasons must not only be socio-political but also, and more specifically their understanding of federalism. Once we accept that socio-political factors influence court decisions, then the idea that the Court, in making sense of the division of powers, constructs the nature of federalism and use this conceptualization as an analytical tool, is not a far leap.

If this is true, then we must acknowledge in any theory of judicial review, not only that the Court is not guided by objective principles, but also that federalism as a concept is understood differently by the Court at different times. This understanding underpins its decisions and consequently, is used as an analytical tool when it renders its decisions on cases dealing with this very issue.

CONCLUSION

In constructing or conceptualizing such fundamental concepts as federalism, the Court is not an isolated or completely individual institution; it is in fact affected by the environment in which it is a participant and certainly the environment in which the case or issue unfolds. As Russell argues, judicial decisions *have* an impact as they “reinforce

¹⁷⁷ Russell, *The Judiciary in Canada: The Third Branch of Government*, 54.

social, political and economic forces at work in the country.”¹⁷⁸ Recognizing this, I adopt the critical approach introduced by Lajoie and the functionalist approach espoused by Laskin and Lederman to argue that, it is in *defining and setting the limits of the Constitution* where judges construct the nature of federalism and then in *focussing on the impugned legislation/government action (deciding who has the power to enact such a legislation)*, where the conceptualization of federalism is invoked, that is, used as an analytical tool.

The S.C.C., as an institution, is important, but it is not the cause of an outcome, in this case, the social and political understanding of Canadian federalism. By looking at the political environment and behaviour on the one hand, and the S.C.C. decisions and their ability to construct the nature of federalism on the other, we see that the two variables have both an independent and a dependent relationship with each other. In essence therefore, I will look at how these two seemingly distinct and independent variables are linked. In the case analysis to follow, we see that institutions, the S.C.C. in particular, influence the social and political understanding of federalism held by society, which in turn, influences the S.C.C.; this is evident in Supreme Court rulings. This symbiotic relationship has the ultimate effect of re-affirming and sustaining the dominant ideology of the time.

¹⁷⁸ Ibid., 55.

CHAPTER 2: STILL IN SPIN: A NEW TYPOLOGY OF FEDERALISM

The nature of federalism is a form of government designed to get the best of two worlds: the advantages of a unified state and the benefits of the diversity which is inherent in the peoples and the regions which make up the state.¹

INTRODUCTION

In a federation, a particular theory, or theories of federalism underpin its constitutional politics. In effect, one's conceptualization of federalism almost always informs one's constitutional position. Similarly, one's constitutional position is a strong indication of one's conception of federalism. That is, the way in which one, an individual, a government, or an institution, conceptualizes federalism and consequently federation, has an impact on constitutional politics in that one's position on federalism translates into a constitutional position. For this reason, understanding the various conceptualizations of federalism becomes important in understanding constitutionalism.

Despite this seemingly simple task, federalism, what it is and how it ought to operate vis-à-vis constitutional politics is highly contested and convoluted. Nonetheless, there seems to be a consensus amongst academics that federalism is a balance between unity and diversity. According to James Bryce, "the problem all federalized nations have to solve is how to secure an efficient central government and preserve national unity, while allowing free scope for the diversities and free play to the authorities, of the members of the federation."² Dicey adds to this by pointing out that "the sentiment [...]

¹ A.W. Johnson, "The Dynamics of Federalism in Canada", in *Canadian Federalism: Myth or Reality*, ed. J. Peter Meekinon (Toronto: Methuen Publication, 1968) 98.

² James, Bryce, *The American Commonwealth, Volume 1*, (New York: Capricorn Books, 1959) 87.

which creates a federal state is the prevalence throughout the citizens of more or less allied countries of two feelings which are to a certain extent inconsistent – the desire for national unity and the determination to maintain the independence of each man's separate state.”³ The aim of federalism thus becomes to “reconcile national unity and power with the maintenance of state rights.”⁴ In its simplest form then, federalism can be understood as a political system in which there are at least two levels of government and responsibilities, powers and jurisdiction are outlined, divided, and entrenched in a constitution. Furthermore, there is a ‘set of ideas’ and prioritization of federal principles underpinning federal institutions. However, this set of ideas and accentuation of principles varies from academic to academic, from government to government and from institution to institution. Scholars and political players differ on how power ought to be shared, the degree of autonomy to be allocated to the regional/constituent units, the degree of centralization and decentralization and finally, why a country chooses a federal form of governance over other forms.

The task of understanding federalism as a theory is further complicated when considering Aboriginal nations and treaty federalism, and when taking into account the development of new literature regarding multinational democracies and reconciling or accommodating diversity within the multinational state. Specifically, how do we reconcile, (and can we), a traditional institutional understanding of federalism with the idea that a state can be understood as a one nation, a bi-nation or a multinational state? Furthermore, how do we reconcile the distinct and often conflicting conceptions of Canadian federalism?

³ A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (London: MacMillan and Co. limited, 1948) 142-143.

⁴ *Ibid.*, 143.

Within the contemporary literature, several influential academics have posited various conceptions of what federalism is in theory and how it should function in practice. This is especially evident in the distinct visions of federalism presented to the Court in the Senate, Patriation, Quebec Veto and Secession References. To simplify the various theories and visions of federalism, Kymlicka has identified two models of federalism in Canada, territorial and multinational. Each model is informed by what Hueghlin has identified as two traditions of federalism thought, constitutional/institutional and sociological. In addition to this, each model is underpinned by a particular understanding of the nation. The understanding of federalism and the realization of it in the form of a federative model depends on how the people of the country or nation see themselves. That is, are they one nation which includes diverse groups, or are they nations within a nation which encompasses Kymlicka's idea of non-immigrant national minorities⁵ or McRoberts idea of internal nations?⁶ This inevitably begs the question of who is charged with, and to what degree, the responsibility of maintaining and flourishing the acknowledged diversity. Taking this into consideration and combining it with Kymlicka's two models, we can identify two approaches to the understanding of federalism, the mononational approach and the bi/multinational approach.

⁵ Will Kymlicka, "Multinational Federalism in Canada: Rethinking the Partnership," in *Beyond the Impasse: Toward Reconciliation*, ed Roger Gibbins and Guy LaForest (Montreal: Institute for Research on Public Policy (IRPP), 1998) 15:

Kymlicka understands the Quebec and Aboriginal Peoples as non-immigrant national minorities 'because they have fought to form themselves (or rather to maintain themselves) as separate and self governing societies and have adopted the language of "nationhood" to both express and justify this struggle for self-government. [...] These groups have defined themselves as "nations" and, as such, they claim the same inherent rights of self determination as other colonized or conquered nations around the world.'

⁶ Kenneth McRoberts, "Canada and the Multinational State," *The Canadian Journal of Political Science* 34, 4, (December 2001): 683-714.

During the span of 18 years, (when the four references took place) three distinct visions of the Canadian federation emerged: the centralist, provincialist and the dualist. To a lesser degree, the Aboriginal peoples did present a fourth vision—a multinational one—which included the Aboriginal peoples as players. However, they were not one of the two key players in the Secession Reference. Thus the vision they presented was not at the forefront of the S.C.C. analysis in the opinion rendered for the Secession Reference. These three distinct visions, all rooted in a particular understanding of the compact of Confederation, can be identified as either a territorial/mononational or bi/multinational understanding of federalism. The purpose of this chapter therefore is to expand upon the two models identified by Kymlicka in order to view the constitutional visions presented to the Court as falling under one of these two models or approaches. In turn this will aid in the better understanding of the concept, principles, and underlying assumptions of the constitutional positions and visions of the Canadian federation. I begin this chapter with a look at the different theories of Canadian federalism and the constitutional visions which are informed by these theories. I then proceed to clarify the meaning of nation in order to build upon the idea of two models of federalism hinging upon the idea of one nation versus bi or multinational. In the final section of the chapter I take a specific look at the two approaches and combine it with the discussion of nationhood in order to demonstrate that the visions of federalism presented to the Court in these four references can be viewed as either a mononational or bi/multinational approach to the understanding of federalism.

This idea of two approaches to the understanding of federalism will then be used in subsequent chapters as an analytical tool in looking at how the Supreme Court of

Canada conceptualized Canadian federalism, and how this conceptualization was used as a variable in its judicial decision-making process. Expanding our assessment of how to understand different theories of federalism to include the multinational approach enables us to recognize that the conflicting visions of Canada present in the Quebec Veto Reference and the Secession Reference are in fact rooted in a particular understanding of federalism different from those presented in the other two references. In the Senate Reference and the Patriation Reference, the conflicting visions of Canadian federalism, provincialist and centralist, are rooted in a mononational approach to the understanding of Canadian federalism. In the other two references, the conflicting visions of Canada, centralist, dualist, and multinational, can be located in the multinational approach, specifically the binational understanding of Canadian federalism. So, in viewing federalism through this lens, mononational and multinational, we recognize that the S.C.C. not only chose one vision over the other, but it reinforced a mononational approach to the understanding of federalism even when it was faced with the multinational interpretation – specifically, the binational view in the Quebec Veto Reference and the multinational view, introduced by the Aboriginal peoples, in the Secession Reference.

THEORIES OF CANADIAN FEDERALISM

Discussing theories of Canadian federalism seems simple enough. However, nothing could be further from the truth. First, as A.R.M. Lower states, “there are no theories [of Canadian federalism], at least none neatly put down in syllogisms and

maintaining up to the dignity of a political philosophy.”⁷ Therefore, in order to uncover the theories of Canadian federalism (or close to them) we must look at past and present court decisions, government actions, and the attitudes of the socio-political community. Second, the meaning of federalism to Canadians is dependent on one’s perception of what the relationship between the provinces and the federal government ought to be and what the relationship between Quebec and Ottawa ought to be or between Aboriginal nations and Canada. Third, we need to acknowledge that the problem in identifying one meaning of Canadian federalism rests in the manipulation of it. That is, the meaning of federalism throughout Canada’s history has been and continues to be manipulated by political actors to fit in or justify a political position or a policy preference.⁸ This is most evident in the different views of the compact reached between the provinces in 1867.

Why Federalism in Canada

There are essentially three reasons why the original provinces of the Dominion of Canada, the United Provinces of Canada (modern day Quebec and Ontario), New Brunswick and Nova Scotia, desired unification and creation of the country: one, politics, two, economics, and three, security. The first, political reasons, mainly dealt with the failure of the United Provinces of Canada. This failure frustrated both the English and the French. It was thought that unification of British North America would alleviate the tensions between the two ethnic communities. Second, economics concerns which were brought about by a new policy of Britain. The British government had ended its practice of favouring Canadian exports. In creating a new country it was intended to establish a

⁷ A.R.M Lower, “Theories of Canadian Federalism: Yesterday and Today,” 5.

⁸ Edwin Black, *Divided Loyalties* (Montreal: McGill Queen’s University Press, 1975) 7.

market from sea to sea with a nation-wide railway to facilitate this new economy.

Attached to this new market and railway was also the desire to expand the West. In order to fulfill these desires, the unification of the independent colonies was needed. Finally, the threat of the United States placed the security of these colonies in peril. The small colonies were unable to defend themselves against the Americans. As such, it was thought that the colonies would be better able to defend themselves if they joined forces.⁹ As Lower points out, two overall goals underpin the purpose of Confederation: one, to create a central government and two, 'the British North America Union was to be a Union for the defense against the United States.'¹⁰

During the debates leading up to Confederation, there were different ideas of what a new nation would look like. Sir John A. Macdonald, for one, had hoped for a unitary state, similar to that of Britain. It was argued by him, and others, including George Brown, that a strong central government was needed in order to fulfill the desires of a new economy, expansion of the West and a strong military able to fend off the Americans. However, this was rejected by Canada East (Quebec) as its leaders felt that a Dominion of Canada, with a unitary government reflecting Britain, would put their language and culture into jeopardy. The Maritime colonies rejected Sir John A. Macdonald's intention as well, as they feared it would lead to the loss of independence and identity that had developed in the colonies prior to Confederation. Therefore, a form of government, reflecting their neighbours to the South was the compromise.¹¹

⁹ Ian Robinson and Richard Simeon, "The Dynamics of Canadian Federalism," in *Canadian Politics, 2nd edition*, ed. James Bickerton and Alain G. Gagnon (Peterborough: Broadview Press, 1995) 372.

¹⁰ Lower, "Theories of Canadian Federalism: Yesterday and Today," 10.

¹¹ *Ibid.*, 16:

Lower in fact argues that without the acceptance of George Etienne Cartier's blues, there would have been no Confederation. Cartier was able to accept the compromise of federalism because of the language and the religious guarantees.

Various theories, theories that remain politically vital today, emerged to explain the purposes and goals of Confederation and Canada's adoption of federalism. The most notable include the provincial compact theory which asserts the equality of the provinces and the equality between the two orders of government, the dual compact theory or the compact of cultures which holds that since Canada was founded by two people, the French and the English, the federation ought to reflect this component, and the no compact theory which maintains that at the time of Confederation there was no pact thus, the federal government is not obliged to observe the implied obligations of the previous two theories: unanimity of the provinces or the approval of the Quebec government respectively, when amending the Constitution. These theories remain important today as they underpin and inform the distinct visions of Canadian federalism held by past and current political leaders and form the basis of the distinct constitutional visions presented to the Court in the four references.

Competitive and dual image federalism

Beginning in the Sixties,¹² Canadian federalism took on a very competitive nature most notable in the struggles between nation building and province building on one level and pan-canadianism versus Quebec nationalism on the other. This period was

¹² J.R. Mallory, "Five Faces of Federalism," in *Canadian Federalism: Myth Reality*, ed., Peter J. Meekison (Toronto: Metheun, 1977):

Mallory considers the period beginning in the Sixties up until and including the Eighties. I would, however, would extend this period to include present day actions of the federal government. During the Nineties, Brian Mulroney, through the Charlottetown Accord, attempted to correct the mistakes of the Meech Lake Accord by including the Aboriginal nation and interest groups into the constitutional fold and negotiations, while adhering to the demands of Quebec and the other provinces. Such attempts were also evident under the Jean Chrétien government through the Calgary Declaration and the Social Union Contract. Finally, under the present day Stephen Harper government, we are witnessing Harper's attempts to appease Quebec by acknowledging that the provinces form a nation within a united Canada. Also, through Harpers commitment to open federalism in order to address the current fiscal imbalance, we see how the Harper government is attempting to deal with the demands and struggles of the provinces vis-à-vis the federal government.

overwhelmed by the constitutional, political and institutional struggles between the two levels of government. In fact, Simeon and Robinson have recognized this phase of Canadian federalism as competitive federalism. Mallory, with similar undertones, has named this phase as dual image federalism.

The Quiet Revolution in Quebec triggered this new phase of Canadian federalism. The government, under the Lesage Liberals, looked to expand its role, and the role of all of Quebec for that matter, politically, socially and economically, in order to fulfill its new goal of becoming *maître chez nous*. The government of Quebec began with adopting a new national strategy of preserving and enhancing the French language and culture. This responsibility was to be bestowed upon the National Assembly by its people; thus it needed the necessary powers to fulfill this new and ever important task. Upon the death of Duplessis, leader of the governing party in Quebec, the Union Nationale, and the election of the Lesage Liberals, the new middle class looked to re-assert the role of French Canadians both economically and politically and both within its borders and within Canada. They were no longer willing to sit back and watch the centralization of Canada and slowly lose its language and culture. Underpinning their claim and their new agenda was the dual compact theory: "Canada is in fact a country based on the co-existence of these two cultures [English and French] and is better for it."¹³ The Constitution, therefore, should reflect this reality.¹⁴

Quebec, however, was not the only province to resist Trudeau's desires for a strong central government. Essentially, the wealthier provinces, Alberta, British

¹³ Ibid., 29.

¹⁴ This is a brief account of the Quiet Revolution. In the following chapters, more detail will be offered. However, for a more complete picture of the ideologies, goals, gains and implications of the Quiet Revolution, please see Kenneth McRoberts, *Quebec: Social Change and Political Crisis: 3rd Edition* (Don Mills Ontario: Oxford University Press, 1993); John F. Conway, *Debts to Pay: The Future of Federalism in Quebec*, Third Edition. (Toronto: Lorimer, 2004).

Columbia, and Ontario, desired for the devolution of powers and greater control over its respective economies. These sentiments and aspirations “reflected the growing resources, competence and confidence of provincial governments and the bureaucracies, which, fuelled by federal transfers, had been growing much faster than the federal government’s.”¹⁵ The provinces began to resent and refuse to accept federal definitions of the national standards and priorities. Furthermore, the provinces, in light of the volatile and unstable economy, looked to secure and “control the policy levers to assure their ability to manage the economy.”¹⁶

In *Canada in Question: Federalism in the Eighties*, 3rd ed., Donald Smiley discusses the compound crisis of Canadian federalism. In his sixth chapter, he outlines “three sets of relations which have in the most elemental way determined Canadian nationhood.”¹⁷ French-English relations, the Centre and the peripheries, and the Canadian – American Relations.¹⁸ Only the first two are relevant for the purposes of this study. The first axis, French – English relations, is concerned with finding a workable solution, satisfying to both, between Canada’s two linguistic groups.¹⁹ It is mainly concerned with Canada’s dualistic nature. The second axis, centre-periphery, which more or less has been ignored due to the concern with Canada’s duality,²⁰ concerns reaching an economic and political balance between the provinces and regions with each other and with the federal government. It is fuelled with the commitment to provincial

¹⁵ Robinson and Simeon, *The Dynamics of Canadian Federalism*,” 380.

¹⁶ *Ibid.*, 380.

¹⁷ Donald Smiley, *Canada in Question: Federalism in the Eighties*, 3rd ed. (Toronto: McGraw – Hill Ryerson Limited, 1980):

Smiley identifies this structural dimension of the Canadian crisis (the re-establishment of Canadian nationhood).

¹⁸ *Ibid.*, 252.

¹⁹ *Ibid.*, 261.

²⁰ *Ibid.*, 262.

equality and equality between the two orders of government so as to secure economic and political stability.²¹

The manifestation of these two axes can be seen in the conflicting visions of the Canadian federalism played out during the Eighties and the Nineties and in front of the S.C.C. in the Senate Reference, the Patriation Reference, the Quebec Veto Reference and the Secession Reference. Identifying four constitutional visions, the provincialist (or equality of the provinces), the centralizing vision, the dualist vision and the Rights based constitutional vision, Rocher and Smith argue that these different and often conflicting visions are rooted in different political identities.²² They define political identity as “the way individuals perceive their membership in the community upon which political institutions are built.”²³ I would take Rocher and Smith’s analysis one step further to include the nation discourse. At root of Smiley’s identified axes and Rocher and Smith’s constitutional visions is not only a particular understanding of Canadian federalism and how it ought to operate, but also a particular vision of the Canadian nation and how it ought to be reflected in and by the Constitution of the country. By uncovering the way in which the nation is understood in these various visions of Canadian federalism, we can begin to view them under the two approaches to the understanding of Canadian federalism.

²¹ Ibid., 261-268.

²² Francois Rocher and Miriam Smith, “Four Dimensions of the Canadian Constitutional Debate,” in *New Trends in Canadian Federalism*, eds. Francois Rocher and Miriam Smith (Peterborough: Broadview Press, 1995) 46:

Only the first three are considered as the fourth does not necessarily come into play in any of the four references.

²³ Ibid., 46.

KYMLICKA'S TWO MODELS OF FEDERALISM

In *Finding Our Way*, Kymlicka offers two models of federalism in Canada: territorial and multinational. The former is based on the traditional American model fuelled by the thoughts of Publius first articulated in the Federalist Papers; the need for the homogeneity of the federation is stressed. Such thoughts more often than not manifest into a territorial model. I understand this tradition as a mononational approach to the understanding of federalism. Offering the United States as a good example of the territorial model of federalism, Kymlicka argues that “[i]n deciding how to arrange their [those who devised American federalism] federal system, [...], their aim was to consolidate, then expand, a new country and to protect the equal rights of individuals within a common national community, not to recognize the rights of national minorities to self-government.”²⁴ In fact, the sub-units in this mononational approach are understood to be region-based. This spills over into how diversity within a mononation and subsequently a mononational understanding of federalism is perceived. In other words, diversity is based on regional differences and usually centres on economic disparity. The centralist and provincialist visions of federalism can be identified as a mononational approach to the understanding of federalism.

The latter is based on the German model mainly fuelled by theories and views of Althusius and reflects thoughts underpinning treaty federalism. In this model, theorists tend to stress diversity and the need to ensure its vitality. According to Kymlicka, in a multinational federal system, “federalism [...] would have to be seen as a means of

²⁴ Kymlicka, Will, *Finding Our Way*, 137.

accommodating the desire of national minorities for self-government.”²⁵ The understanding of diversity, therefore, is broadened beyond the economic differences, to include socio-political differences. Federalism “seeks to maintain the unity of the larger state, while giving recognition and empowerment to minorities.”²⁶ Federalism is one way of managing diversity in a multinational state. Management of diversity means enabling the flourishing of differences and not the suppression of it. The dualist vision, as well as the multinational vision presented by the Aboriginal nations in the Secession Reference can be understood as a multinational approach. Though Kymlicka refers to the second model as a multinational, I, however, refer to it as a binational approach for the reasons indicated in the introductory chapter.

UNDERSTANDING ‘NATION’

Underpinning these approaches and traditions of federal thought is the concept of nation and the connected debate between mononational democracies versus multinational democracies. Specifically, thoughts of federalism akin to the mononational approach promote and base the idea of federalism on the premise that the federation/state is comprised of one nation – the nation state – which may or may not include constitutionally recognized socially diverse groups. John Rawls’ understanding of society best describes this idea of a mononational federation. “For Rawls, ‘society’ is defined in terms of the nation-state. Each nation-state forms one (and only one) society,

²⁵ Ibid., 138.

²⁶ Simeon, Richard and Conway, Daniel-Patrick. “Federalism and the management of conflict in multinational societies,” in *Multinational Democracies*, eds. Alain Gagnon and James Tully (New York: Cambridge University Press, 2001) 338.

and Rawls' theory applies within the boundaries of each nation-state.²⁷ Kymlicka offers a more complex description of the mononation by considering and making room for cultural diversity. First, he begins by referring to such a state as a polyethnic one comprised of ethnic groups. He then goes on to argue that it is a nation-state which recognizes cultural diversity. Such recognition may include institutional and/or constitutional accommodation etc., in any given form. This description of the society is replicated by political scientists who assume the nation-state to be comprised of only one people and who subsequently adopt a mononational approach to the understanding of federalism. It is also replicated by the federal government in all four references and the provinces in the first two references; all begin from the point that Canada is a one nation state which includes constituent units. Such understanding of course neglects the role and reality of nationhood, other than the dominant nation existent in a federation. In the last fifteen years, however, such conceptualization has been changing.²⁸

Under the multinational approach, the federation/state is more often than not understood to be a multinational one – that is, a state comprised of more than just the majority nation; minority or internal nations exist as well. In his look at cultural diversity, Kymlicka notes two broad patterns: national minorities and ethnic groups. The first “arises from the incorporation of previously self-governing, territorially concentrated cultures into a larger state.”²⁹ The second, on the other hand, usually emerge “from individual and familial immigration [and] often coalesce into loose associations.”³⁰ The difference for Kymlicka rests in that the multination state, cultural diversity manifests or

²⁷ Will Kymlicka and Christine Straehle, “Cosmopolitanism, Nation-States, and Minority Nationalism: A Critical Review of Recent Literature”, *European Journal of Philosophy*, 7:1, (1999): 65.

²⁸ *Ibid.*, 65.

²⁹ Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights*, (Oxford: Clarendon Press, 1995) 10.

³⁰ *Ibid.*, 10.

is understood as nationhood distinct from the nation-state, where the nation wishes to remain autonomous from the dominant nation. In a polyethnic state, however, ethnic groups, more or less, are content to be incorporated into the nation-state while retaining some form of cultural distinctiveness. The ethnic groups do not wish to challenge the nation-state; this, however, does not mean that they welcome assimilation. As Kymlicka argues, "while immigrant groups have increasingly asserted their right to express their ethnic particularly, they typically wish to do so within the public institutions of the English-speaking society (or French-speaking in Canada)."³¹ Understanding society with cultural diversity in mind allows for a broader conceptualization of nation, one that is not narrowed to the idea of the existence of one and only one.

In order to fully understand this idea of and distinction between one nation versus multi-nations, a definition of nation is required. I fear though that the concept of nation and the manifestation of it in the form of 'nationhood' are too diverse and convoluted to generate a theory or definition pleasing and satisfactory to all. Such an exercise will inevitably fall short of encompassing all angles and aspects of the concept. A concrete and universal definition of a nation both in the traditional sense of the nation-state and nations of multinationals, as McRoberts and Angus point out, does not exist.³² The concept is fluid. Balthazar too recognizes this of the concept. In fact, Seton Watson, to whom Balthazar refers, has argued that nation is such an arbitrary concept that it can be said to

³¹ Ibid., 15.

³² McRoberts, "Canada and the Multinational State," 684 and Angus, Ian quoted in McRoberts, "Canada and the Multinational State," 684.

exist “when a significant number of people in a community consider themselves to form a nation, or behave as if they form a nation.”³³

Nonetheless, the necessity of an analysis of ‘nation’ is inescapable. In delving into such an exercise, I will rely heavily upon the work of Balthazar, Maclure, Kymlicka, and McRoberts who have engaged in a review of a plethora of prominent theories put forth to explain the concept of nation, and have succinctly arrived at, though simplified, workable definitions.

Accepting the subjectivity of the concept of nation, Balthazar attempts to normalize it by removing some aspects of the ambiguity and fluidity of the term. He argues that there are common factors that determine the existence of a nation; these include, “common culture, common history, common aspirations, a certain territory and almost inevitably, at least as an embryonic political organization.”³⁴

Balthazar does recognize the existence of nations constructed on a sociological foundation and acknowledges that they too can be resilient.³⁵ However, he does not go further than this in distinguishing between a constructed nation and a non-constructed nation. Nor does he discuss what he means by a constructed nation. Furthermore, he does not acknowledge, in any meaningful sense, the idea of stateless nation. To be fair to Balthazar, the idea of stateless nation is a relatively new study and it is beyond the scope of his objective in this paper. Balthazar, rather than focusing on this area, opts to adopt the above definition of nation and use it as a foundation in his analysis of the evolution of the Quebec nation and Quebec nationalism. He thus inevitably falls prey to the

³³ Seton, Watson, 977:5, quoted in Louis Balthazar, “The Faces of Quebec Nationalism,” in *Quebec: State and Society, 2nd Edition*, ed, Alain G Gagnon (Scarborough: Nelson Canada, 1993) 3.

³⁴ Balthazar, “The Faces of Quebec Nationalism,” 3.

³⁵ *Ibid.*, 4

'commonness bug' and assumptions of homogeneity within a nation; this is specifically addressed by Jocelyn Maclure in *Between Nation and Dissemination: Revisiting the Tension between National Identity and Diversity*

According to Maclure, traditional liberal thought conceptualizes nation as a *homogeneous cultural unit*; it was thought of "as both a political community and a source of identity."³⁶ Maclure accurately points out that Montserrat Guibernau captures well, as does Balthazar, the traditional liberal understanding of nation in her definition; she conceptualizes nation as "a human group conscious of forming a community, sharing a common culture, attached to a clearly demarcated territory, having a common past and a common project for the future and claiming the right to rule itself."³⁷

Maclure suggests that such is no longer the case. Such a narrow understanding of nation and what constitutes a nation excludes such stateless nations including First Nations of Canada and abroad. Further such a definition assumes that all those belonging to any given nation are identical. That is, diversity, or multiple identities, loyalties, sets of principles adhered to and so on, do not exist. In other words *commonness* underpins such a traditional understanding of nation³⁸. The concept of nation and a nation specifically need not be linked to the state or to a territory; nor need it be associated with the idea that it is made up of one homogeneous people with one history, one goal and one set of principles. Instead, he suggests, that the reality of deep pluralism, the idea of

³⁶ Jocelyn Maclure, "Between Nation and Dissemination: Revisiting the Tension between National Identity and Diversity," in *The Conditions of diversity in Multinational Democracies*, ed. Gagnon et al., (Montreal: the Institute for Research on Public Policy, 2003) 43.

For a more through examination and review of the traditional liberal thought, see Jocelyn Maclure, "Between Nation and Dissemination: Revisiting the Tension between National Identity and Diversity."

³⁷ Guibernau, quoted in Maclure, "Between Nation and Dissemination: Revisiting the Tension between National Identity and Diversity," 44-45.

³⁸ Maclure, "Between Nation and Dissemination: Revisiting the Tension between National Identity and Diversity," 44-45.

internal diversities of minority nations, in any given nation demands a redefinition of the concept of nation.

Partly relying on the work of Homi Bhabba, Maclure proposes that we see and begin to understand nation, particularly the “nation as a political space, as a fluid configuration of power/knowledge relationships.”³⁹ Specifically, it is “a continuous and polyphonic process of interpretation and narration and debates over the character of its identity are ongoing and rarely free of dissent.”⁴⁰

Though this definition is broader than the one offered by traditional liberal thought in that it departs from the trap of homogeneity, and introduces the concept of ongoing dialogue and deep pluralism in understanding nation, it fails to provide the reader with a definition, per se, of nation and what constitutes a nation. To be fair to Maclure, he does acknowledge the difficulty of realizing such an endeavour. McRoberts and Kymlicka, going one step further, embrace this idea of deep pluralism and introduce the idea of internal nations or minority nationalism where they incorporate, into their understanding of both nation and internal nations or minority, this idea as well as some degree of the traditional ideas relied upon Balthazar, Guibernau and others.

In his look at nations and cultural diversity, Kymlicka offers the sociological definition of nation: “a historical community, more or less institutionally complete, occupying a given territory or homeland, sharing a distinct language and culture.”⁴¹ Unlike ethnic groups who “wish to integrate into larger society and to be accepted as full members of it,” national minorities question the nation-state ideal by challenging the idea

³⁹ Ibid, 46.

⁴⁰ Ibid., 49.

⁴¹ Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Clarendon Press, 1995) 11.

of one. That is, national minorities “typically wish to maintain themselves as distinct societies alongside the majority culture, and demand various forms of autonomy or self-government to ensure their survival as distinct societies.”⁴² Thus, they and their demands tend not to be easily accommodated within the established institutions of the mononation-state as ethnic groups tend to be, through such policies as multiculturalism, for instance.

McRoberts does not define nation per se; rather, he attempts to expand upon the idea of nations within nations. According to McRoberts, the nation or nations within the nation state are not created by the latter; rather they are constructed. This does not necessarily dismiss the reality of them or their relative strength.⁴³ Similar to the nation-state, nations within nations are based and “supported on social conditions – language, culture, history, media structures, communication networks, and so on.”⁴⁴ From this, his conceptualization of nation emerges. Essentially, McRoberts argues that “nations are the work of nationalist leaderships who try to invest social conditions with *national* meaning, combining them to form a national ideal.”⁴⁵ The nation is understood as a constructed entity. This does not necessarily mean that these *constructed* nations are not viable. On the contrary, once the nation is “defined in terms that are credible to the general population” and the national ideal is embraced, the nation can be quite tenacious.⁴⁶ One can simply think of the Quebec nation and its tenacity and resilience in the face of the many attempts to eradicate the Quebec nation, the sentiments attached to it as well as the associated movement.

⁴² Ibid., 10.

⁴³ McRoberts, “Canada and the Multinational State,” 683-684.

⁴⁴ Ibid., 684.

⁴⁵ Ibid., 684.

⁴⁶ Ibid., 684.

The concept of nation is further complicated when we factor in the reality that there is not only one type of nation. The concept of nation does not begin or end with the idea that nations are political ones alone or that they are specifically associated with a particular territory. Sociological nations (or stateless nations) which can in fact be a minority nation, do factor into the equation. These sociological nations can, and some do, have a political agenda and political force. McRoberts offers the Catalonia and Basque nations as two good examples of sociological nations with both a political agenda and political force. The Aboriginal nations in Canada can be considered as sociological nations with a political agenda; however, they do not necessarily have the economic and/or political force of the Catalonia and Basque nations in Spain or of the Quebec nation in Canada. This idea of sociological or minority nations raises the issue of multiple identities of individuals forming the nation. At no time does McRoberts presume that these minority nations ascribe to a single identity. In fact, members can and sometimes do identify with both the majority and the minority nation.

In light of the ambiguity of the concept and the debates and issues which flow from it still being reconciled by political scientists in Canada and abroad, McRoberts has resolved to refer to the multiple nations as internal nations. Kymlicka, on the other hand refers to them as national minorities understood as “ethnocultural groups which think themselves as nations within a larger state.”⁴⁷ The two terminology are one in the same as both terms “can embrace all forms of nations which see their collectivity as being smaller than (or internal to) the state as a whole.”⁴⁸ The definition of nation, be it internal/minority nation or majority nation remains unchanged; both Kymlicka and

⁴⁷ Will Kymlicka and Christine Straehle, “Cosmopolitanism, Nation-States, and Minority Nationalism: A Critical Review of Recent Literature.” *European Journal of Philosophy*, 7:1, (1999): 66.

⁴⁸ McRoberts, “Canada and the Multinational State,” 685.

McRoberts have broadened upon the traditional liberal understanding of nation to include the idea that a nation need not be specifically connected to a state or territory – so a stateless nation – however, the common factors distinguishing a nation from a diverse group remain firm in the ideas espoused by Guibernau and Balthazar reviewed above. ‘Common’, however, should not be considered through the narrow lens of homogeneity, as Maclure suggests. Rather, we should regard the factors to be at least congruent, meaning from a similar position or towards a similar end.

The question that needs to be addressed and that has not been looked at specifically by the authors reviewed above, is whether or not a nation needs to be recognized by the “Other”, that is another recognized nation, specifically in the case of internal or minority nations, in order for it to not necessarily exist, but enjoy the benefits of being a constitutionally recognized nation. The benefit I allude to specifically is the right of self-determination. McRoberts acknowledges that nation needs to be defined in terms that are accepted by the general public to ensure its legitimacy and acceptance. He does not, however, specify whether it is the general public belonging to the nation under question or a general public within the said nation and those of other nations. Tully also touches upon this issue when he acknowledges that nations aspire to be recognized both internally and externally. However, it is not necessarily clear, although it may be argued that it is implied, whether the acceptance and recognition of the existence of a nation, the compliance of the state’s government of another nation would suffice or if the embracing by the people in general is required.

It is my belief that in order for a nation to enjoy the benefits attached to recognized nationhood, specifically the right to self determination which may or may not

lead to the right to secede; it must be constitutionally recognized as such. This is not to say that a nation, not recognized constitutionally or openly by another nation, is not a nation or is meaningless; sociologically and politically, the importance of identifying oneself as a nation remains.

The nations of Quebec and the Aboriginal Peoples of Canada serve as good examples in illustrating this last point. Both the Quebec and Aboriginal nations have made great strides through their adoption of the nation discourse, despite the fact that under the Canadian Constitution neither of the two is recognized as such.⁴⁹ For instance, Aboriginal groups have gained a seat on the constitutional negotiation table, first enjoyed during the Charlottetown Accord discussions. Quebec, however, has been more successful, regardless of which type of party, federalist or separatist, sits as government, in its adoption of the nation discourse. This is especially true of its accomplishments on the international scene. Stéphan Paquin argues “when it comes to its commitment to international relations, Quebec is one of the leading sub-national governments in the entire world.”⁵⁰ Its Ministère des Relations Internationales has “28 mini embassies, has signed more than 550 international ‘ententes’ or agreements, most of them with sovereign states.”⁵¹ As a result, Quebec has expanded its presence abroad. According to Paquin, nationalism has led them to engage in such nation building strategies on the international scene. Flanders and Catalonia have engaged in similar tactics and actions, but not to the same extent as Quebec. Similar to Quebec, however, such activity is fuelled by nationalism and sustained through the adoption of nation discourse.

⁴⁹ This by no means is an assertion that the adoption of the nation discourse alone has led to the accomplishments and the political and sociological advancements of these two nations.

⁵⁰ Stéphan Paquin, “Relentless Internationalism,” in *Diplomat and International Canada*, Vol, 6 No. 4, (July-August 2006) 17.

⁵¹ *Ibid.*, 17.

Nonetheless, they have been stifled in realizing their full potential as a nation, be it to secede, increased powers for their representative government, or self-government, mainly due to the reality that constitutionally they are not recognized as nations; this also serves to prevent them from being regarded, by the nation-state, as nations equal to the nation-state, legitimately able to make such demands from the nation-state.

For the sake of brevity and simplification, adopting Tully's and Kymlicka's definitions, reviewed earlier, mononational democracy is understood as a state composed of one nation, the nation state, which recognizes culturally diverse groups. Accordingly, a mononational approach to the understanding of federalism champions such idea. Multinational democracy, on the other hand, is understood as a state comprised of more than just the majority nation; it goes beyond the idea of multiculturalism to include minority or internal nations. Nation is understood to be, adopting a combination of Balthazar and McRoberts, a people supported on, not necessarily common, but at least congruent, social conditions including, history, culture, language, political goals and endeavours, media structures, et cetera. A multinational approach to the understanding of federalism, therefore, embraces this perception of the federation. Taking this into consideration, we can view the first two constitutional visions identified by Rocher and Smith, centralist and provincialist, as a mononational approach to the understanding of federalism, and the third vision, the dualist, as a multinational approach.

Both the provincialist and centralist visions are rooted in the idea that Canada is made up of one nation, the Canadian nation. The difference between the two rests in the relationship between the two orders of government and the manifestations of this in a federative form of governance. Specifically, are the two orders of government equal to

each other, leading to a classical or decentralized form of federalism? Or, are the provinces subordinate to the federal government thereby justifying a centralized federation? These two visions, with the one nation idea at their root are in direct contrast to the dualist (or multinational) which begins from the premise that Canada is made up of more than one nation. An asymmetrical form or confederal model of federalism would best reflect this bi or multinational federation.

CATEGORIZING FEDERALISM (AND VISIONS): MONONATIONAL AND MULTINATIONAL

In its simplest form, the understanding of federalism, regardless of which approach it is classified as, is reduced to a *federal bargain* between autonomous units. According to Elazar, federal means covenant. One way in which a polity comes together into existence is through a covenant, which is understood as choice. It “emphasizes the deliberate coming together of humans as equals to establish bodies politic in such a way that all re-affirm their fundamental equality and retain their basic rights.”⁵² Federal is understood as a ‘matrix’; the constituent units are equals “who come together freely and retain their respective integrities even as they are bound in a common whole.”⁵³ Elazar equates covenant with federal; the two concepts are one and the same. Thus a federal arrangement constitutes a “partnership established and regulated by a covenant, whose internal relationships reflect the special kind of sharing that must prevail among the

⁵² Daniel Elazar. *Exploring Federalism* (Tuscaloosa, Alabama: The University of Alabama Press 1987) 4.

⁵³ *Ibid.*, 4.

partners, based on a mutual recognition of the integrity of each partner and the attempt to foster a special unity among them.”⁵⁴

MONONATIONAL FEDERALISM

Conceptions of federalism in the mononational fashion stress the political structure of federalism. Mononational federalism is defined, “first in terms of constitutional law and then in terms of political relationships which had developed on the basis of the constitutional provisions.”⁵⁵ It is understood as the division of power between at least two levels of government, which guarantees independence and autonomy for the sub-units within its sphere of jurisdiction while maintaining a strong national government; this ensures stability and order. The sub-units are regarded as political units alone and not necessarily as communities, and definitely not as nations. Furthermore, social diversity (at times associated with nationhood) and the management thereof, does not necessarily factor into the understanding of federalism. The essence of federalism is understood, under this first approach as the bringing together of autonomous political units to form one larger unit. A country is understood as forming one nation, the promotion and security of which rests with the national government. Securing stability and order are at the heart of federalism in this larger category.

The strictly legal and constitutional understanding of federalism associated with a mononational approach is best articulated by Stephen Brooks:

A federal system of government is one in which the constitutional authority to make laws and to tax is divided between a national government and some number

⁵⁴ Ibid., 5.

⁵⁵ A.H. Birch, “Approaches to the Study of federalism,” in *Canadian Federalism: Myth or Reality*, ed. Peter Meekison (Toronto: Methuen Publications, 1968) 3.

of regional governments. Neither the national government acting alone nor the regional governments acting together have the authority to alter the powers of the other level of government. They are co-ordinate and independent in their separate constitutional spheres.⁵⁶

Brooks acknowledges the sociological understanding of federalism; however, he prefers the constitutional understanding for two reasons: first, if one looks just at society, then hardly any country would classify as federal.⁵⁷ Brooks here assumes that the sociological approach to the understanding of federalism omits constitutional aspects, which is simply not true. Second, Brooks feels that the constitution embeds the division of powers, thus elevating “the political significance of regional differences.”⁵⁸ Here he assumes, as do others adopting this approach, that political significance can only be achieved through a constitutional division of powers and not through sociological importance attached to a level of government. This idea is further emphasized in how the federal bargain is perceived.

The federal bargain

An important and necessary condition of the federal bargain is the willingness of every party to engage in such an endeavour. The federal bargain, under the mononational approach is understood as *the coming together of autonomous political sub-units to form one larger unit*⁵⁹. According to Wheare, the autonomy of units is favoured over the unity of the whole. Emphasis is placed on the division of powers so as to ensure the institutional independence of the sub-units; this would, in turn, maintain their autonomy.

⁵⁶ Stephen Brooks, *Canadian Democracy: An Introduction, 2nd edition* (Toronto: Oxford University Press, 1996) 119.

⁵⁷ *Ibid.*, 120.

⁵⁸ *Ibid.*, 120.

⁵⁹ Alain- G. Gagnon, “The Moral Foundation of Asymmetrical Federalism: A normative Exploration of the case of Quebec and Canada,” in *Multinational Democracies*, ed. Alain Gagnon and James Tully (New York: Cambridge University Press, 2001).

In this light, the goal or purpose of federalism is to bring together independent units to form a single nation while maintaining a level of independence.⁶⁰ This idea of *independence*, however, is not understood as full sovereignty or full autonomy; instead, it is understood as a controlled independence so as to eliminate the possibility of a civil war or civil unrest.⁶¹ This controlled independence also limits the level of autonomy *granted* to the sub-units.

The federal bargain under the mononational approach tends to be viewed in rational terms by the employment of cost/benefit analysis. As is so succinctly argued by Brooks, the federal bargain “involves agreement among regional components of the federal state that has benefits of being part of the union which exceed whatever costs membership may impose.”⁶² Federalism, therefore, is based on *a consensus of regions*. It is this idea which underpins the provincial compact theory of federalism as supporters of this theory stress that the Confederation was the coming together of constituent units. They did not relinquish their autonomy. Thus any change to the original agreement must be approved by the constituent units, in this case the provinces. This of course is in contrast to the ‘no’ compact theory, which holds that at the time of Confederation, the provinces were not in the legal capacity to sign a ‘compact’. Thus no compact exists.

Underpinning the idea of shared rule and self-rule is the notion of hierarchy amongst the levels of governments. Regional individuality is secured; however, it is a controlled individuality. Autonomy is maintained, but again, it is autonomy for certain

⁶⁰ Gilles Lalonde, *In Defence of Federalism: A View From Quebec*, (Toronto: McClelland and Stewart Limited, 1978) 34.

⁶¹ Preston King, “Federation and Representation,” in *Comparative Federalism and Federation: Competing Traditions and Future Directions*, ed. Michael Burgess and Alain Gagnon (Toronto: University of Toronto Press, 1993) 22.

⁶² Stephen Brooks, *Canadian Democracy: An Introduction, 2nd edition* (Toronto: Oxford University Press, 1996) 121.

purposes only. Unity, understood in terms of homogeneity, stability and order, is favoured over the recognition and management of socio-political diversity.

Publius understands federalism, more specifically the idea of independent sub-units coming together, as a *confederate republic*. Federalism, in other words, is an “assemblage of societies” where these societies are sovereign in their own right though subordinate to the union government so as to ensure homogeneity of the nation and in turn a united federation based on stability and order:

The definition of a *confederate republic* seems simply to be “an assemblage of societies” or an association of two or more states into one state. The extent, modifications, and objects of the federal authority are mere matters of discretion. So long as the separate organization of the members is not abolished; so long as it exists, by a constitutional necessity, for local purposes; though it should be in perfect subordination to the general authority of the union, it would still be, in fact and in theory, an association of states, or a confederacy. The proposed Constitution, so far from implying an abolition of the State governments, makes them constituent parts of the national sovereignty, by allowing them a direct representation in the Senate, and leaves in their possession certain exclusive and very important portions of sovereign power. This fully corresponds with the idea of a federal government.⁶³

Emerging from such a conceptualization of the federal bargain is the idea of centralized or decentralized federalism⁶⁴.

Vision One: Centralism

This first vision is based on a territorial political identity; the only legitimate political identity is the Canadian one. Others including provincial, regional, nation, are secondary. In light of this, subscribers of this constitutional vision favour a strong federal

⁶³ Publius, *The Federalist Papers: Alexander Hamilton, James Madison, John Jay: (with an introduction, table of contents and index of ideas by Clinton Rossiter)* (New York: New American Library, 1961) 9.

⁶⁴ The reason decentralization is adopted under this approach are most likely different from those under the multinational approach. For the former, order and stability may be best suited under a decentralized form of federation. For the latter, decentralization is adopted in order to best manage and enable the flourishing of socio-political differences.

government and as such advocate for a centralized federation. At root of this vision is the idea that at the time of Confederation, there was no compact between the provinces or between the constituent units and the federal government.

Eugene Forsey⁶⁵ argues that Canada, with regard to its political aspects, is one nation; the proof is in the 'clear' intentions of the Fathers and the plain terms of the British North America Act⁶⁶. It was believed that in order for Canada to succeed politically, economically and socially, a strong central government was required.⁶⁷ Beginning in the 1930s, and taking shape during the Great Depression, centralists and social democrats began to denounce the existence of a compact, and subsequently, any obligations and implications associated with this compact⁶⁸. For instance, Desmond Morton has argued, in *A Short History of Canada*, that "as an historical interpretation of what happened in the 1860s, the compact theory is absurd."⁶⁹ According to Dawson, the compact theory, believed to be formed out of the Quebec Resolutions is without historical or constitutional basis. The simple fact remains that the "only legislative authority or approval behind the Canadian Constitution was that of the Imperial Parliament. Neither the legislatures nor the people of the provinces had given their consent to the terms of union as set out in the B.N.A. Act."⁷⁰ Social democrats argued that a strong central

⁶⁵ Eugene Forsey, *Freedom and Order* (Toronto: McClelland and Stewart Limited, 1974) 253.

⁶⁶ Whether the intentions of the Fathers are clear is quite questionable; at the time of Confederation it is often argued that there was no one clear and unanimous consensus amongst the Fathers.

⁶⁷ Rocher and Smith, "Four Dimensions of the Canadian Constitutional Debate," 57.

⁶⁸ Desmond Morton, *A Short History of Canada* (Toronto: McClelland and Stewart Limited, 1994) 93.

⁶⁹ *Ibid.*, 93

⁷⁰ Robert MacGregor Dawson, *Constitutional Issues in Canada, 1900-1931* (London: Oxford University Press, 1933) 40.

government, which inevitably means certain extra powers for the federal government, was required to alleviate some of the effects of the Great Depression.⁷¹

In reaction to Quebec nationalism the third variant, as identified by Rocher and Smith, arose; the Trudeau or pan-Canadian vision. This vision further stressed the idea that as a citizen of Canada, you belong to the Canadian community first. The identification with a province, a region or another nationality, other than the Canadian, is second.⁷² In light of this, the federal government acts on behalf of all citizens, who are all regarded as equal. Furthermore, the federal government can and should override the narrow interests of the provinces in order to serve Canadians better. As a consequence, subscribers of this vision reject both decentralized and asymmetrical federalism as both hinder the fabric of a unified Canadian identity. According to Rocher and Smith, this vision justified the nation building projects of the Trudeau government including the multiculturalism and the National Energy Program, and most importantly the Canadian Charter of Rights and Freedoms.⁷³

This first constitutional vision, premised on the existence of no compact and on centralized federalism, then indicates that the federal government need not obtain provincial consent to amend the Constitution as the federal government would be acting in the best interest of all Canadians. Further it essentially implies the existence of a hierarchy of levels between the two orders of government, with the provincial governments subordinate to the central government. The federal government, because it represents all Canadians, is the only legitimate body to act in the best interest of Canada.

⁷¹ Rocher and Smith, "Four Dimensions of the Canadian Constitutional Debate," 58.

⁷² *Ibid.*, 59.

⁷³ *Ibid.*, 59.

Vision Two: Provincialism

Essentially this provincialist view of Canadian federalism asserts that the provinces are equal to the federal government and this should be reflected in the Canadian constitutional framework.⁷⁴ This view of federalism took on the form of the compact theory of Confederation. Subscribers of this version of the compact theory hold the “view that Confederation was a contractual agreement among the provincial governments.”⁷⁵ Individual and autonomous governments came together to form a union; federalism was adopted as a form of governance in order to ensure that the provinces were able to maintain their autonomy.

In fact, this theory asserts the primacy of the provinces, rather than the federal government as the building blocks of the Canadian community. Loranger, one of the first to pioneer the compact theory, believed and argued that the provinces are not subordinate to the federal government.⁷⁶ In fact, it was out of the provinces relenting some of their powers that the federal government was created. In the representation of citizens, the powers of the provincial premiers are equal to those of the Prime Minister.⁷⁷ The first community of belonging is the provincial community and then the national one. The federal government therefore, is not in a position to speak for provincial interests.⁷⁸

In contemporary Canadian politics, this theory is understood as the promotion and respect of the principle of provincial equality signalling that, not only are provinces equal to each other, but to the federal government as well (classical federalism). This vision

⁷⁴ Ibid., 47.

⁷⁵ Stevenson, *Unfulfilled Union*, 40.

⁷⁶ Kenneth McRoberts, *Misconceiving Canada: The Struggle for National Unity* (Toronto: Oxford Press, 1997) 16.

⁷⁷ Rocher and Smith, “Four Dimensions of the Canadian Constitutional Debate,” 48.

⁷⁸ Ibid., 48.

also asserts that each party is sovereign within its jurisdiction; the constituent units making up the nation retain both their sovereignty and autonomy. Further, this vision emphasizes not only regional representation at the centre but equal and effective representation of the regions in the Senate (Triple E Senate).⁷⁹ This also extends to the way provinces are regarded in the federation. As such, subscribers of this provincialist vision reject the idea that one province is distinct or deserving of special status; to single out one province, in this case Quebec, is unjust⁸⁰. As such this vision is in direct conflict with the dualism vision as well as the centralism vision; the former puts into doubt the equality of the provinces and the latter questions the principle of the equality of the two orders of government.

If we accept this constitutional vision as a premise, then “the logical conclusion is that no changes can be made to the original agreement without the unanimous consent of all the parties to that agreement.”⁸¹ Underpinning this assertion is the idea that both levels of government have an obligation to each other and to the Constitution to respect the division of powers.

MULTINATIONAL FEDERALISM

According to Will Kymlicka, “a genuine multination federation will tackle new challenges on the basis not of ‘majority versus minority’, or ‘superiority versus subordinate’, but of consent and shared sovereignty.”⁸² Thus, as Hueglin argues, the idea

⁷⁹ Ibid., 48

⁸⁰ Ibid., 49.

⁸¹ David Kwavnick, *The Tremblay Report*, Ottawa: Carleton Library No. 64, McClelland and Stewart Ltd., 1973, p. x.

⁸² Kymlicka, *Finding Our Way*, 138.

of the separation/division of powers is meaningless if we do not consider the socio-economic and socio-cultural factors.

The federal bargain

Under the multinational approach to the understanding of federalism, the federal bargain is perceived as a compromise and a balance of interests. Livingston argues that federal systems are characterized by the reconciliation of two demands: autonomy and independence for the component units on the one hand, and centralization and the suppression of diversity on the other.⁸³ For Althusius, federalism is understood as “a plurality of partially autonomous communities tied together and interconnected in a common political architecture.”⁸⁴ He stresses two main points: first, the communities, also understood as sub-national units, need liberty and autonomy; and second, these communities deserve protection from national majorities. “Althusius’ federalism is more a societal, not a governmental federalism; it is a process of organizing the plurality of interests in a co-operative and mutually agreeable way - on the basis of consent and solidarity.”⁸⁵

Burgess and Gagnon, contributing to this idea of federalism as a compromise and a balance of interests, state that federalism, in the political sense, directly engages the endless public debate about political authority and power - how human relations are best

⁸³ W.S. Livingston, “A Note on the Nature of Federalism,” in *Canadian Federalism: Myth or Reality*, ed. Peter Meekison (Toronto: Metheun Publications, 1968) 26.

⁸⁴ Thomas Hueglin, *Early Modern Concepts for a Late Modern World: Althusius on Community And Federalism* (Waterloo: Wilfrid Laurier University Press, 1999) 11.

⁸⁵ *Ibid.*, 11.

organized in order to accommodate, preserve and promote distinct identities.⁸⁶ They view federalism as a value concept; it is located within the federal principle, which is the idea of balancing unity and maintaining diversity with the underpinning goal of accommodating human association. In short, Burgess and Gagnon acknowledge federalism as a tool used to manage diversity and accommodate, preserve and promote distinct identities at the sub-national level.

Taking this one step further, for James Youngblood Henderson, federalism, specifically treaty federalism, is a nation-to-nation relationship where the nations co-exist and share the same territory – each governing along their own customs and traditions. Key to this understanding of the federal bargain is that each nation is regarded as a nation thus remains equal to the other. Further, each nation remains sovereign and autonomous – “each has a right to govern itself without the interference of the other.”⁸⁷

The basic point arising from the theories of federalism falling under this approach is that federalism is a reflection of society and its diversity; it is not only about constitutional and legalistic matters.⁸⁸ “The essence of federalism lies not in the institutional or constitutional structure but in the society itself. Federal government is a device by which the federal qualities of the society are articulated and protected.”⁸⁹ From this, the dualist (as well as the multinational) vision emerges.

⁸⁶ Michael Burgess, “Federalism and Federation: a Reappraisal,” In *Comparative Federalism and Federation: Competing traditions and Future Directions*, ed. Michael Burgess and Alain Gagnon (Toronto: University of Toronto Press, 1993) 3.

⁸⁷ Kiera Ladner, “Treaty Federalism: An Indigenous Vision of Canadian Federalisms,” in *New Trends in Canadian Federalism, 2nd ed.*, ed. Francois Rocher and Miriam Smith (Toronto: Broadview Press, 2003) 191. See also, Henderson, “Empowering Treaty Federalism.”

⁸⁸ Birch, “Approaches to the Study of federalism,” 4.

⁸⁹ Livingston, “A Note on the Nature of Federalism,” 22.

Vision Three: Dualism

Subscribers of the third constitutional vision assert that the B.N.A. Act was entered into and established by two founding nations. The provincial compact theory was embraced by political activists within the province of Quebec and reinterpreted in what came to be known as the compact of cultures or the dual compact. Confederation was a compact between the provinces to deal with the vast diversity; in fact federalism was adopted because of the diversity within Canada.⁹⁰ Further, Confederation was a compact between the two linguistic groups to deal with the aspirations of Lower Canada (Quebec).⁹¹ Affirming Canada's dualistic nature, this theory is "based on the contention that Canada was established through an agreement of two founding peoples, the francophones and the anglophones." [These two peoples agreed] "that Canada should be a country inhabited by two nationalities and that the new nation, Canada, should recognize its bicultural nature."⁹² As such, there is an implied obligation that governments ought to promote and preserve Canada as a bi-cultural state (today it is often referred to as a binational state by, mainly, Quebecois nationalists).

This idea of a dual compact came into play with the Quiet Revolution and the emergence of modern Quebec nationalism. The belief is that Quebec is the homeland of French Canada, so the National Assembly should have the power to protect and enhance the French language and culture in order to serve its citizens better. This constitutional vision is not necessarily a rejection of Canada; it simply asserts that certain powers in the area of culture are required to ensure the vitality of the Quebec nation. The province of

⁹⁰ Rocher and Smith, "Four Dimensions of the Canadian Constitutional Debate," 52.

⁹¹ *Ibid.*, 48.

⁹² Ramsay Cook, "Provincial Autonomy, Minority Rights and the Compact Theory, 1867-1921," *Studies of the Royal Commission on Bilingualism and Biculturalism*. Ottawa, 1969, 51

Quebec is viewed as a nation within a nation and the constitutional framework ought to reflect this. As such, subscribers of this theory promote the idea of a highly decentralized state or an asymmetrical form of federalism and reject both the principle of equality of the provinces and a highly centralized state.⁹³ This desire for asymmetrical federalism is also advocated by the Aboriginal Peoples as they feel that through this form of federalism they are able to have their inherent right of self government adequately implemented. This position of the Aboriginal peoples puts the two-nation concept projected by the dualism vision in question. Conceiving Canada as a dualist state ignores the historical and current role of the Aboriginal community in the development of Canada. As a result a new concept has emerged in contemporary Canadian politics; Canada as a multinational federation has now been put into play.⁹⁴ Constitutionally and politically this dualism vision asserts that the consent of the Quebec government, as it represents the people of a nation within Canada, is needed in amending the Canadian Constitution.

The struggles of the different and conflicting visions of the way in which the federation ought to operate were widely expressed during the constitutional talks of the Seventies and of the early Eighties. Further they were actively present in the arguments presented to the Court in the four references. On the one hand, there were the provinces (at times including Quebec and other times excluding her), with their provincially centred view of Canadian federalism, who argued for the recognition of ten provinces equal to each other and to the federal government. On the other hand, was the federal government who endorsed the centralizing view of pan-Canadianism, under which the provinces were regarded as equal, however, Canada was more than the sum of its parts. Thus a strong

⁹³ Rocher and Smith, "Four Dimensions of the Canadian Constitutional Debate," 54.

⁹⁴ *Ibid.*, 56.

central government was needed in order to realize and strengthen the national identity. This struggle was further complicated with the Parti Quebecois' views of Canada, in which it argued that Canada was made up of two equal nations and certain special powers ought to be allotted to the province of Quebec in order to ensure the vitality of the French nation through the preservation and enhancement of its language and culture. What is important to note is that the constitutional debate and visions of Canadian federalism are no longer only about historical and institutional matter political and national identity⁹⁵ and concepts of nationhood also play a role.

CONCLUSION

It is evident in all four references that there are contrasting views of Canadian federalism which the Court had to settle. The first two references speak directly to the ownership of the Constitution and the role of the provinces vis-à-vis the Constitution. Thus the contrasting visions present in these two references can be located within the territorial or mononational approach to the understanding of federalism. The nation state made up of one nation is not questioned. In fact, it is not even raised as an issue. Rather the issue of these two references is centred on the relationship between the two orders of government. Are they equal to each other, thus both having a role to play in amending the Constitution where the amendment affects their powers and the relationship between the two orders of government? Or, are the provinces subordinate to the federal government, thus their consent is not necessarily required in the amending of the

⁹⁵ Ibid., 64.

Constitution, even if the amendment affects provincial powers and/or federal-provincial relations?

In the second set of References, the question of nationhood outside the Canadian nation-state is put directly to the Court. It is at this point of this study that the multinational approach, in general, and the bi-national approach, in particular, comes into play. The contrasting visions are not centred only on the struggle between the provinces and the federal government. Rather, the issue is centred on the struggle between nations. The Quebec Veto Reference and the Secession Reference deal with the French Canadian nation manifested in the Quebec National Assembly and Quebec government and speak specifically of the English Canadian nation versus the Quebec nation.⁹⁶ If it is true that the people of Quebec form a nation equal to the Canadian nation, then its consent was required when the Constitution was patriated. Emerging from this perception, Quebec as a nation does have the right to self-determination which may or may not lead to a right to declare independence. If however, the opposite is the case and Quebec is simply a province like the others, then not only was the patriation process legitimate, despite Quebec's lack of consent; but also, Quebec as a province of Canada, may not have the right to self determination. The opinions rendered in these second set of references has definite implications on how the Canadian federation is understood. Is Canada a one nation state? Or, is it a federation made up of more than one nation equal to one another?

⁹⁶ Interveners of the Secession Reference, submitted arguments concerning the rights of First Nations and the obligations the federal government has vis-à-vis the Aboriginal peoples of Canada, including those within the provincial boundaries of Quebec. The Supreme Court, however did not fully explore these issues in their written decision. This point will be elaborated upon in the sixth chapter of this dissertation.

In the Secession Reference, the Aboriginal Peoples as a nation is discussed at some length by the various interveners representing different Aboriginal groups,⁹⁷ in the factums they submitted to the S.C.C. As well it is slightly alluded to by the Court in their opinion. However, the main focus remains the struggle of the Quebec state and its ability to secede unilaterally⁹⁸.

To a certain degree, it was left to the Court in the Senate Reference, Patriation Reference, Quebec Veto Reference and finally the Secession Reference who was confronted with the challenge to reconcile these conflicting visions and struggles between the provinces and the federal government and between the Canadian nation and the Quebec nation when the political players were unable to through the traditional means of federal-provincial relations. In this sense then, there is some truth in the statement of Justice Lamer; the S.C.C. has been asked to come to the rescue. In 'rescuing the nation' from the political impasse present in each of the four references, the Court, because it was faced with conflicting constitutional visions rooted in different conceptions of the nation, was asked to give its opinion on the nature of the Canadian nation as it pertained to the political issue of the particular reference. The Court in all four opinions it rendered may have slightly altered its view of the obligations of the two orders of government to the Constitution and to Canadian federalism. However, its understanding of Canadian federalism underpinned by a particular conception of the Canadian nation, remained. The core issue in all four references concerned the ability or non ability of an order of government to unilaterally amend the Constitution. The first reference sets the Court on the path of viewing the Canadian nation in a particular way. This vision was affirmed in

⁹⁷ These include, the Cree, the Kitigan, Makivik, the Mi'gmaq Nation and the Chiefs of Ontario.

⁹⁸ This will be discussed at length in the fifth chapter.

the Patriation Reference, re-established in the Quebec Veto Reference and confirmed in the Secession Reference. The genius of the Court in all four opinions was its ability to locate a particular vision of Canadian federalism, underpinned by a conception of the nation, within the constitutional framework; a framework which it itself set the parameters. In turn, the Court was able to re-affirm its legitimacy, the legitimacy of its opinion and finally and its neutrality.

CHAPTER 3: THE SENATE REFERENCE: THE CONSTITUTION AS A ROADBLOCK

INTRODUCTION

It is often argued that the Canadian Senate, as an institution representing regional interests and identities, is a failure. The way in which the system is presently operating with twenty-four Senators per region appointed by the Prime Minister until the age of seventy-five does not reflect the realities of contemporary Canada. This, coupled with the fact that it almost always agrees with the government of the day, the Senate's independence from the House and in turn, its function and role of exercising *sober second thought*, is put into question.¹ As a result, the democratic legitimacy and effectiveness of the Senate is constantly doubted. As Gibbins and Berdhal, amongst others adopting a similar school of thought argue: "from the perspective of federalism or regional representation, the Senate can most charitably be described as wasted institutional space."²

Since the 1990s, the desire for a change in the institution crystallized into calls for a Triple E Senate, elected, effective and efficient, making its way, upon the insistence of mainly political leaders from the West, onto the political agenda in the mid 1980s and early 1990s. Initiated to secure the acceptance of the Quebec government,³ both constitutional packages aimed at repatriating the Constitution, the 1987 Meech Lake

¹ Roger Gibbins and Berdhal, Loleen, *Western Visions, Western Futures: Perspectives on the West in Canada*, (Peterborough: Broadview Press, 2003) 53.

² *Ibid.*, 54-55.

³ Quebec, refusing to *sign onto* the 1982 packages, remains the only province that has not politically endorsed the Constitution Act, 1982.

Accord⁴ and the 1992 Charlottetown Accord,⁵ included provisions of Senate reform in order to appease the demands of the political players from the West. Both of these attempts, however, ended in failure.⁶ Irrespective of these failures, or perhaps because of them, regional discontent embodied in the demands for institutional reform in general and Senate reform in particular, perseveres and remains on the political agenda.

The first case under analysis represents an examination of the federal government's first real attempt at fundamentally restructuring the Senate by the S.C.C. and the political actors involved. In January of 1979, the federal government asked the Court to consider the constitutional validity of its proposal of a new Senate. The significant dilemma with the proposal was not whether or not the projected House of Federation would be more effective at fulfilling the purpose of the institution vis-à-vis the goal of the federation. Rather, it concerned the federal government's presumption that the unilateral alteration of the Senate was at its sole discretion; senate reform, according to the federal government, clearly fell within its scope of jurisdiction outlined in section 91(1) of the BNA Act. Drawing upon the arguments presented by the provincial governments and its thoughts on the *spirit of the Senate* and on the *obligations emerging from Canadian federalism*, the S.C.C. found the opposite to be true; s. 91(1) does not

⁴ Kenneth McRoberts, *Misconceiving Canada: The Struggle for National Unity*, 94:

Had Meech Lake been ratified by all ten provinces and the federal government, vacancies in the Senate would have been filled not on the initiative of the federal government alone; rather 'Ottawa would [have had to] choose from a list of names submitted by the government of the provinces in question.' This of course was to be a temporary solution until a new formula vis-à-vis Senate Reform was agreed upon by the political leaders. A similar formula was also proposed for the reform of the Supreme Court of Canada.

⁵ *Ibid.*, 210:

A Triple e Senate was in fact proposed in the 1992 Accord in which the Senate would have been, had the Accord been ratified, comprised of an equal amount of elected Senators from each province, two from each territory and representatives from the Aboriginal community (the number to be determined at a later date). The new Senate would have been effective as its powers to delay or veto a bill would have increased. (For more detail on this proposed Triple E Senate, see McRoberts, *Misconceiving Canada: The Struggle for National Unity*, Russell, *A Constitutional Odyssey: Can Canadians Become a Sovereign People?*, 1993.

⁶ For the causes and reasons for the failure of these two Accords see McRoberts, *Misconceiving Canada*; Russell, *A Constitutional Odyssey*.

empower the federal government to amend the BNA Act where the amendment affects federal-provincial relations.

Upon an in-depth analysis of the Senate Reference, it becomes evident that the actors involved adopted a very constitutional and legalistic look at the issues and consequently embraced a particular approach to the understanding of Canadian federalism. The Court in this Reference was presented with two distinct visions of Canadian federalism, the centralist and the provincialist. At the core of both visions was the Senate – what it represents vis-à-vis the federal bargain and how it secures and ensures a role for the provinces at the centre. As indicated in the second chapter concerning distinct visions of the Canadian federation, these two visions are understood to be a mononation/territorial approach to the understanding of Canadian federalism. The Canadian federation is viewed as a one nation state. The issue of contention in this Reference is the role of the provinces, via the Senate, in the mononational state of Canada.

I begin this chapter with a review of s. 91(1) and how it relates to the issues of this Reference. I then proceed with a look at the federal government's Bill C-60 where it proposed the unilateral alteration of the Senate. In the third section I analyze the arguments of the federal government and of the provinces where it becomes clear that each side presented the Court with a particular understanding of Canadian federalism. The position of the federal government is informed by the centralist vision. This is evident in the way in which it understands its powers under s. 91(1) and how it understands the role of the Senate and subsequently of the provinces in the federation. This is in direct contrast of the provincialist view informing the arguments of the

provinces. The way the federal bargain and the Senate as a key feature of this bargain are understood by the provinces lead them to conclude that unilateral alteration of the Senate upsets the balance of federalism and undermines the role of the provinces secured at the time of Confederation and by the compact of Confederation. In the final section of this chapter, I provide an analysis of the S.C.C.'s opinion. Three important aspects emerge from this opinion. First, the Court seemingly endorses the provincialist view. However, upon closer analysis, the Court in fact hints at a hierarchy between the two orders of government. This aspect of its opinion goes unnoticed and not surprisingly as very little focus was given to it by the Court. Second, the Court ensured the legitimacy of its opinion and its neutrality by rendering an opinion akin to the dominant view at the time and located it within the constitutional framework of Canada. Third, the Court indicated with this Reference that it will accept an invitation to participate in the political and constitutional wrangling between the two orders of government. That is, the Court will help to resolve the dispute as to who has power to amend the Constitution when the federal government and the provinces are unable to come to an amicable solution.

SECTION 91(1)

In addition to analyzing the federal government's proposal, specifically its intent to unilaterally alter the Senate, this particular case also tested the scope of s. 91(1). When the BNA Act was enacted and put into effect in 1867, there was no formula in place enabling the Canadian political leaders to amend Canada's new Constitution. A process nonetheless, developed in which the federal Parliament, on a joint address from both federal Houses, would ask the British Parliament to amend the BNA Act. On matters that

concerned the provinces or federal – provincial relations, the federal government would seek and obtain the consent of the provincial governments. In 1949, the British Parliament, on request from the federal Parliament, amended the Constitution to add s. 91(1).⁷ With s. 91(1) in place, the federal government could unilaterally amend the BNA Act where the amendment did not affect federal – provincial relations, amongst other exceptions.⁸

Until 1970, the federal government amended the BNA Act, using s. 91(1), five times: in 1952,⁹ 1965,¹⁰ 1974,¹¹ and twice in 1975,¹² for mainly, as the S.C.C. stated in this Reference, “federal housekeeping;” the five amendments concerned essentially those matters that did not affect federal-provincial relations. Thus, provincial consent was not required pursuant to the practices developed in amending the BNA Act prior to and upon

⁷Peter H. Russell, et. al., *Federalism and the Charter: Leading Constitutional Decisions: A New Decision*; Hogg, Peter, “Comments,” *Canadian Bar Review*, 58, (1980): 634-635:

It should be noted that provincial consent was not obtained when the federal government proceeded to ask Britain to include this amendment. This caused some controversy. Some provinces felt that this project should be put on hold until an agreement with the provinces was reached. Then Prime Minister, St. Laurent, attempted to alleviate any concerns and controversy by pointing out that s. 91(1) would give the federal government no more power than that which is enjoyed by the provinces under s. 92(1).

⁸ Canada. Department of Justice. *The Constitution Act, 1867*. Ottawa, 1982, s44 [previously s91(1) of the BNA Act, 1867.]:

Exceptions include: amendments that affect exclusive provincial jurisdiction, amendments that affect rights of people with regards to schools or use of English or French, amendments that affect the five year maximum life of Parliament or that there be one session of Parliament at least once a year.

⁹ *The Senate Reference*, 8.

The British North America Act, 1952, effected a readjustment of representation in the House of Commons. The principle of representation by population was not affected by this legislation.

¹⁰ *Ibid.*, 8.

The British North America Act, 1965, provided for the compulsory retirement of senators, henceforth appointed, at age seventy-five.

¹¹ *Ibid.*, 8.

The British North America Act (No. 2), 1974, repealed the provisions of the Act of 1952 and substituted a new readjustment of representation in the House of Commons. The principle of representation by population was maintained.

¹² *Ibid.*, 8.

The British North America Act, 1975, increased the representation of the Northwest Territories in the House of Commons from one to two members.

The British North America Act (No.2), 1975, increased the total number of senators from 102 to 104, and provided for representation in the Senate for the Yukon Territory and the Northwest Territories by one member each.

the enactment of the 1949 amendment formula¹³ The Senate Reference was the first time, upon the request of the federal government, that the scope and power of the federal government under s. 91(1) was under judicial scrutiny.

THE GOVERNMENT'S PROPOSAL

In mid 1978, the federal government, in response to the constitutional predicament it found itself entangled in,¹⁴ released "A Time for Action", a two-phase program aimed at the renewal of the Canadian federation.¹⁵ On June 20, 1978, the federal government, under Trudeau, tabled Phase One of the plan known as Bill C-60, Constitutional Amendment Bill. The bill included, amongst other things,¹⁶ a proposal to replace the current Senate with a House of Federation.¹⁷ Phase Two, which would proceed upon the completion of Phase One, included all actions and reforms requiring consultation and agreement with the provinces; i.e., the division of powers and a new amending formula bringing about the Patriation of the Constitution. All this was to be completed, as Trudeau hoped, by July 1st, 1981.¹⁸ According to the federal government, the Canadian federation needed a "second chamber that will function as a politically

¹³ Ibid., 8.

Interestingly enough, even if s. 91(1) had not existed during the time of these amendments, provincial consent would not necessarily have been sought nor obtained.

¹⁴ Negotiations to patriate the Constitution ended in a stalemate in the time following the failure of the Victoria Charter, essentially due to the intransigence of both the federal government and the provincial governments

¹⁵ Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?* 2nd ed., 100.

¹⁶ Russell et. al., *Federalism and the Charter: Leading Constitutional Decisions: A New Decision*, 693: The reform to the Senate was part of the first phase which would be effected under the federal government's power of s91(1).

In addition to reforming the Senate, bill C60 would have also, again with the use of s91(1), codified the office of the Governor General, made changes to the S.C.C., entrench a charter of rights which would apply to the federal government alone, with options for provincial governments to opt in.

¹⁷ Gilles Lalonde, *In Defence of Federalism: A View From Quebec* (Toronto: McClelland and Stewart Limited, 1978) 1.

¹⁸ Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?* 2nd ed., 100.

effective regional forum.”¹⁹ As such it proposed to abolish the current Senate and introduce a new second chamber to meet this objective.²⁰

Not surprisingly, Bill C-60 struck a chord with various political actors and newspaper columnists within the country. As soon as Trudeau tabled the new constitutional plan, Peter Lougheed, Premier of Alberta, quickly questioned the political and legal legitimacy of the Trudeau intentions. Drawing upon the principle of equality between the two orders of government and the compact theory of Confederation, he stated, “I think this is contrary to the spirit of the federation, if not the law ... The provinces originally came together to form Confederation and they should be involved in any change to it.”²¹ Premier Regan of Nova Scotia stated that the proposal was faulty in some key areas.²² Premier Hatfield of New Brunswick, echoing the sentiments expressed by Lougheed, stated, in an interview with *Le Devoir*, vis-à-vis constitutional change, that “les provinces doivent être consultées et chacun doit tenir compte des droits e l’autre; cependant il ne faudra pas permettre a une seule province d’orienter le débat.”²³

Lise Bissonnette from *le Devoir* questioned the federal government’s legitimacy in unilaterally realizing even phase one of the plan:

Tout ce que ce dernier voudra en effet “intégrer” dans la Constitution, c’est-à-dire rendre intouchable tant pour les législatures provinciales que fédérale sauf par la voie difficile d’un amendement constitutionnel, [...] ne pourra l’être sans la contribution des provinces.²⁴

Rather than addressing the unilateral plan of the federal government, an editorial in the *Calgary Herald* chose to critically analyse the merits of the proposal, concluding

¹⁹ Lalonde, *In Defence of Federalism: A View From Quebec*, 3.

²⁰ See Appendix A.

²¹ John Forsythe, (*Edmonton Journal*), “Alberta may fight reform bill.” *Calgary Herald*, [Calgary], 21, June 1978, A1-A2.

²² Canadian Press. “Senate reforms worry Regan,” *Calgary Herald*, [Calgary], 21 June 1978, D19.

²³ Deshaies, Guy, “Hatfield: les Canadiens anglais ont peur”, *Le Devoir*, [Montréal], 27 June 1978, 2.

²⁴ Bissonnette, Lise, “Un labyrinthe parsème d’embauches”, *Le Devoir*, [Montréal], 21 June 1978, 7.

that the changes, especially those regarding the Senate, were merely window dressing: “The claim that the plan is designed to accommodate regionalism is offset by the appearance of a greater centralization of power in the House of Commons where Ontario and Quebec would continue to hold the trump representation-by-population cards.”²⁵ On a similar note, an editorial appearing in the *Toronto Star* echoed equal concerns: “[The new House of Federation] is far from enough to satisfy regional discontent in the West and East with our present federal government, let alone convince Quebec that it can find its destiny within Confederation while still maintaining strong control over its social and cultural development.”²⁶

The *Montreal Gazette*, in contrast welcomed, if not fully embraced the Trudeau plan:

In general substance, if not all of the particular details, these changes are innovative and constructive. Taken in conjunction with the coming constitutional talks about a division of powers between federal and provincial governments, they offer at last the promise of a new beginning for Canada.²⁷

These proposals will take time to assess fully. But they look like the best version yet of the needed “House of Provinces.”²⁸

Neither of these two editorials however, acknowledged or even considered the unilateralism of the ‘worthy and innovative plan’.

The two parties sitting in the Opposition received the proposals with some mixed reaction; Joe Clark, leader of the Progressive Conservatives, cautiously welcomed the new proposal,²⁹ whereas Ed Broadbent, leader of the New Democrat Party (NDP), though

²⁵ Editorial, “The Senate,” *Calgary Herald*, 21 June, 1978.

²⁶ Editorial, “This is no better than the Senate”, *The Toronto Star*, [Toronto], 21 June 1978, A8.

²⁷ Editorial, “The rebuilding begins,” *The Montreal Gazette*. [Montreal], 22 June 1978, 6.

²⁸ Editorial, “Power to the provinces,” *The Montreal Gazette*, June 22, 1978, 6.

²⁹ Canadian Press, “Constitutional bill gets cautious approval from Clark”, *The Globe and Mail*, [Toronto], 21 June 1978, 9:

accepting some aspects of it, was alarmed at the 'anti-democratic' proposal regarding the Upper House. However, Mr. Broadbent was not referring to Trudeau's plan of unilateralism. Rather, he was referring to the new way in which the senators were to be appointed in the new House of Federation and the new powers to be invested in the restructured institution.³⁰

In short, there was no consensus amongst the various groups, individuals, parties or the media. Different factions criticized or accepted different aspects of the proposal. All seemed, however, to glance over the underlying issue of unilateralism and the potentially dangerous precedent such an action posed to the Canadian federation. If the federal government were able to single handily readjust and even fundamentally change a key federal institution, important in securing regional representation at the centre, then we should wonder whether the provinces are an equal partner in the nation, or simply, as Sir John A. Macdonald once hoped they would become, glorified municipal governments.

In light of, or maybe even in spite of the lack of enthusiasm and consensus within society, the federal government decided to seek the advice of the S.C.C. as to whether it could abolish or reform the Senate unilaterally under its power of s. 91(1). It posed two questions, which addressed not only the issues pertaining to the proposals introduced in Bill C-60, but also those issues concerning potential proposals at reforming the Senate:³¹

Clark did not openly or enthusiastically welcome the set deadline of July 1st, 1981; "the deadline, [argued Clark] has more to do with the Prime Minister's electoral problems than with the nation's problems."

³⁰ Canadian Press, "Constitutional bill gets cautious approval from Clark", *The Globe and Mail*, [Toronto], 21 June 1978, 9.

³¹ Hogg, "Comments." 632.

1. Is it within the legislative authority of the Parliament of Canada to repeal section 21 to 36 of the *British North America Act, 1867*, as amended, and to amend other sections thereof so as to delete any reference to an Upper House or the Senate? If not, in what particular or particulars and to what extent?
2. Is it within the legislative authority of the Parliament of Canada to enact legislation altering, or providing a replacement for, the Upper House of Parliament, so as to effect any or all of the following:
 - (a) to change the name of the Upper House;
 - (b) to change the numbers and proportions of members by whom provinces and territories are represented in that House;
 - (c) to change the qualifications of members in that House;
 - (d) to change the tenure of members of that House;
 - (e) to change the method by which members of that House are chosen by:
 - i. conferring authority on provincial legislative assemblies to select, on the nomination of the respective Lieutenant Governors in Council, some members of the Upper House, and, if a legislative assembly has not selected such members within the time permitted, authority on the House of Commons to select those members on the nomination of the Governor General in Council, and
 - ii. conferring authority on the House of Commons to select, on the nomination of the Governor General in Council, some members of the Upper House from each province, and, if the House of Commons has not selected such members from a province within the time permitted, authority on the legislative assembly of the province to select those members on the nomination of the Lieutenant Governor in Council,
 - iii. conferring authority on the Lieutenant Governors in Council of the provinces or on some other body or bodies to select some or all of the members of the Upper House, or
 - iv. providing for the direct election of all or some of the members of the Upper House by the public; or
 - (f) to provide that Bills approved by the House of Commons could be given assent and the force of law after the passage of a certain period of time notwithstanding that the Upper House has not approved them?
If not, in what particular or particulars and to what extent?³²

MEDIA REACTION

As indicated above, despite the potential significance such a change to the Senate could have on Canadian federalism and the relationship between the two orders of government, and the Court's opinion of the federal government's ability to effect such

³² *The Senate Reference*, 3.

alterations, society seemed less than concerned with both the possible consequences and outcome. This indifference to the Senate Reference and to the specific questions emerging from it was further and more blatantly evident during the unfolding of the case in the Supreme Court of Canada. In fact, the *Toronto Star* referred to the Reference as a 'squabble' between the federal government and the provincial governments.³³

At first glance, this is not surprising considering that the Reference came on the heels of the release of the report on national unity by the Pepin-Robarts Task Force,³⁴ the very real potential of a referendum on sovereignty association in Quebec which would possibly result in the break-up of the nation, and the upcoming first ministers conference, to be held on February 5th and 6th, 1979, on constitutional renewal. Society at the time was more concerned with these seemingly more pressing and tangible issues and less worried or enthused about a federal government unilaterally altering the Senate.

At second glance, however, the lack of direct interest in the Reference is surprising. Aside from the enduring interest in the restructuring of the Senate held by western political players, the issues and questions raised by these ongoing events are quite similar to those raised in the Senate Reference. The recommendations of the Pepin-Robarts Task Force underpinned by "the twin concepts of dualism and regionalism,"³⁵

³³ Canadian Press, "Ruling on Senate due", *The Toronto Star*, [Toronto], 22 January 1980, A13.

³⁴ The Pepin-Robarts Task Force on Canadian Unity, established in July of 1977, was mandated, among other things to look into the issue of Canadian Unity and to advise the Trudeau government on such. Released in January of 1979, the recommendations surprised the nation, not to mention the federal government; it advocated a federation sympathetic to the desires of Quebec and of the other provinces wishes for decentralization.

³⁵ McRoberts, *Misconceiving Canada: The Struggle for National Unity*, 150:

In the recommendations of the Task Force the Aboriginal Peoples were not factored into their conceptualization of Canada, hence the promotion of a binational and not a multinational Canada. Its recommendations flowed from such a perception of Canadian federalism endorsing one, the clear recognition of Quebec special status; two, diversity amongst regions, provinces, and individuals, to be reflected in, amongst other institutions, a reformed Senate where the provincial governments play a direct role in the restructuring of the institution,; and three, the essential role of the Quebec government (and the other provinces) to strengthen language and culture within their respective provinces.

the real potential of Quebec secession,³⁶ and the ongoing attempt to patriate the Constitution spoke directly to the relationship between the two orders of government in the federation and to the question of Canada as a centralist, provincialist or dualist federation. Though the Senate Reference spoke directly to the role of the Senate as an institution in the federation, it indirectly dealt with the role of the provinces in the federation and in relation to the federal government. If the federal government were right and it did have the power to unilaterally amend the Senate, it would further stamp the strength and power of the federal government over the provincial governments and put into question the principle of equality between the two orders of government.

Pepin-Robarts and Quebec Sovereignty – a look into society's views

Considering the idea of dualism and regionalism underpinning both the recommendations of the Pepin-Robarts Task Force and Lévesque's sovereignty-association agenda, it is not surprising that Pierre Trudeau did not fully endorse these suggestions, as they challenged his view of the Canadian nation. Premised on a centralized and mononational conception of the Canadian federation, Trudeau's nation building agenda centred upon the promotion of a pan – Canadian identity. Such a vision championed the idea of one Canada where all provinces, regardless of language and culture, are equal to each other and where all citizens identify first and foremost with the

³⁶ Under Levesque's leadership, the Quebec government began to talk about a sovereignty association with the rest of Canada.

For a more detailed account of this plan, please see Kenneth McRoberts, *Quebec: Social Change and Political Crisis: 3rd edition*.

nation and then the province. Furthermore, this Canada is best represented and promoted by the federal government as it is the government which represents all Canadians.³⁷

Similar disdain for the Pepin-Robarts recommendations and the PQ agenda was echoed by media analysts calling for a more ‘balanced’³⁸ federation. It was perceived that such visions of Canada, as those advanced by the Pepin-Robarts Task Force or the PQ, would serve to divide the nation by highlighting and entertaining differences,³⁹ and severely weaken the position and strength of the federal government in the Canadian federation.⁴⁰ An editorial appearing in the *Globe and Mail* went so far as to argue that “the task force on Canadian unity appears to have been severely shaken by its cross-country experiences, shaken to the point where it postponed the application of principle

³⁷ This pan Canadian agenda is best represented in Trudeau’s nation building policies which included the Multiculturalism Policy, and the Official Languages Act; it also included his plans to patriate the Constitution which was centred on the notion that all provinces are equal to each other and all citizens are equal regardless of where they reside (this is evident in his calls for a charter of rights and freedoms)

³⁸ There was no clear consensus of what constituted a balanced federation for the various media pundits; it varied from a strong centralized federation where all provinces, equal to each other, are subordinate to the federal government, to a federation where the two orders of government are equal to one another. There was an implicit consensus amongst the English language newspapers that a balanced federation does not include a nation where any one provinces, in this instance, Quebec, is viewed as a distinct provinces or nation separate from the nation-state.

³⁹ According to one editorial ‘the changes it proposes seem more likely to re-enforce the “multiplicity of solitudes” than to lead to a stronger sense of Canadian unity and identity’(Editorial, “It’s time for action on unity”, *The Toronto Star*, [Toronto] 2 January 1979, A6.). D.H. Fullerton, writing for the *Toronto Star*, questions ‘the massive shift of power to the provinces which is implicit in the report’. According to Fullerton, if all the recommendation were to be implemented, it ‘would lead to a dangerous balkanization of the country. That would pose a greater threat to Canada’s survival than the preset uneasy balance of forces’ (Fullerton, D.H., “Unity Report: blueprint for balkanization?” *The Toronto Star*, [Toronto], 4 February 1979, A10).

⁴⁰ In an editorial appearing in the *Calgary Herald*, it was exclaimed that the ‘report was daring in the emphasis it puts on the powers of the provinces at the expense of federal authorities’(Editorial, “Unity Report”, *Calgary Herald*, [Calgary], 6 January 1979, p. A6). Charles Lynch, chief of *Southam News* at the time, argued that the recommendations of the task force would render the federal government to nothing (Lynch, Charles, “Task Force decentralization ideas go too far”, *Calgary Herald*, [Calgary], 29 January 1979, A6).

to achieve accommodation.”⁴¹ The Quebec government seemed to be the only government to embrace these recommendations.⁴²

Preliminary discussion of the Quebec government holding a referendum on sovereignty-association added to the ‘urgency’ for the need to patriate the Constitution. When various parties addressed both of these issues, they tended to reduce the debate to the original compact at the time of Confederation. The focus, as seen in various editorials and news reports was reduced to first, whether Quebec was a nation in a two nation federation⁴³ or a province like the others in a mononation comprised of equal provinces; and second, the role of the federal government in either scenario – are the two nations equal or vis-à-vis the second scenario, is the federal government equal, subordinate, or superior to the provinces?⁴⁴

When the decision of the S.C.C. was finally released in December 1979, there was no analysis; the public was simply provided with small captions of the court decision. The public, including the media, was simply wrapped up in the promise of a

⁴¹ Editorial, “Giving away the house,” *The Globe and Mail*, [Toronto] 26 January 1979, A8.

⁴² In an editorial appearing in the *Montreal Gazette*, it was reported that the recommendations were well received in Quebec. (Editorial, “*Strength in diversity*,” *The Montreal Gazette*, [Montreal], 26 June 1979, A6) In fact, Levesque ‘wanted the task force report put on the agenda (of constitutional renewal)’. This of course comes as no surprise given that the Task Forces endorsed the idea of Quebec special status.

⁴³ In Quebec, federalists and separatists alike ‘feel Quebec has a right to self determination’⁴³. “Claude Ryan [leader of the Liberal Party of Canada] and Rene Levesque [Premier of Quebec] oppose Trudeau’s plan to proceed unilaterally or via national referendum to patriate the Constitution if he wins the election (Cowan, Peter, “Trudeau scheme for reform meets opposition from provinces”, *The Calgary Herald*, [Calgary], 12 May 1979, A6).

⁴⁴ Lougheed was quoted as saying that ‘unanimity is required legally even to introduce an amending formula and Trudeau will provoke a serious confrontation if he tries to impose a system ... since Canada was founded, the diversity among all provinces has been recognized and accepted’ (Jaremko, Gordon, “Premier has trump cards in reserve,” *The Calgary Herald*, [Calgary], 5 February 1979, A1 and A3). An editorial published in the *Toronto Star* argued that the best strategy for the federal government in defeating the separatists was to concentrate on federal central institutions; “that was the approach the Trudeau government was attempting before its defeat, with a particular emphasis on finding a way to make the Senate a voice of the provinces and enshrining in the Constitution, a bill of rights with linguistic guarantees. It’s the right and necessary approach and the Clark government should adopt it without delay’ (Editorial, “Canada’s fate in our hands”, *The Toronto Star*, [Toronto] 7 November 1979).

Quebec referendum on Quebec sovereignty and the intentions of the political leaders to patriate the Constitution.

The complexity and importance of the issues of this particular reference, however, did not escape the federal government, the provincial governments or the Supreme Court of Canada. Regardless of this original interest, the decision, once released, was all but shelved. The political actors dedicated very little attention to it and its potential implications. It should be noted, though, that by the time this decision was rendered, the Progressive Conservatives, under Joe Clark, had won the federal election and replaced the Liberals under Pierre Trudeau. Thus the decision did not thwart the Clark's agenda as his government placed amending the Constitution low on its priority list.⁴⁵ This could very well explain the lack of attention and enthusiasm by the public and the political players when the decision was delivered.

THE FEDERAL GOVERNMENT ARGUES

Informed by a centralist vision of the federation, the Attorney General of Canada embraced a constitutional legalistic and institutional approach to the issues pertaining to this reference. It addressed the questions within the narrow boundaries of the framework it established – a self-serving framework confined to section 91(1). The federal government, in relation to the Senate and its ability to abolish it or reform it, considered only whether or not it had the power to do so under s. 91(1) at the expense of the purpose and function of the Senate in the federation.

⁴⁵ Russell, et. al., *Federalism and the Charter: Leading Constitutional Decisions: A New Decision*, 693.

The Attorney General of Canada began the factum by setting out the perceived parameters of the issues concerning this particular reference. According to the Attorney General, the two questions touch upon and speak to three related issues:

- (a) whether the Senate provisions in 1867 fall within the s. 91(1) jurisdiction
- (b) the limits of Parliament's power under s. 91(1)
- (c) if the limitations prevent Parliament from altering the Senate.⁴⁶

Arguing that since the Upper House, styled as the Senate, is included in the phrase *the Constitution of Canada* found in s. 91(1), and since s. 91(1) clearly stipulates that the federal power under this section is absolute except for those limitations listed, and since the Upper House is not one such exception, the Attorney General of Canada affirmed that Parliament did have the exclusive jurisdiction under s. 91(1) regarding the matter of this reference; the questions submitted to the Court ought to be answered in the affirmative.⁴⁷

Adopting such a position, the Attorney General of Canada considered neither s. 91 or the Constitution as a whole, nor the purpose and spirit of the Senate both as an institution on its own and in relation to the Canadian federation and Canadian federalism. Instead, he viewed the Senate simply as an extension, of lesser importance, to the House of Commons. In doing so, he implicitly advanced the notion that the provinces are subordinate to the federal government. The fact the Senate was established to secure regional representation at the centre is and was inconsequential to the matter at hand.

By underplaying the *theoretical* original purpose of the Senate, the federal government in actuality dismissed the role of the provinces in the federation at present time, as well as the time of Confederation and the years thereafter. One is left to

⁴⁶ Government of Canada, Department of Justice, "Factum of the Attorney General of Canada in the matter of Reference: *Re Authority of Parliament in Relation to the Upper House, (the Senate Reference)* [1980]," Ottawa, 28 February 1979. (Factum of the Attorney General of Canada, 1979), para. 6.

⁴⁷ *Ibid.*, para. 8.

conclude that the federal government viewed Canada from the time of Confederation and onward, as a highly centralized federation.

First, the Attorney General of Canada relied upon amendments made to the Senate both prior to and after the enactment of s. 91(1) to argue that such clear examples indicate that unilateral changes to the Senate is permissible. Since the Senate has been altered in the past, specifically in 1875,⁴⁸ 1886,⁴⁹ 1895,⁵⁰ and 1915,⁵¹ without the prior consent of the provincial governments, the federal government has the ability to proceed alone in changing the Senate; such ability extends to abolishing the Senate.⁵² However, the Attorney General did not consider the reality that none of the examples he relied upon affected or upset the spirit and/or core of the Senate (sober second thought and regional representation at the centre), the way abolishing the Senate would.

The proposed amendments to the Senate can, if one embraces the logic of the Attorney General of Canada, be easily classified and understood as simple federal housekeeping, similar to the previous changes to the Senate. Such logic allows us to glance over the significance of the Senate and its role in the federation as well as the importance of maintaining a power balance between the two orders of government and the relationship between the two.

⁴⁸ Ibid., para. 20:

The 1875 amendment 'accorded Parliament to define the privileges, immunities, and powers of the Senate and the House of Commons.'

⁴⁹ Ibid., para. 21:

This amendment enabled Parliament to "make provisions for the representation in the Senate and the House of Commons for territories forming part of Canada but not including any province."

⁵⁰ Ibid., para. 22:

(The Canadian Speaker (appointment of Deputy Act), confirmed in Canadian law providing for a Deputy Speaker of the Senate

⁵¹ Ibid., para. 23:

The 1915 amendment altered the Constitution of the Senate:

(a) members increased from 72 to 96

(b) fourth region created to accommodate new western provinces.

⁵² Ibid., para. 20.

Consequently, such a simplistic understanding of the amendment process vis-à-vis the Senate further enabled the Attorney General of Canada to ignore the political understanding that had developed with regard to amending the Constitution. In essence, this position permitted him to apply one standard for effecting minor amendments of the Constitution, where the federal government proceeded alone, to another type of amendment that has the potential of affecting the foundations of Canadian federalism, where the provincial consent was sought and obtained.

Second, the Attorney General equated the powers of the federal government under s. 91(1) (the ability to amend the Constitution where the amendment only affects the federal government) with those of the provinces under s. 92(1) (the ability of the provinces to amend its jurisdiction of powers). According to the Attorney General of Canada, the wording of s. 91(1) can be compared to the wording of s. 92(1). The intent of s. 91(1) was to vest Parliament with the same authority to amend the Constitution of Canada as the provinces enjoy under s. 92(1).⁵³ To substantiate this position, the Attorney General pointed to the White Paper, 1965, which states that the powers of the provincial governments under s. 92(1) correspond to the powers of the federal government's powers under s. 91(1).⁵⁴ Since the two powers can be equated and since five provinces, Manitoba, Prince Edward Island (PEI), Nova Scotia, New Brunswick, and Quebec, abolished their respective Legislative Councils, then the federal government should be able to do so as well; nothing explicitly written in the exceptions listed in s.

⁵³ Ibid., para. 32.

⁵⁴ Ibid., para. 32.

91(1) leads one to conclude otherwise.⁵⁵ Further, since s. 92(1) is understood to include the repeal or abolition of provincial legislative councils, then so should s. 91(1).⁵⁶

Arguing as such, the Attorney General conveniently ignored that the use of s. 92(1) by an individual province does not necessarily affect the use of s. 91(1) by the federal government. That is, the removal of the Upper House at the provincial level does not affect the relation between the two orders of government the way abolishing the Senate at the federal level would because of what the Senate fundamentally represents (regional representation at the centre). Furthermore, if s. 92(1) were to be used by a province in a manner that would affect either federal – provincial relations or more than one province, the federal government has recourse through its power of disallowance or through its power of requesting the Lieutenant Governor to reserve royal assent. With these powers, the federal government can, in effect, veto the actions of a provincial government if it feels that it would affect the nation as a whole. Though these powers have fallen into disuse, and probably will not ever be exercised by the federal government, they continue to remain in the Constitution and thus provide the federal government an additional avenue, besides the court system, to address a perceived misuse of provincial powers. The provinces do not have a similar power of veto in the BNA Act. For this reason, the use or misuse of s. 91(1) becomes all the more perilous.

Third, further dismissing the role of the provinces in the federation, the Attorney General argued that, though it is true that the federal government under s. 91(1) cannot affect federal-provincial relations, no rights or privileges have been awarded to provinces regarding the Senate, and therefore the exception does not apply. Further to this, the

⁵⁵ Ibid., para. 36.

⁵⁶ Ibid., para. 37.

rights and privileges of the provinces are not affected by the federal government reforming or even abolishing the Senate.⁵⁷ A positivist reading of the proposals advanced by the federal government to reform or abolish the Senate would without doubt lead one to conclude that the powers of the provinces would not be affected as nothing in s. 92 would be either touched or affected. However, implicitly the powers of the provinces are affected in that abolition of the Senate or a fundamental change in the way it operates has the potential to abolish and/or change any significant role played by the provinces in the daily functions of Parliament; this would be and is counter to the very principle of federalism which ensures and secures regional representation at the centre. In short, with the arguments presented by the Attorney General of Canada, the federal government presented a legal positivist reading of not only the Constitution and its powers under s. 91(1), but also, and more importantly, of Canadian federalism to rule that the federal government under its powers of s. 91(1) can legitimately and constitutionally abolish the Senate unilaterally. Opting not to present any justifications for abolishing the current Senate by replacing it with a House of Federation, the federal government presented itself as a rogue institution!⁵⁸ It portrayed the idea that it believed itself to be the stronger *level* of government and in turn, asked the Court to view federalism in strictly centralist terms.

⁵⁷ *Ibid.*, para. 49-50.

⁵⁸ Government of Canada, Honourable Marc Lalonde, Minister of State for Federal-Provincial Relations, *Constitutional Reform: House of the Federation*, Ottawa, August, 1978:

In a paper released by the federal government in August of 1978, entitled Constitutional Reform: House of Federation, written by then Minister of State for Federal – Provincial Relations, Marc Lalonde, the federal government offered a broader, more inclusive understanding of the Senate, its role and its purpose within the Canadian federation. According to the federal government, the purpose of a second chamber is to ensure that “the less populous units would not be completely subjected to decisions taken by the majority of the public.” (19)

Further, the federal government recognized the important role of the Senate representing the regions and in turn seems to be more welcoming to a conception of Canadian federalism in which the regions have an important role to play. “The government’s objective is to create a forum for the free expression of regional views as part of Canada’s Parliament, and one that will have significant political authority without challenging the supremacy of the House of Commons” (19).

THE PROVINCES ARGUE

Similar to the federal government, the provinces structured their analysis to focus upon the first matter – whether or not the federal government could unilaterally abolish the Senate – within the s. 91(1) framework. However the provinces' approach was informed by a provincialist view of the federation; Canadian federalism is premised on the idea that the two orders of government are equal. The federal government alone cannot effect changes to the federal arrangement without the prior consent of the provinces. Arguing that the federal government's understanding of section 91(1) is inconsistent with Canadian federalism, the provinces advanced another way of understanding s. 91(1), one which is consistent with their idea of the spirit of federalism.

The understanding and interpretation of s. 91(1) by the Court thus becomes the crux of their position. Directing specific attention to the phrase *the Constitution of Canada*, the limitations of the use of s. 91(1), the convention which developed with regard to amending the Constitution, and how s. 91(1) has been typically used to date, the provinces argue that the interpretation of s. 91(1) must consider the spirit of Canadian federalism, the spirit of the Senate, and, the legal guarantees protecting the status of the provinces in the federation through specific provisions outlined in the BNA Act. Conceived within such parameters, an understanding of the scope of the section would emerge supplementing Canadian federalism and the principles emerging from it, including autonomy of the provinces, regional representation at the centre, equality amongst the provinces and between the two orders of governments. Such an understanding of s. 91(1) would inevitably lead to the conclusion that under s. 91(1), the federal government cannot unilaterally abolish the Senate.

Contrary to the spirit of federalism

Each of the provinces stressed that if any one body, the Supreme Court in particular, interprets the powers of the federal government under s. 91(1) in the manner which the Attorney General of Canada advanced, would be hypothesizing that Canada is a unitary state. This understanding is contrary to the spirit of Canadian federalism. According to the province of Saskatchewan, it would promote a conception of the Canadian federation in which Canada is understood to be a legislative union with provinces enjoying little or no autonomy or independence.⁵⁹ Such an enthusiastic reading of s. 91(1) by the Attorney General of Canada must be rejected.⁶⁰ Instead, s. 91(1), ought to be conceptualized by the S.C.C. in much more narrow fashion in order to remain consistent with the true nature of Canadian federalism.

The provinces' understanding of Canadian federalism and of the spirit of the Senate can be located in how they understand the federal bargain; they established the basis of their relationship with the federal government, and how this relationship is partly maintained through the existence of the Senate in its present form of representing the various regions at the centre. The legal and political status of the provinces in the federation, first established in the BNA Act, is evident when considering the make up of the Senate and provinces' exclusive powers under s. 92; such status "is not enjoyed at the sufferance of the national Parliament or Government."⁶¹ This is important as it ensures

⁵⁹ Government of Saskatchewan, Department of Justice, "Factum of the Attorney General of Saskatchewan" in the matter of *Reference: Re Authority of Parliament in Relation to the Upper House, (the Senate Reference)* [1980], Ottawa, 7 March 1979. (Factum of the Attorney General of Saskatchewan, 1979), para. 31.

⁶⁰ Government of Ontario. Department of Justice, "Factum of the Attorney General of Ontario" in the matter of *Reference: Re Authority of Parliament in Relation to the Upper House, (the Senate Reference)* [1980], Ottawa, 8 March 1979. (Factum of the Attorney General of Ontario, 1979), para. 16.

⁶¹ Factum of the Attorney General of Saskatchewan, 1979, para. 17.

that every province is equal, not only to every other province, but also and more importantly, to the federal government. Furthermore, the status of the provinces through provincial representation at the centre and the guaranteed exclusive powers ensures that the provinces continue to have a role in the functioning of Parliament. But more importantly, it ensures that the provinces are autonomous from the federal government.

According to the Attorney General of Saskatchewan, such status was secured upon the passing of the Manitoba Act, 1871, when George Etienne Cartier stated that all new provinces hold the same status as the original provinces making up Canada.⁶² This political status of the provinces in the federation was further entrenched in the political psyche of the nation when the JCPC brought down its decision in *Liquidators of Maritime Bank v. Receiver General* [1892] AC 437; with this case decision, the Committee firmly articulated that the provinces are not subordinate to the federal government.⁶³

The object of the Act was neither to weld the provinces into one, nor to subordinate provincial governments to a central authority, but to create a federal government, in which they should all be represented, entrusted with the exclusive administration of affairs in which they have a common interest, each province retaining its independence and autonomy.⁶⁴

This understanding of the spirit of Canadian federalism, rooted in the principles of equality of the two orders of government and the autonomy of the provinces, extends also to the principle of regional representation at the centre; the three are key factors in understanding the spirit of the Senate in relation to Canadian federalism.

⁶² Ibid., para. 17.

⁶³ Ibid., para. 19.

⁶⁴ *The Liquidators of the Maritime Bank of Canada v. The Receiver General of New Brunswick*, [1892] A.C. 437.

Spirit of the Senate

The provinces of Saskatchewan, Ontario, and Nova Scotia attempted to expand their arguments of the understanding of constitutional powers to reach beyond the literal text. They argued that reforming the Senate or abolishing it would alter the fundamental nature of the Senate and in turn upset a key factor of Canadian federalism. Regional representation is a right according to the provinces by way of the true nature of Canadian federalism. As such, altering the Senate where changes affect its nature is beyond the scope of the federal government's powers under s. 91(1).

The provinces, unlike the federal government, understood the federal bargain to be much more than the simple coming together of autonomous units. Rather, in stressing the importance of the Senate as an institution in the federation, the provinces seemed to advance the notion that federalism in Canada concerns a balance of interest and a compromise reached between the provinces and the federal government; the Senate is a testament of such a compromise and thus became and is a product of the federal bargain. "The provisions of the Constitution respecting the Senate were an integral part of the federal scheme; [it was] an essential compliment to the grant of the exclusive legislative powers to the provinces over local matters."⁶⁵ In fact, Saskatchewan and Ontario point out that the less populated provinces insisted upon securing regional representation at the centre before joining Confederation.⁶⁶

⁶⁵ Factum of the Attorney General of Saskatchewan, 1979, para. 16;

⁶⁶ *Ibid.*, para. 16;

Factum of the Attorney General of Ontario, 1979, para. 21;

Government of Nova Scotia, Department of Justice, "Factum of the Attorney General of Nova Scotia" in the matter of *Reference: Re Authority of Parliament in Relation to the Upper House, (the Senate Reference) [1980]*," Ottawa, 6 March 1979. (Factum of the Attorney General of Nova Scotia, 1979), para. 6:

Nova Scotia, also relying on the Confederation debates, argued that a simple review of historical debates quickly points to the conclusion that the Senate is a "fundamental safeguard of provincial interests in the

Introducing a legal element to strengthen this understanding of the federal bargain, Newfoundland argued that due to the existence of s51(A), any removal of the Senate would affect Canada's parliamentary system; this would violate the compact reached between the provinces and the one agreed upon by those provinces joining Confederation after 1867. In advancing this argument, Newfoundland, along with the other provinces, drew upon the compact theory of Confederation and thereby promoted one of the key tenets of this theory – equality of the provinces to the federal government and equality between the provinces; flowing from this is the idea of unanimity. Therefore, in order to abolish the Senate, not only does the federal government have to consult the provinces, it is also obliged to obtain their unanimous consent.

It becomes obvious by this point that the understanding of federalism for the provinces is reduced to the equal representation of the regions at the centre, equality of the two orders of government and autonomy of the provinces. These principles are at the heart of Canadian federalism. Thus, in order to remain consistent and true to the spirit, these principles must be considered and honoured by the S.C.C. when interpreting s. 91(1) in general and the phrase the *constitution of Canada* in particular. In other words, the use of s. 91(1) cannot contradict the principles of federalism.

system of checks and balances of the federation;" the Senate was established to deal with concerns that the less populated provinces had with being overly swamped in the House of Commons. The principle of the Senate thus became representation of the regions. This ideal was preserved throughout the years even with changes to the Senate; such a principle is "basic to the federation." ((para. 8-9); Government of Newfoundland, Department of Justice, "Factum of the Attorney General of Newfoundland" in the matter of *Reference: Re Authority of Parliament in Relation to the Upper House, (the Senate Reference)* [1980], Ottawa, 5 March 1979. (Factum of the Attorney General of Canada, 1979), para. 16.

Section 91(1) limited

Understanding s. 91(1) through this federalism lens led the provinces to conclude that the elimination of the federal Upper House is not an isolated action; it does affect other aspects of Canadian federalism. Section 91(1) was not intended for such action.

Outlining the three different constitutional arrangements in the BNA Act,

- (1) Constitution of provinces,
- (2) Constitution of the federal government
- (3) Elements affecting both levels of governments and the constitutional arrangement between the two,

the province of Nova Scotia argued that s.91(1) was not intended to and does not extend to the first and third constitutional arrangements. The phrase, *the Constitution of Canada*, only refers to the second constitutional arrangement. The constitutional arrangement between the federal government and the provincial governments can only be amended by the Imperial Parliament.⁶⁷

The abolition of the Senate, an institution basic to the federal – provincial union, is prohibited by the expressed limitation that *Parliament must hold at least one session per year* explicit in s. 91(1).⁶⁸ Parliament consists of the House, the Senate and the Queen. If the Senate were to be abolished it would upset this very requirement;⁶⁹ the continued existence of the Senate is thus secured.⁷⁰ The Attorney General of Canada, in arguing that the federal government can alter the Senate is in effect arguing that it can alter s. 17 of the BNA Act which constitutes “the basic structure of the Parliament system

⁶⁷ Factum of the Attorney General of Nova Scotia, 1979, para. 11.

⁶⁸ Factum of the Attorney General of Ontario, 1979, para. 12;

Factum of the Attorney General of Saskatchewan, 1979, para. 23;

Factum of the Attorney General of Nova Scotia, 1979, para. 19;

Factum of the Attorney General of Prince Edward Island, 1979, para. 13.

⁶⁹ Factum of the Attorney General of Saskatchewan, 1979, para. 23.

⁷⁰ Factum of the Attorney General of Ontario, 1979, para. 13.

in Canada.”⁷¹ From this logic then, one can also conclude that the federal government is also able, under s. 91(1), to abolish the House and the office of the Queen.⁷² Such a conclusion would seem preposterous.

Further to this, the limitations listed s. 91(1) are not exhaustive; s. 91(1) limits the federal authority to amend fundamental or essential matters of the Constitution in a way so as to affect the rights of the provinces;⁷³ significantly altering the Senate would affect such relations.⁷⁴ Sections 147 and 22 of the BNA Act, 1867, and the B.N.A. Act, 1945, ensure that PEI, Nova Scotia and Newfoundland, respectively, are to have a minimum number of seats in the Senate; the existence of this section clearly prevents the federal government from abolishing the Senate.⁷⁵ If the Senate were to be abolished, it may lead to the province not having any seats in the House as the provision (s. 51a) guaranteeing minimum representation in the House for a province is contingent upon the existence of the Senate.⁷⁶ Thus the federal government does not have to authority to “repeal sections 21 to 36” of the BNA Act.⁷⁷

Such a conclusion is further strengthened when considering the amending procedure adopted with the use of s. 91(1) and past amendments made to the Senate. Constitutional conventions, though not enforceable by law, are important in understanding key concepts and phrases. Thus past practices must be considered in the interpretation of s. 91(1). The provinces conceded that in the past the federal

⁷¹ Factum of the Attorney General of Nova Scotia, 1979, para. 12.

⁷² Ibid., para. 12.

⁷³ Factum of the Attorney General of Ontario, 1979, para. 13.

⁷⁴ Factum of the Attorney General of Prince Edward Island, 1979, para. 14.

⁷⁵ Ibid., para. 15;

Factum of the Attorney General of Newfoundland, 1979, para. 6-7.

Factum of the Attorney General of Nova Scotia, 1979, para. 18.

⁷⁶ Ibid., para. 16.

⁷⁷ Ibid., para. 21.

government, using s. 91(1), made changes to the Senate. However, these changes did not alter the fundamental nature of the Senate or the essential basis of provincial representation at the centre; no feature of Canadian federalism was upset.⁷⁸ For those amendments which affected the provinces or federal – provincial relations, provincial consent was sought and obtained before proceeding.⁷⁹ Drawing upon the fourth principle of the Favreau White Paper, the province of Ontario argued that the understanding of s. 91(1) should not conflict with the established convention of obtaining provincial consent. The *Constitution of Canada* does not include the power to change the Senate where changes affect federal – provincial relations.

The provinces proceeded to argue that the provincial and federal Upper Houses are not similar institutions. Despite the views of the Attorney General of Canada, the federal Senate is a much more important institution to Canadian federalism than provincial Upper Houses were, are and could ever be. Unlike the federal Senate, provincial legislative councils do not affect the rights and privileges of Canadians in general and federal institutions in particular; they do not embody the federal characteristics of the Senate.⁸⁰ The importance of the Senate vis-à-vis Canadian federalism is reinforced through the constitutional entrenchment of its legislative role; there is no such entrenchment of the provincial Upper House.⁸¹ Further, the Senate is not a national institution the way the legislative council is a provincial institution in that the

⁷⁸ Factum of the Attorney General of Saskatchewan, 1979, para. 7 ;
Factum of the Attorney General of Nova Scotia, 1979, para. 16;
Factum of the Attorney General of New Brunswick, 1979, para. 20.

⁷⁹ Factum of the Attorney General of Ontario, 1979, para. 27-28.

⁸⁰ Factum of the Attorney General of Nova Scotia, 1979, para. 21;
Factum of the Attorney General of Ontario, 1970, para. 31.

⁸¹ Factum of the Attorney General of New Brunswick, 1979, para. 15.

Senate embraces “communities which exist as separate political entities.”⁸² According to the province of New Brunswick, this clearly indicates that the role of the Senate is much more meaningful to Canada’s federal structure.⁸³ In short, the federal Senate, in its present form, preserves the true nature of Canadian federalism, understood as regional representation at the centre and the equality between the two orders of government.

On the surface the issues of this Reference can be reduced to the spirit of Canadian federalism and how the Senate serves to protect and enhance this spirit. It would seem by virtue of their arguments that the federal government considers the spirit of Canadian federalism in general and the federal bargain in particular in centralized terms. The role of the Senate as a body ensuring regional representation at the centre becomes inconsequential. As such, the Senate can be altered unilaterally at the whim of the federal government. This of course is in direct contrast with the views and arguments presented by the provinces. Both the spirit of Canadian federalism and the federal bargain are understood in provincialist terms – specifically both orders of government are equal partners in the federation. The Senate protects this ideal as it was established to ensure regional representation at the centre. In light of this, the Senate cannot be unilaterally altered at the fancy of the federal government.

If the federal government can unilaterally alter a key feature of the federal bargain, in this reference the Senate, then the provinces cease to be equal partners in the federation. Canada thus is a state closer akin to a unitary one and not a federal one. If however the federal government cannot, then the provinces are recognized as partners and must be respected as such. At this point it becomes clear that the S.C.C. is presented

⁸² Factum of the Attorney General of Saskatchewan, 1979, para. 21.

⁸³ Factum of the Attorney General of New Brunswick, 1979, para. 16.

with two distinct visions of Canadian federalism: the centralized one where the provinces play an almost insignificant role; and the provincialist one where the provinces are regarded as equal players. The political players at the time were unable to reach a consensus regarding this issue. And so, it was left to the Court to settle the dispute.

THE S.C.C. SPEAKS

The Court's understanding of the role the provinces and provincial governments play in the Canadian federation and the function served by the Senate in realizing this role, is crucial to this opinion. Adopting the provincialist vision pronounced by the provinces, the S.C.C. understood the federal bargain, and consequently federalism as a consensus amongst the constituent units in which the Senate, securing and ensuring regional representation at the centre is a key feature. Applying this understanding, the Court ruled that the federal government cannot alter the body of the Senate unilaterally because of what it represents in the Canadian federal structure. This decision is important because the Supreme Court, in giving meaning to the Constitution, acknowledged the constitutional equality of the two orders of government with regard to the Senate and the importance of regional representation at the centre. So, on the surface, its decision seems to be informed by the provincialist view; however, upon closer analysis, we recognize that the Court did not fully promote the ideals embodied in such a view. It was able to maintain the hierarchical position of the federal government in two ways: First, in applying the obligations emerging from the Constitution to the matter at hand, the Court restricted itself to the legislative function of the Senate; second, it affirmed that the Senate continues to exist as an appointed body. It is because of this

affirmation that the role of the provinces at the centre, secured through the Senate, is minimized.

Step one: The purpose of the proposed bill

In deciding the matter of Bill C-60, the Court began by analyzing the reasons why the Senate, as an institution, was adopted and the purposes it serves. Relying upon statements delivered by John A. Macdonald and George Brown in the debates on Confederation, the Court found that the Senate essentially ensures regional representation at the centre as it was adopted “to afford protection to the various sectional interests in Canada in relation to the enactment of federal legislation.”⁸⁴ Consequently, the Senate plays a vital part in exercising power to enact federal legislation, as its advice and consent is needed before royal assent. Such a function of the Senate and its place in the federation “in the exercise of federal legislative powers” is determined by ss. 17 and 91 of the BNA Act;⁸⁵ and this role relates to the Canadian constitutional make-up. Thus “the body which has been created as a means of protecting sectional and provincial interests was made a participant in [the] legislative process.”⁸⁶

In adopting such an institutional understanding of the purpose and function of the Senate, the Court concentrated its outlook on the federal Parliament makeup of Canada and the role the Senate plays within this institution of Parliament to the neglect of other purposes and functions it can execute. The focus for the Court became the role of the Senate in passing legislation, specifically, that both Houses need to pass a bill before it

⁸⁴ Ibid., para. 10.

⁸⁵ Ibid., para. 10-11:

section 17 indicates that Parliament is made up of a House of Commons, Senate and the Queen; in section 91, it is clearly understood that royal assent is granted and appointment made by the Queen are effected on the advice of both the House of Commons and the Senate.

⁸⁶ Ibid., para. 11.

can receive royal assent. The matter of law, or for this particular reference, the purpose of the proposed bill C-60, thus was understood as the unilateral modification of the institutional and constitutional structure of Parliament through the abolition of the Senate; this upsets the constitutional functions of the Parliament understood to be made up of two houses, an elected lower house and an appointed upper house and the Queen.

Consequently, the question to be addressed became, does the federal government have the ability to do so under the Constitution, in general, and under s. 91(1) in particular?

Step two: Power to do so?

In deciding that “Parliament does not have the legislative authority to abolish the Senate,”⁸⁷ the Court considered the purpose of enacting s. 91(1) and the purpose of it in relation to the BNA Act, 1867. The federal government exercising its power under s. 91(1) does not occur in a vacuum; the use of this section can have an effect on the federation as a whole. Thus, one must consider the purpose and intention of s. 91(1) in relation to the purpose and intention of the BNA Act and inexorably, Canadian federalism.

At this point the Court’s understanding of federalism emerged; it adopted Lord Sankey’s understanding of the BNA Act and consequentially endorsed his conceptualization of the compact between the provinces at the time of Confederation when addressing this idea of the relationship between the BNA Act and s. 91(1).

Inasmuch as the Act embodies a compromise under which the original Provinces agreed to federate, it is important to keep in mind that the preservation of the rights of minorities was a condition on which such minorities entered into the federation, and the foundation upon which the whole structure was subsequently erected.⁸⁸

⁸⁷ *The Senate Reference*, 12.

⁸⁸ *Ibid.*, 13.

In light of this, Confederation was understood as a compact amongst the provinces; a compact which ensures the protection of interests and autonomy of the confederate units; and a compromise which formed the basis of the Canadian federation. Thus, as the provinces are equal to each other, so are the two orders of government. This principle, Lord Sankey argued, needs to be honoured and maintained in both practice and interpretation of the contract:

The process of interpretation as the years go on ought not to be allowed to dim or to whittle down the provisions of the original contract upon which the federation was founded, nor is it legitimate that any judicial construction of the provisions of ss. 91 and 92 should impose a new and different contract of the federating bodies.⁸⁹

Agreeing with the provinces, the Court found that the phrase *Constitution of Canada* in s. 91(1) refers to the “*Constitution of the federal government* as distinct from the provincial governments.”⁹⁰ (emphasis added) If we recall, the Attorney General of Canada argued that the federal government is only limited by the exceptions listed in s. 91(1). The Court, rejecting this argument and embracing the one advanced by the provinces, argued that the phrase *Constitution of Canada* in s. 91(1) does not mean the federal government has the power to amend the entire BNA Act; rather, the power of the federal government by virtue of s. 91(1) is restricted to the power to amend only the Constitution of the federal government. If the S.C.C. were to adopt the approach suggested by the Attorney General of Canada, then the federal government would have the ultimate power to unilaterally amend the entire BNA Act. The Supreme Court

⁸⁹ Ibid., 13.

⁹⁰ Ibid., 12.

agreed with such a vision; it felt that s. 91(1) is intended to confer power to amend the Constitution in so far as it only affects the powers of the federal government.⁹¹

Consequently, the federal government's power to amend the BNA Act

literally is restricted to those amendments which affect the federal government alone.

The power of amendment given by s. 91(1) relates to the Constitution of the federal

government in matters of interest to that government.⁹² So, does s 91(1) understood as

include the Senate? That is, is the Senate solely a federal matter thereby able to be

amended unilaterally by the federal government?

Considering the purpose of s. 91(1), coupled with the history of the reasons for

amending the Senate, s. 91(1), the Court found that the effects of an amendment which

fundamentally alters the structure of the Senate, including its abolition, go beyond the

scope of the federal government's powers under s. 91(1). First, abolishing the Senate

would affect the legislative powers of the federal Parliament; these general powers, as per

the BNA Act, "can be exercised only by the Queen by and with the advice and consent of

the Senate and the House of Commons."⁹³ Second, the S.C.C. in *A.-G N.S. et al. v. A.-G.*

et al. [1950] 4 D.L.R. 369, [1951] 31, ruled that neither the federal government nor

a provincial government can transfer its powers to another order of government; by

amending the Senate, the federal government would transfer its powers not to another

order of government, but to an entirely different body – this is not permitted under s.

91(1). Further to this, the Court argued that the exceptions listed in s. 91(1) coupled with

exceptions throughout the BNA Act, imply the continued existence of the Senate:

..., 12:

..., 12: Dictating the understanding of the term Canada under section 91(1) to encompass only the jurisdictional unit other than the whole geographical unit of the nation, the S.C.C. is consistent with the understanding of the term in other sections of the BNA Act.

..., 13.

..., 13.

both orders of government to settle the political dispute of who ought to be involved in the amending process of the Constitution.

Essentially, the opinion in this Reference can be reduced to the principle of equality between the two orders of government in so far as the consent of all parties needs to be obtained in order to alter the original compact. We are quickly reminded of Althusius' idea of what touches all, must be approved by all. It would seem that it should be safe to infer from this *unanimous* opinion then that, legally and constitutionally, no order of government is empowered, by way of either s. 91(1) or 92 (1) or even by the BNA Act, to unilaterally amend the Constitution if the amendment significantly affects federal-provincial relations, key institutions, or another government's powers. However, as we will see in the following references to be reviewed in the subsequent chapters, the opinions, especially those of the Patriation and of the Quebec Veto References, in which the Court was composed of the same Justices, seemingly contradict the opinion of this unanimous court in the Senate Reference.

Lastly, with this opinion the Court does, to a certain extent, establish a particular understanding of federalism and of the nation – the provinces though perceived to be equal to the federal government are in fact the subordinate order of government. The hierarchical position of the federal government in the federation is not explicit in this Reference, but it is definitely hinted through the Court's reaffirmation that that the Senate remain an appointed body and that the Senate not be abolished as its approval is needed to pass legislation. So here the Court begins to lay the groundwork (in cases dealing with amending the Constitution) of a vision centred on a centralized federation.

CHAPTER 4: THE PATRIATION REFERENCE: HOMEWARD BOUND

INTRODUCTION

The following two cases to be analysed, the Patriation Reference, 1981, and the Quebec Veto Reference, 1982, in the fourth and fifth chapters respectively, deal with the same issue – the patriation of the Constitution and which governments, constitutionally and by way of convention, need to consent to the amendments in order to legitimately affect the process of patriation. Where the first case addressed the need of the provinces to consent in general, the second case addressed the requirement of the Quebec government and legislature to consent in particular. Also distinguishing the two cases was the issue of a nation other than the Canadian nation. In the first case the provinces including Quebec, but excluding Ontario and New Brunswick, appealed to the decentralized vision of Canadian federalism to argue that the consent of the provinces is required as they represent equal constitutional partners in the federation. In the second case, the Attorney General of Quebec introduced the idea of constitutional, legal and cultural dualism into the discourse at the court level¹ to argue that the consent of the province and legislature of Quebec is required as the province of Quebec represents a nation equal to the Canadian nation. Relying upon the logic first introduced in the Senate Reference, the federal government argued in both cases that it alone can amend the Constitution. Nothing in law or the Constitution explicitly requires the federal

¹ I indicate here that the issue was introduced at the court level, as the discussion of Quebec distinctiveness had already made its way onto the political scene and into the discussions concerning the patriation of the Constitution.

government to acquire the consent of the provinces in general and/or that of Quebec in particular before asking the British Parliament to amend the BNA Act.

As will become evident in the following two chapters, the arguments relied upon by the parties involved, with the exception of Quebec (but only in the Quebec Veto Reference), are underpinned by a one nation understanding of the Canadian federation in general and a specific vision of the Canadian federation in particular. For the provinces, including Quebec in the Patriation Reference, the federal bargain and subsequently federalism was understood as the legal and constitutional equality between the two orders of government where such equality needs to be respected by the other order. For the government of Quebec in the Quebec Veto Reference, the federal bargain and consequently Canadian federalism is understood as a partnership between two distinct and equal nations – the consent of both is needed in order to legitimately effect any changes to the original compact. For the federal government and the provinces of Ontario and New Brunswick in the first case, the equality between the orders of governments is not the specific issue; rather, the legal text, which does not explicitly prevent the federal government from proceeding alone to amend the Constitution or explicitly require the consent of all or any particular province, is the crux of the matter. As it did in the Senate Reference, the federal government, along with the other two provinces in these sets of cases, advanced the notion that there exists a hierarchy of levels in which the provinces are subordinate to the federal government. The S.C.C., seemingly forgetting the opinion it rendered less than two years prior, adopted the arguments of the federal government vis-à-vis the legality of the action. On the convention issue, however, it endorsed a view of federalism akin to the position pronounced by the

provinces. It nonetheless, unequivocally rejected and dismissed Quebec's arguments in the Quebec Veto Reference and consequently rejected the dualist vision. Though it ruled differently than it did in the Senate Reference, the S.C.C.'s opinions in these next two references are similar in that all three are rooted in a comparable understanding of Canadian federalism and all three sustained and/or promoted the dominant ideology of the time. Furthermore, in the following two references, the Court not only continued to play the political mediator, but it also ensured its legitimacy by locating its opinion within the text in the Constitution.

In this particular chapter, I look specifically at the Patriation Reference and how the issues were understood by all parties, both involved and affected. I begin with a brief outline and account of what led to the federal government's bold attempt to unilaterally patriate the Constitution and the reaction and actions of the provinces. I then proceed to analyse the positions of the federal government, the provinces and the interveners and examine how federalism was understood. Also, I look at how the issues were presented and understood by the media. Finally, I assess the opinion of the Court in relation to arguments presented to it and to the different visions of Canadian federalism.

ON THEIR OWN

The quest to patriate the Constitution of Canada did not begin nor end with the 1980-1982 process. In fact, the desire to 'bring home the Constitution', in other words devise and agree upon a domestic amending formula which would enable Canadian governments to amend Canada's Constitution without requesting the government of Britain to do so, began in 1926. Between 1926 and 1982, various First Ministers

attempted to arrive at a consensus with hopes of agreeing upon a domestic amending formula and ultimately patriating Canada's Constitution. During this period, a struggle between the leaders emerged; they were unable to agree upon an amending formula. Such struggle was further magnified as the years progressed with the emergence of Quebec nationalism as a strong force beginning in the Sixties, and a rising force in the West regarding provincial autonomy rooted in issues of natural resources and inclusion. The provinces began to demand a significant role in the federation and in the new Constitution.²

By 1980, the events of the previous years of failed attempts culminated; constitutional negotiations were pursued with a new vigour. Ignited by both his re-election and the loss of the sovereignty association referendum in Quebec,³ Trudeau wasted no time re-opening constitutional talks. Peter Russell has pointed out, "[T]wo political events in the first half of the year [of 1980] had a decisive bearing on these developments: Pierre Trudeau won an election and René Lévesque lost a referendum [on sovereignty-association]. The combination of these two events transformed the balance of power between the two Canadians whose competing visions of Quebec were at heart of the constitutional debate."⁴ I would broaden the vision of Quebec at heart of the

² Prior to the patriation in 1982, leaders came close to patriating the Constitution on three occasions, the Fulton Formula of 1961, the Fulton Favreau Formula of 1964 and the Victoria Charter of 1970. All attempts ultimately failed when one province (Saskatchewan on the first formula and Quebec on the second and third) decided not to endorse the proposed package.

For a full account and analysis of the political dynamics and constitutional wrangling of the process of attempting to patriate the Constitution, please see Peter Russell, *A Constitutional Odyssey*; Kenneth McRoberts, *Misconceiving Canada*; Garth Stevenson, *Unfulfilled Union*; Guy LaForest, *Trudeau and the End of a Canadian Dream*. This, by no means is a complete list as there is a plethora of political scientists who have commented and studied the road to patriation and the political and legal struggles associated with the leaders reaching a consensus.

³ The referendum on sovereignty association in Quebec, held in May of 1980, will be looked at in more detail in the last chapter discussing the Secession Reference

⁴ Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?* 2nd ed., 107.

debate to include the vision of Canada and the role of the provinces at the root of the constitutional battle.

During this time, the positions of the leaders were much more polarized, rendering unanimous consent much more difficult to attain. In response to the intransigence of the provinces, as perceived and projected by Trudeau, the federal government announced to the country, on October 2nd, 1980, that they would, upon joint request from both federal houses, ask the British Parliament to amend the BNA Act according to the proposed Canada Act; this would amongst other items, include an amending formula and a charter of rights and freedoms. The ultimate result of effecting the Canada Act would be the patriation of the Constitution.⁵ According to Stevenson, this was a bold move: “since the days of Mackenzie King it had apparently been assumed that agreement of all provinces on an amending formula was a prerequisite for patriation.”⁶ Considering the rebirth of Trudeau in the 1980s, this is not surprising.

At the heart of Trudeau’s package, which he dubbed the “*people’s package*,” was his philosophy of equality of all Canadians protected by a charter and the idea that all Canadians belong to one nation; this *pan-Canadianism* would be embodied and entrenched in a new Canadian Constitution. According to Russell, “the constitutional process Trudeau proposed to follow in giving effect to the rest of this package represented an even more categorical denial of Canada’s federal nature,”⁷ as the provinces would be excluded from the process.

The Ontario government, under William Davis, the New Brunswick government under Richard Hatfield and the federal NDP, under the leadership of Ed Broadbent,

⁵ Ibid., 111.

⁶ Stevenson, *Unfulfilled Union*, 250.

⁷ Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?* 2nd ed., 112.

supported Trudeau's package. The other eight provinces, later dubbed "the gang of eight" by the media, rejected the package for two fundamental reasons: first, the unilateral intentions of the Trudeau government excluded the provinces from the process of patriation. This inevitably altered the manifestation of federalism in Canada from a federation made up of two equal orders of government each partaking in the changing of the original contract, to a state where the federal government could alter the nation's Constitution, having the ultimate effect of subordinating the provinces vis-à-vis the Constitution and constitutional powers. And second, an entrenched charter of rights and freedoms directly challenged, if not replaced parliamentary supremacy with judicial supremacy where the final word rested not with elected officials, but with a federally appointed institution. Considering the audacity of Trudeau and his plan of unilateralism, it is not surprising that reactions to such a 'bold move' varied and were vociferous.

THE MEDIA REACTS

The press, it seemed, felt compelled to take sides in an adversarial combat which pitted the Trudeau government and the provinces against each other. Such need to choose sides was, however, ignited by Trudeau and the way he chose to formulate the debate. When Pierre Trudeau announced his plan to proceed unilaterally he confidently stated that "any group that opposed it would look foolish in the eyes of the world."⁸ He intentionally, or unintentionally, set the parameters of the debate of the struggle between the two orders of government. The discourse was reduced to us versus them, Canada versus the provinces, rights versus no rights, united Canada versus checkerboard Canada;

⁸ Robert Sheppard, 'NDP offers support, Tories will fight move', *Globe and Mail*, [Toronto], 3 October 1980, 1.

in essence, it was boiled down to good versus bad. Jean Chrétien, then Justice Minister, sustaining the discourse, argued the proposed action is “not a matter of ramming anything down anyone’s throat; it is rather, *in the finest tradition of democracy*” (emphasis added).⁹

The provinces in various statements made soon after Trudeau released his plan to unilaterally amend the BNA Act, added to the discourse, depicting themselves as good and the federal government as bad; this had the ultimate effect of further compelling the media and in turn society to choose sides. Lévesque called the plan an “attack on some of Quebecers’ most essential rights and a flagrant betrayal of their hopes.”¹⁰ Premier Sterling Lyon of Manitoba also expressed some reservation calling the plan “a scheme proposed by one man, going to impose it on Canada regardless of the will of the provinces or, for that matter anyone else.”¹¹ Brian Peckford, Premier of Newfoundland, stated that the proposals “materially change the nature and very existence of the relationships that have existed between the provinces and the federal government since 1867; also, it would effectively change Canada from a federation to a unitary state.”¹² Such animosity and combat between the two orders of government was inevitably reproduced in various columns and editorials appearing in the print media.

The Toronto Star, adopting a very centralist approach to Canadian federalism fully supported Trudeau’s plans. In one editorial published on October 3rd, 1980, all were urged to accept Trudeau’s plan as it was the best thing for all Canadians and for the

⁹ Ian Mulgrew, “Chrétien evokes pride in Canada on Constitution”, *The Globe and Mail*, [Toronto], 9 October 1980, 10.

¹⁰ Margot Gibb-Clarke, “Quebec leaders reject Ottawa’s scheme”, *The Globe and Mail*, [Toronto], 4 October 1980, 15.

¹¹ Canadian Press, “M. in a dream world, Manitoba Lyon say”, *The Globe and Mail*, [Toronto], 4 October 1980, 15.

¹² Canadian Press, “Trudeau’s plan is ‘terrifying’, Peckford asserts”, *The Globe and Mail*, [Toronto], 10 October 1980, 10.

country: "He has chosen a course which, while taking nothing away from any individual or any provincial government, can unblock the process of constitutional renewal and help make Canada a better nation."¹³ In a follow up editorial, the arguments put forth by the provinces and by the Leader of the Opposition, Joe Clark, which asserted that Canada was a community of communities, were rejected and dismissed as a detriment to the country and to Canadians: "such a vision of Canada would leave her with a weak central government. Rather, we should have a strong central government able to act in the interests of all Canadians."¹⁴ Its views on the federation in general, and the role of the provinces in 'destroying it' become even more transparent when reading the front page of their April 16 edition. The eight dissident provinces released their plan the day before, and the Toronto Star responded with a simple yet bold statement "Hopes of unity dashed as premiers reject deal."¹⁵

The Globe and Mail on the other hand, embraced a more sympathetic approach to the position of the provinces. Rejecting the federal government's plan to unilaterally amend the Constitution, it expressed views favouring a more balanced federation with both orders of government playing an important role in patriating and amending the Constitution. "The danger in any unilateral action – the imposing of will by the federal level on the provincial – is that it creates dissension and hostility. It ensures for some time to come, at least, the constitution will not be able to serve as an agent for national unity and purpose."¹⁶ In an editorial appearing in its October 4th edition, the Trudeau plan was described as "Trudeau's bid for unilateral patriation of the constitution on terms

¹³ Editorial, "Trudeau is right to act", *The Globe and Mail*, [Toronto], 3 October 1980, A8.

¹⁴ Editorial, "Trudeau's constitution plan: Is it legally, morally okay?" *The Toronto Star*, [Toronto], 4 October 1980, B1.

¹⁵ Canadian Press, "Hopes of unity dashed as premiers reject deal", *The Toronto Star*, 16 April 1980, A1.

¹⁶ Gregory Stevens, "Velvet Gloves, iron fists", *The Globe and Mail*, [Toronto], 3 October 1980, 6.

that offend the provinces and place new strains upon the threadbare fabric of national unity [. . .] It would be the great redoubt of Canadian centralism and the peril of our state.”¹⁷

Le Devoir expressed a comparable reaction. Arguing for a more balanced federalism where the idea of provincial autonomy is maintained and enhanced; a federalism that was promised to the people of Quebec by Trudeau during the May 1980 referendum on sovereignty – association. “One must condemn the means taken by the Prime Minister and his Cabinet. They are unacceptable for the country as a whole and, for Quebec after the referendum, they look like an imposture.”¹⁸

The Calgary Herald, very much in the fashion similar to the *Globe and Mail*, expressed distaste and outright rejection of the Trudeau plan. It too favoured a more balanced federation where provinces play a significant role in the amending of the Constitution and in the federation. One editorial claimed that “Trudeau took a gamble and the bet [was] Canadian nationhood. The proposals “cannot fail to jolt the provinces; [they] turmoil and changes the very nature of the country if it succeeds. The whole project is self-serving and it does not necessarily serve the nation.”¹⁹ It further rejected the way in which Trudeau formulated the debate. It did not see it as a fight between Canadian citizenship and loyalty versus provincial identity. Rather, the unity of Canada should be a task to be engaged in by all players affected and not only the Liberal Party.

¹⁷ Editorial, “Davis and the compact”, *The Globe and Mail*, [Toronto], 6 October 1980, 6.

¹⁸ Editorial, *Le Devoir*, [Montreal] 3 October 1980.

¹⁹ Editorial, “Big gamble on the constitution”, *The Calgary Herald*, [Calgary], 3 October 1980, A6.

Such views, however, were not the only ones expressed in the *Calgary Herald*. Expressing implicit support for Trudeau and his agenda, Charles Lynch²⁰ rejected the initiatives of the provinces dismissing them both as futile and dangerous to the fabric of the nation. He argued that the ensuing debate would force Canadians to choose between the two levels of government. "My own solution is to get behind Trudeau in what he is doing and pray that my long-term impression of him as a nation-saver is the right one."²¹

The Montreal Gazette, even before Trudeau made public his intentions to proceed unilaterally, lent its full support to the Trudeau government: "The strategy of the federal government through the period of the Quebec referendum and leading up to this week's conference has been highly successful [...] It is a strong arm process, but the justification is that there is no better solution."²² In an editorial appearing the following day the desire not to support the provinces are made explicit: "The premiers have asserted their own rights this week, but they have failed shamelessly to protect the citizens."²³

In short, the debate which took place in the print media and society spilled over into the court room and it was inevitably reduced to a particular vision of Canada: is Canada a nation with equally strong orders of government, both having a significant role to play in the amending and patriation of her Constitution? Or, is Canada a nation with a strong central government able to act in the best interests, as it sees fit, of the nation?

²⁰ Charles Lynch also writes and publishes in the *Montreal Gazette*. As such, his columns appeared in both papers.

²¹ Charles Lynch, "Confrontation contained in constitutional package", *The Calgary Herald*, [Calgary], 4 October 1980, A6.

²² Christopher Young, "Trudeau's strategy of strong arm tactics may prove the best", *The Montreal Gazette*, [Montreal], 11 September 1980, 9.

²³ Editorial, "The premiers fail Canada", *The Montreal Gazette*, [Montreal], 12 September 1980, 6.

CALLING THE SUPREME COURT OF CANADA

The provinces of Manitoba, Quebec, and Newfoundland decided to challenge such actions in their respective courts; the decisions of each of these cases produced mixed results and were appealed. The three individual cases eventually reached the S.C.C., where they were consolidated into one – the Patriation Reference. Addressing a total of six questions, the references dealt with two specific issues, Constitutional law and convention:

On appeals from the Manitoba and Newfoundland Courts of Appeal:

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

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

(3) is the agreement of the provinces of Canada constitutionally required for amendment to the Constitution of Canada where such amendment affects federal – provincial relationships or alters the powers, rights or privileges granted or secured by the Constitution of Canada to the provinces, their legislatures or governments?

A further question on the appeal from the Newfoundland Court of Appeal

(4) If Part V of the proposed resolution referred to in question 1 is enacted and proclaimed into force could

(a) the Terms of Union, including terms 2 and 17 thereof contained in the Schedule to the British North America Act 1949 (12-13 George VI, c. 22 [U.K.]), or

(b) sections 3 of the British North America Act, 1871 (34-35 Victoria, c. 28 [U.K.]) be amended directly or indirectly pursuant to Part V without the consent of the Government, Legislature or a majority of

the Province of Newfoundland voting in a referendum held pursuant to Part V?

On appeal from the Quebec Court of Appeal

- (a) If the Canada Act and the Constitution Act 1981 should come into force and if they should be valid in all respects in Canada would they affect:
- (i) the legislative competence of the provincial legislatures in virtue of the Canadian Constitution?
 - (ii) the status or role of the provincial legislatures or governments within the Canadian Federation?
- (b) Does the Canadian Constitution empower, whether by statute, convention or otherwise, the Senate and the House of Commons of Canada to cause the Canadian Constitution to be amended without the consent of the provinces and in spite of the objection of several of them, in such a manner as to affect:
- (i) the legislative competence of the provincial legislatures in virtue of the Canadian Constitution?
 - (ii) the status or role of the provincial legislatures or governments within the Canadian Federation?²⁴

In short the questions were: is it legal for the federal Parliament alone (by way of a joint request) to amend the Constitution, having the affect of patriating the BNA Act? And, regardless of its legality, does the action of the federal government accord with convention? What was interesting and unique about this case was that the S.C.C. was asked to consider the weight of a convention in relation to the constitutional powers of the federal government and the role of the provinces in the federation and in amending the Constitution.

For the purposes of this and the next two chapters, a convention is understood to be unwritten constitutional rules which govern the constitutional behaviour of governments. Because they are not explicitly written into the Constitution or law, they

²⁴ *The Patriation Reference*, 1-3.

are not enforceable by the courts.²⁵ Further, “a convention differs from a mere usage or practice in that it is normative: the person to whom the convention applies must feel obliged to follow it.”²⁶ According to Peter Russell, there are four essential features of a constitutional convention: first, conventions “provide rules concerning the proper exercise of the legal powers of government;” second, conventions are normative in that “conventional rules have come to be regarded as obligatory by most of those who are active in the institutions to which the conventions pertain;” third, justification is “dependent on prevailing political principles of the period;” and fourth, they bring “a dynamic element to the constitution,” in that they may enable the smooth operation of a constitution.²⁷ When we look specifically at both the Patriation Reference and the Quebec Reference, we begin to uncover how the political actors understand the idea of complying with a constitutional convention and how it relates to constitutional law and constitutional democracy.

So, in 1981, the S.C.C. was once again called upon to settle a political dispute between the federal government and the provinces dealing with which order of government had the authority to amend the Constitution. Unlike the previous reference where only one institution was under review, in this case, the BNA Act as a whole was in question. Similar to it, the Court was presented with two distinct visions of Canadian federalism; the provincialist advanced by “the gang of eight” who asserted that as equal partners in the federation, provincial consent is required to legitimately effect the

²⁵ For a closer analysis on the various ways of conceptualizing and understanding conventions, please see Andrew Heard, *Canadian Constitutional Conventions*, (Toronto: McClelland Stewart, 1991).

²⁶ Peter Hogg, “Comments on Legislation and Judicial Decisions,” 60 *Canadian Bar Review* 1983:317.

²⁷ Peter H. Russell, “Bold Statescraft, Questionable Jurisprudence,” in *And No One Cheered: Federalism, Democracy & The Constitution Act*, ed. Keith Banting and Richard Simeon (Toronto: Methuen Publications, 1983) 217-218.

patriation of the Constitution; and the centralist vision advanced by the federal government and the provinces of Ontario and New Brunswick who asserted that nothing in the BNA Act prohibits the federal government from proceeding alone.

THE POSITION OF THE EIGHT PROVINCES

The provinces began by firmly stating the fundamental issue of the case: can the federal government alone, without the prior consent of the provinces, request the Parliament of Britain to amend the Constitution if the amendment affects the provinces? This issue speaks to the very heart of Canadian federalism. Upon distinguishing, either implicitly or explicitly the different classes of amendments,²⁸ the provinces stated that the new proposed Constitution, if passed, would affect the provinces and their legislative powers. Further, it would upset the nature of Canadian federalism.²⁹ Thus, the federal

²⁸ Governments of Alberta, British Columbia, Manitoba, Newfoundland, Nova Scotia, Prince Edward Island, Saskatchewan, Quebec. Departments of Justice. "Factum of the Attorney Generals of Alberta, British Columbia, Manitoba, Newfoundland, Nova Scotia, Prince Edward Island, Saskatchewan, Quebec" in the matter of *Reference: Re Amendment to the Constitution of Canada, (Nos. 1, 2, and 3), [1981]* in *Materials Concerning the Constitutional Reference, 1980/81 Vol 2 No 4-8a*.

Underpinning the arguments of the provinces was the understanding that there are different classes of amendments, thus was explicitly expressed by Manitoba stating that not all amendments to the Constitution require provincial consent; it is dependent upon the class of amendment of which there are three:

- (i) amendments by the provinces which affect only the provincial powers found in s92(1)
- (ii) the power of the federal government to amend its powers not affecting provincial powers or federal – provincial relations, as stipulated by s91(1)
- (iii) all those not falling into the first two categories must be passed by legislation of the Parliament of the U.K. In order to legitimize those amendments which affect federal-provincial relations and/or provincial powers, provincial consent must be sought and obtained. This of course is at the heart of questions 2 and 3. (Factum of the Attorney General of Manitoba, 1981, 20).

Such sentiment was reiterated by the provinces of Alberta (Factum of the Attorney General of Alberta, 1981, para. 24), and Saskatchewan (Factum of the Attorney General of Saskatchewan, 1981, para. 2-4). Further to this, there was a tacit agreement amongst that only those amendments which affect the provinces are of concern this case. This is reinforced, in my opinion, by the decision of this court in the Quebec Veto Reference.

²⁹ First, the Charter would restrict the legal powers of the provinces (Factum of the Attorney General of Newfoundland, 1981, para. 6-8; Factum of the Attorney General of Nova Scotia, 1981, 4; Factum of the Attorney General of Prince Edward Island, 1981, para. 18-20; Factum of the Attorney General of British Columbia, par 28; Factum of the Attorney General of Alberta, 1981, para. 8; Factum of the Attorney General of Quebec, 1981, par 14-15); second, the new amending formula, particularly the 7/50 rule reduces the current powers of the provinces vis-à-vis constitutional amendments (Factum of the Attorney General

government's ability to proceed unilaterally to amend the Constitution where the amendments affect federal-provincial relations and the powers of the provincial governments and legislatures is constitutionally invalid for two reasons: first, Canada's sovereignty coupled with its federalism and second, established convention. Both lead to the logical conclusion that the consent of the provinces is required when amending the Constitution where the amendment affects the powers of the provinces and/or federal-provincial relations. Both reasons are underpinned by the provincialist vision of Canada; Canada as one nation is made up of equal constituent units which must agree to changes to the original contract if those changes affect their constitutional powers and relations.

Federalism as a pact and a compact

Beginning with the purpose of Confederation, the provinces argued that it is clearly indicated in the preamble of the BNA Act that "each province retained its independence and autonomy and legislative authority conferred on the provinces by s. 92 was exclusive."³⁰ Drawing upon Lord Watson's thoughts on the nature of the Canadian

of Manitoba, 1981, par 15-19; Factum of the Attorney General of Nova Scotia, 1981, 4; Factum of the Attorney General of Prince Edward Island, 1981, para. 19; Factum of the Attorney General of Quebec, 1981, para. 14-15) (this assertion is of course dependent upon the assumption that the convention of unanimity of the provinces has been acknowledged and accepted as a valid and politically binding constitutional convention); third, the new amending formula empowers the federal government with the ability to unilaterally initiate a referendum, which takes away from the powers of the provinces (Factum of the Attorney General of Nova Scotia, 1981, 4; Factum of the Attorney General of Prince Edward Island, 1981, para. 19; Factum of the Attorney General of British Columbia, 1981, para. 31); fourth, the federal government is giving itself powers which it does not have according to the S.C.C. opinion in the Senate Reference (Factum of the Attorney General of Alberta, 1981, para. 19); fifth, it commits the provinces and its legislatures to equalization payments without it complying to such obligations (Factum of the Attorney General of Prince Edward Island, 1981, para. 19; Factum of the Attorney General of Quebec, 1981, para. 11); sixth, it would affect natural resource ownership (Factum of the Attorney General of Alberta, 1981, para. 18); and seventh, the Charter is contrary to the principle of parliamentary supremacy (Factum of the Attorney General of Saskatchewan, 1981, para. 9; Factum of the Attorney General of Quebec, 1981, para. 17).

³⁰ Factum of the Attorney General of Manitoba, 1981, para. 8-9; reiterated by Factum of the Attorney General of British Columbia, 1981, para. 4; and Factum of the Attorney General of Quebec, 1981, para. 34.

Union first articulated in the *Liquidators of Maritime Bank of Canada v Receiver General of New Brunswick*,³¹ the provinces asserted that the purpose of the Act was to ensure that the provinces retained their independence and autonomy.³² Since the provincial governments have “supreme legislative authority within their jurisdiction assigned by the BNA Act, their consent is required if their jurisdiction were to be affected.”³³ This is supported by the principle of non-subordination; “protection against unilateral federal executive action abridging provincial legislative authority”³⁴ and “protection against unilateral federal legislative action abolishing or altering the fundamental character of federal institutions”.³⁵

The purpose of the Act and the principle of non-subordination are coupled with the compact of Confederation which was endorsed by the S.C.C. in the unanimous opinion of the Senate Reference. The S.C.C. in this reference affirmed the role of the provinces in amending the Constitution. It found that in Canada, all amendments directly affecting federal – provincial relations, provincial consent was obtained. This became the rule which arose out of practice and out of the compact theory of

This view is also supported by the JCPC in *Hodge v. the Queen*, 1883, *Liquidators of Maritime Bank v Receiver General of New Brunswick*, 1892, *Re: Initiative and Referendum Act, 1919*.

³¹ See footnote 64, chapter 3.

³² Factum of the Attorney General of British Columbia, 1981, para. 4.

³³ Factum of the Attorney General of Nova Scotia, 1981, para. 9.

³⁴ Factum of the Attorney General of Saskatchewan, 1981, para. 27.

³⁵ *Ibid.*, para. 27.

Factum of the Attorney General of Alberta, 1981, para. 31, 32:

Echoing such an outlook, Alberta submitted “that a federal state is an association of separate, sovereign governments, each with a specific legislative jurisdiction of their own as defined by their common Constitution.” No one order of government can change the other’s jurisdiction of powers without its consent. This according to the province of Alberta is the very essence of Canadian federalism. Branching from this essence of Canadian federalism is “the rule of law which requires consent of all provinces to amendments to the BNA Act affecting federal – provincial relations or the rights or privileges of the provinces.” The main proponents of federalism advanced by the province of Alberta centre on the idea of the autonomy of the provinces vis-à-vis each other and the federal government.

Confederation.³⁶ The fundamental principles of federalism, the equality of the two orders of government, autonomy of the provinces, “gave birth to this nation and the division of powers agreed upon by our founding fathers” would be eroded if provincial autonomy were to be offended; such would be the case if the federal government could unilaterally amend the Constitution.³⁷

Sovereignty

Reinforcing the federalism argument, the provinces turn to the sovereignty of Canada in building its argument. Canada is a sovereign state, thus the consent of its governments is required in amending the fundamental nature of the country, its form of governance, and its Constitution.³⁸ “With the accession of Canada to a sovereign state, the powers listed in s. 92 became definitive and cannot be revoked or modified without the consent of the provinces affected.”³⁹ The foundation of this *sovereignty* argument rested in the Statute of Westminster.⁴⁰

Ratified by the British Parliament in 1931, the Statute of Westminster essentially passed legislative authority onto Canada. Because Canada was a federal state, the

³⁶ Factum of the Attorney General of Manitoba, 1981, para 10-11.

³⁷ Factum of the Attorney General of Nova Scotia, 1981, para. 14.

³⁸ Factum of the Attorney General of Quebec, 1981, para. 29.

³⁹ *Ibid.*, para. 33 (my translation).

⁴⁰ Four Nations Confederacy, “Factum of the Four Nations Confederacy” in the matter of Reference: *Re Amendment to the Constitution of Canada, (Nos. 1, 2, and 3), [1981]*, In *Materials Concerning the Constitutional Reference, 1980/81 Vol 2 No 4-8a*, 1981. (Factum of the Four Nations Confederacy, 1981). A factum was also submitted by the Four Nations Confederacy. The Confederacy, however, limited their arguments to the issue of Canadian sovereignty to simply ask and answer is Canada a sovereign nation? If it can amend its own Constitution then in it is sovereign (Factum of the Four Nations Confederacy, 1981, para. 5). The Confederacy disagrees with the federal government’s assertion that the absolute power to amend the Canadian Constitution rests with the Parliament of Britain. On the contrary, the Statute of Westminster clearly transferred powers to the Dominion of Canada. (Factum of the Four Nations Confederacy, 1981, para. 11). Further, the wording of s4 indicates that the intention was to preserve the federal structure of Canada and Australia (Factum of the Four Nations Confederacy, 1981, para. 14). It is indicated by such section that consent of both orders of government is required through such use of the terms ‘dominion’ and ‘consent’.

provinces contended that the legislative authority was forwarded onto both orders of government.⁴¹ The word *Dominion*, contrary to the federal government's interpretation, refers to both the federal government and the provincial governments and not just the federal government.⁴² From this, it is logical to conclude that the power to amend the Constitution rested with the bodies that were affected from such amendments. So, if a proposed amendment affects the provinces, the provinces' consent must be sought and obtained.⁴³ The third subsection of the statute solidifies this point as it "ensures that neither level of government can infringe upon the other's jurisdiction."⁴⁴

Furthermore, in the drafting and passing of s. 7 of the Statute of Westminster, the status quo (understood that provincial consent sought and obtained in amending the Constitution where the amendment fundamentally and/or substantially affected the provinces) remained.⁴⁵ If this role of the provinces in the amending the Constitution is denied then "provincial autonomy [would be] denied and constitutional safeguards nullified."⁴⁶ The Statute of Westminster did not affect the legal and constitutional status of the provinces nor did it affect the constitutional relationship between the two orders of government; rather, such status and relationship were reaffirmed with the passing of the Statute, particularly with the existence of s. 7(3) which restricts the orders of government to their respective jurisdiction. Thus, the consent of the provinces is mandatory.⁴⁷

⁴¹ Factum of the Attorney General of Manitoba, 1981, para. 15; Factum of the Attorney General of Alberta, 1981, o cit., para. 56-57; Factum of the Four Nations Confederacy, 1981, para. 17-18.

⁴² Factum of the Four Nations Confederacy, para. 14.

⁴³ Factum of the Attorney General of Manitoba, 1981, para. 15.

⁴⁴ Ibid., para. 17.

⁴⁵ Factum of the Attorney General of Manitoba, 1981, para. 20; Factum of the Attorney General of Nova Scotia, 1981, para. 10.

⁴⁶ Factum of the Attorney General of Manitoba, 1981, para. 21.

⁴⁷ Factum of the Attorney General of Alberta, 1981, para. 48-51; Factum of the Attorney General of British Columbia, 1981, para. 44.

In relying on this Statute to affirm Canada's sovereignty and the provinces' role in it, coupled with their understanding and application of Canadian federalism, we recognize the provinces' reliance upon a provincialist vision of the Canadian federation to advance their case. According to the provinces, the legal requirements pronounced and reinforced by the Statute of Westminster and the purpose of federalism reaffirm their legal and constitutional status as equal partners in the federation. Provincial autonomy means that the legal and constitutional jurisdiction of the provinces cannot be tampered with unless they acquiesce to the changes. This is further affirmed by the established convention concerning the process of amending the Constitution.

The convention

According to the provinces, a convention requiring the consent of the provinces had developed and had been accepted. Thus the federal government is bound by it. In proving such an assertion, the provinces framed their arguments within the established Jennings tripartite Test: "first, what are the precedents?; second, did the actors in the precedents believe that they were bound by a rule?; and third, is there a reason for this rule?"⁴⁸ Through the use of this test, the provinces were able to demonstrate first, a precedent had been established, second, the actors did in fact believe it to be binding and third, federalism was the reason for the establishment and adherence to the rule.

In making the argument that a precedent had been established, the provinces distinguished between those amendments which affected provincial powers and those which did not. They proceeded to list the twenty-two amendments identified in the

⁴⁸ Sir Ivan Jennings, *The Law and the Constitution*, 5th ed. (1959), quoted in *the Patriation Reference*, 90.

Favreau White Paper⁴⁹ to argue that a unilateral action of the federal government was not the established convention. Rather, in the five amendments (1930, 1931, 1940, 1951 and 1964)⁵⁰ concerning provincial rights and privileges and federal – provincial relations, the consent of the provinces was sought and obtained. This in fact was the precedent established.

This conclusion was reinforced when taking into account the negative examples – that is, all past attempts to amend the Constitution in 1951, 1960, 1964, and 1971⁵¹, failed as the unanimity of the provinces was not obtained.⁵² This according to the provinces should signal to the Court that a clear convention requiring provincial consent when amending the Constitution in a fundamental way has been affirmed.

Proceeding with the second point of the Jennings Test – actors believed that the convention is binding – the provinces quickly drew upon the fourth principle (of the Favreau White paper), where the convention requiring the consent of the provinces was clearly articulated.⁵³ If not explicit acceptance of the Favreau White Paper and the principles listed in it, there was at the very least tacit acceptance by the political actors. Such tacit acceptance can be inferred from past practices of either obtaining provincial consent prior to making fundamental changes to the BNA Act or ending an attempt to patriate the Constitution when it was known that unanimity of the provinces would not be obtained. Further to such acceptance from the political actors, the S.C.C.'s use of this fourth principle in the Senate Reference firmly established that the convention had been

⁴⁹ See Appendix II.

⁵⁰ See Appendix III.

⁵¹ See Appendix III.

⁵² Factum of the Attorney General of Newfoundland, 1981, para. 54-56; Factum of the Attorney General of Saskatchewan, 1981, para. 13.

⁵³ Factum of the Attorney General of Quebec, 1981, para. 43; Factum of the Attorney General of Saskatchewan, 1981, para. 15; Factum of the Attorney General of Newfoundland, 1981, para. 56; Factum of the Attorney General of Manitoba, 1981, para. 26.

set and that it had been acknowledged and accepted by the actors involved.⁵⁴ This of course had the effect of the S.C.C. confirming the existence of and the need to comply with a convention requiring the consent of the provinces.⁵⁵

The province of Manitoba offered two overarching reasons for both the rule and compliance with the convention:

- (1) to maintain the integrity of the agreement [at the time of Confederation], by which the provinces joined the union
- (2) to avoid anomaly of the Parliament of Canada doing indirectly by request that which it cannot do by legislation.⁵⁶

Federalism, understood as the equality between the two orders of government, thus is the reason for the convention.

Though the province of Saskatchewan adopted a similar logic⁵⁷ in arriving at the reason for the rule as the other provinces did, it separated itself from the other seven provinces by arguing that unanimity is not necessarily required. Rather, it argued that

⁵⁴ Factum of the Attorney General of Quebec, 1981, para. 44; Factum of the Attorney General of Prince Edward Island, 1981, 25; Factum of the Attorney General of Saskatchewan, 1981, para. 71 and 75.

⁵⁵ Factum of the Attorney General of Prince Edward Island, 1981, para. 23.

⁵⁶ Factum of the Attorney General of Manitoba, 1981, para. 29;
Factum of the Attorney General of Newfoundland, 1981, para. 27-33:

Adding to this, Newfoundland argued that the convention must require provincial consent when amending the Constitution where the powers and/or privileges of the provinces as well as federal-provincial relations would be affected for the following reasons:

- (a) in the BNA Act, it is clearly stated that Canada "is a federal state comprised of the component provinces and the federal government."
- (b) the provinces are independent units that "have interests in the Government of Canada as a whole. Also their interests are represented in the Senate; this was made clear by the S.C.C. in the Senate Reference."
- (c) Section 92 clearly indicates that the provinces are not to subordinate to the federal government; this was made clear by the JCPC in the Hodge case (1883).
- (d) Additionally, the provinces' jurisdiction of powers is not "subject to the control of the federal government of Canada." In Liquidators of Maritime Bank of Canada v. Receiver General of New Brunswick [1892], Lord Watson, in his classic endorsement of the compact theory of Confederation, argued that the purpose of the BNA Act was to protect the autonomy and independence of the provinces.

⁵⁷ Factum of the Attorney General of Saskatchewan, 1981, para. 17:

Saskatchewan too points to Canadian federalism as reason for the rule and compliance to it; the reason concerns "the federal principle – the necessity of preserving the integrity of the federal constitution and the allocation of legislative powers effected by the Constitution."

though it was clear from the established convention that the consent of the provinces was required, it was not necessarily so that unanimity of the provinces was the rule. It was able to draw such conclusions by relying on the ambiguity of the fourth principle in the Favreau White Paper.

Nonetheless, Saskatchewan pointed out that the degree of provincial consent was not a matter for the Court to decide, but one for the political actors to resolve. It would be enough for the Court to recognize that a convention requiring provincial consent preventing the federal government from unilaterally amending the Constitution where the amendments affect federal – provincial relations and/or provincial powers exists. It is not necessarily clear how the province of Saskatchewan, using the same evidence, arguments and logic of the other provinces arrived at this particular conclusion. It is important to note, however, that Saskatchewan, in arriving at this particular conclusion regarding the degree of consent, provided the S.C.C. with the ‘safe’ opening it needed to be able to ‘legitimately’ claim that less than unanimity is required.

THE POSITION OF THE FEDERAL GOVERNMENT, ONTARIO AND NEW BRUNSWICK

Similar to the position it developed in the Senate Reference, the federal government, this time joined by the provinces of Ontario and New Brunswick, advanced a legal positivist view of the issues. Arguing that no consent was constitutionally required by either level of government as sole power to amend the BNA Act rests in the hands of British Parliament, the federal government, though it seemed to pronounce a position not rooted in any understanding of Canadian federalism, relied upon a position informed by the centralist vision. This position is of course different from the

understanding informing the position of the eight provinces reviewed above. Where the provincial governments understood the power to amend the Constitution to rest equally in the hands of the Canadian government and legislatures, the federal government, supported by the provinces of Ontario and New Brunswick understood such power to belong only to the British Parliament. I argue that the federal government advanced the centralist vision of Canadian federalism as it proposed that Britain would only amend the Constitution upon a joint request from the two federal houses – the provinces had no role, following the logic of this position – in amending the Canadian Constitution. As a consequence, the federal government is the superior order of government. This conclusion is strengthened when considering the position of the federal government, along with that of the provinces of Ontario and New Brunswick on the convention issue. In arguing that no convention had developed vis-à-vis amending the Constitution, the federal government asserted its hierarchical role in the federation.

For the federal government, the central issue of this reference was whether or not the proposals, if enacted without provincial consent, “would have legal force?”⁵⁸ Adopting a legal positivist approach to constitutionalism led the federal government to simply respond that there was no constitutional rule or principle requiring the provinces to consent to any changes. Not surprising, the federal government did not take the opposite view, still in the legal positivist tradition, that there was no legal or constitutional rule allowing such a unilateral power.

⁵⁸ Government of Canada, Department of Justice, “Factum of the Attorney Generals Canada in the matter of Reference: Re Amendment to the Constitution of Canada, (Nos. 1, 2, and 3), [1981],” in *Materials Concerning the Constitutional Reference, 1980/81 Vol 2 No 4-8a*, 1981. (Factum of the Attorney General of Canada, 1981), para. 8.

In light of the simple approach taken and the simple answer offered by the federal government, it proceeded to focus the arguments in its factum on the third question arguing that question three is, or at least should be, the focal point of the Reference; if this question is answered in the negative, the other question, as a result of this finding, would be moot.⁵⁹ In short, the federal government dismissed the first two questions with quick and effortless answers offering scant analysis.

In answering the first question, the federal government, from an obviously arrogant and paternalistic standpoint, responded by arguing that though the proposals would affect the provinces, they would benefit them. According to the federal government, the proposal would : first, patriate the Constitution – an essentially “neutral character” which does not affect the present political, legal and constitutional climate and in fact, Canada’s quest to full sovereignty;⁶⁰ second, provide an amending formula which secures the future role of the provincial government in amending the Constitution;⁶¹ third, entrench a charter of rights and freedoms which involves no transfer of powers and places limitations on both orders of government;⁶² fourth, entrench Aboriginal rights and treaty rights;⁶³ fifth, entrench the principle of equalization;⁶⁴ sixth, confirm provincial rights vis-à-vis non renewable natural resources, forestry and electrical energy;⁶⁵ seventh, give provinces new rights including indirect taxation and interprovincial trade of the resources

⁵⁹ Ibid., para. 9; Government of Ontario, Department of Justice, “Factum of the Attorney Generals of Ontario in the matter of “Reference: Re Amendment to the Constitution of Canada, (Nos. 1, 2, and 3), [1981],” in *Materials Concerning the Constitutional Reference, 1980/81 Vol 2 No 4-8a*, 1981. (Factum of the Attorney General of Ontario, 1981), para. 12.

⁶⁰ Factum of the Attorney General of Canada, 1981, para. 29 and 31.

⁶¹ Ibid., para. 29 and 35.

⁶² Ibid., para.29 and 47.

⁶³ Ibid., para. 29 and 55.

⁶⁴ Ibid., para. 29.

⁶⁵ Ibid., para. 29.

listed above.⁶⁶ By arguing from such an arrogant and paternalistic standpoint, the federal government did not consider the legal and constitutional implications a unilateral action of this kind could potentially have on the constitutional relationship between the two orders of government. It is probable that unilateral patriation of the Constitution can lead to the constitutional subordination of the provinces.

This position, the nature of which asserted the preeminence of the federal government in the federation, was further strengthened by the arguments presented by the provinces of Ontario and New Brunswick. Ontario simply adopted the arguments of the federal government without adding any of its own insight or analysis.⁶⁷ New Brunswick, on the other hand, not only adopted this argument, but added that the proposals do not affect the nature of Canadian federalism. It began by proposing that there are in fact two ways of interpreting the first question: first, it questions “the integrity of the process of constitutional amendment;”⁶⁸ or second, it “questions the legal effect of the amendments.”⁶⁹ Assuming the first interpretation, the province of New Brunswick concluded that the first question has no constitutional significance: “the fact that such relationships, powers, rights or privileges may be affected without provincial consent does not affect the integrity of the process of constitutional amendments.”⁷⁰ Thus, it is not necessary for the court to answer this question.

In similar fashion to the federal government, New Brunswick continued to quickly dismiss the potential effects a unilateral patriation of the Constitution may have

⁶⁶ Ibid., para. 29.

⁶⁷ Factum of the Attorney General of Ontario, 1981, para. 5; Factum of the Attorney General of Canada, 1981, para. 80.

⁶⁸ Factum of the Attorney General of New Brunswick, 1981, para. 3.

⁶⁹ Ibid., para. 4.

⁷⁰ Ibid., para. 5.

on the relationship between the two orders of government and on the constitutional position of the provinces vis-à-vis the federal government in the federation. It asserted that since the autonomy of the provinces and the relationship between the two orders of government remain intact as the distribution of powers remain unchanged and the rights and resources of the provinces would not be diminished, the nature of federalism in Canada is not drastically changed by the impugned Canada Act.⁷¹

The federal government continued on this road of dismissal in its address of the second question; it argued that because the question is a purely political one, the Court should refuse to answer it, for four reasons: first, "it is not appropriate for judicial determination"; second, the issue concerns internal parliamentary procedure; third, the definition of a convention is unclear rendering it a debated concept; and fourth, because the convention is imprecise and flexible, more so than law, "conventions are unsuitable for judicial determination."⁷² However, if it does choose to answer the question, the Court should find, as the evidence clearly indicates, that no convention had developed, thus no convention requiring the consent of the provinces exists.⁷³

The reality that provincial consent as a convention does not exist is clear by both the practices of the UK Parliament and Canadian Parliament.⁷⁴ According to the federal government in its factum, the UK would only amend the Constitution upon a joint address of the two federal houses and not of the provinces. Furthermore, Westminster never questioned the procedure leading up to the resolution, now in question.⁷⁵

⁷¹ Ibid., para. 31-32, and 39.

⁷² Factum of the Attorney General of Canada, 1981, para. 58.

⁷³ Ibid., para. 11; Factum of the Attorney General of New Brunswick, 1981, para. 8-10.

⁷⁴ Factum of the Attorney General of Canada, 1981, o cit., para. 58; Factum of the Attorney General of New Brunswick, 1981, para. 11; Factum of the Attorney General of Ontario, 1981, para. 61-62.

⁷⁵ Factum of the Attorney General of Canada, 1981, o cit., para. 84-85; Factum of the Attorney General of Ontario, 1981, para. 44-45.

The federal government argued that statements of political actors clearly indicate that provincial consent was politically desirable, but never constitutionally required.⁷⁶ Ontario adds to this by pointing out that there exists no clear consensus of what the political actors said and even less clarity on what they meant; thus an unambiguous “general acceptance” cannot be said to exist.⁷⁷

Addressing the third question, the federal government advanced a strict positivist reading and vision of where responsibility for amending the Canadian Constitution rests. According to the federal government, because there is no explicitly established rule in the Constitution outlining how Canada’s Constitution is to be amended, Britain is the only body with the legal ability to do so. Due to this subordinate position of Canada to Britain, no consent is constitutionally required by either level of government.⁷⁸ This paradox of Canadian sovereignty is resolved by the established convention – the British Parliament only amends the Constitution on request of Canada, regardless of provincial consent.⁷⁹ The provinces “have no locus standi in London” vis-à-vis amending the Constitution.⁸⁰

John Gray, “Pass bill or risk relations, U.K. told”, *The Globe and Mail*, [Toronto], March 25, 1981, 1: This position is however misleading as media reports definitely indicate differently. During the period, the Kershaw Committee issued its report indicating that the British Parliament ought not to amend the BNA Act without the prior consent of the provinces.

Bill Fox, “Constitution on its way home with Lords’ vote of approval”, *The Toronto Star*, [Toronto], March 26, 1982, A16:

However, issuing a statement months after the release of the Kershaw report, then British Prime Minister, Margaret Thatcher indicated that her government would put into the effect the proposal of the federal government regardless of provincial consent. On March 25th, 1982, the House of Lords passed the Canada Act and the Constitution “was on its way home.”

⁷⁶ Factum of the Attorney General of Canada, 1981, para. 112.

⁷⁷ Factum of the Attorney General of Ontario, 1981, para. 66.

⁷⁸ Factum of the Attorney General of Canada, 1981, para. 138; Factum of the Attorney General of Ontario, 1981, para 15.

⁷⁹ Factum of the Attorney General of Canada, 1981, para. 138.

⁸⁰ *Ibid.*, para. 145.

Consequently, the federal government puts into doubt the provincial understanding of legislative supremacy of the provinces by asserting that such supremacy is not equated to provincial sovereignty.⁸¹ Yes, the provinces were correct in arguing that they are autonomous and not subordinate to the federal government, as was reaffirmed by the JCPC in the Hodge case.⁸² However, this does not mean that they are sovereign vis-à-vis Britain. This is further affirmed by the reality that the sovereignty of the provinces is qualified.⁸³ Conversely, they do not have the power to amend the BNA Act.⁸⁴ The limited sovereignty of the provinces does not equate to the legal power to amend the Constitution.⁸⁵

Further diminishing the role of the provinces in the federation, the federal government refuted the very compact theory upon which the provinces base their arguments. It began by challenging the legal basis of such a theory by pointing out that the BNA Act does not acknowledge its existence; thus there is no legal basis validating the compact theory.⁸⁶ Even if there is a political basis for the theory, it does not translate into legal rights;⁸⁷ if it were, it means a “new legal concept.”⁸⁸ Second, the theory is

⁸¹ Factum of the Attorney General of Canada, 1981, para. 198.

⁸² Ibid., para. 198.

⁸³ Ibid., para. 200 – 207:

In the Hodge case, the JCPC pointed out that the legislative supremacy of the provinces ‘is not absolute’:

- (1) the provinces ‘cannot enact laws with extra territorial application’
- (2) they ‘cannot subject the Crown in right of Canada to their laws while the Parliament of Canada can subject the Crown in right of the Provinces to its laws’
- (3) in section 91 we find the power to reserve and disallow provincial laws
- (4) in section 93 we find remedial legislation in repeal of ‘certain provincial legislation’
- (5) POGG power is reserved for the federal government
- (6) Federal paramountcy located in the BNA Act
- (7) The lieutenant Governor, in certain respects is subordinate to the Governor General

⁸⁴ Ibid., para. 198.

⁸⁵ Ibid., para. 212.

⁸⁶ Factum of the Attorney General of Canada, 1981, para. 217; Factum of the Attorney General of Ontario, para. 40.

⁸⁷ Factum of the Attorney General of Canada, 1981, para. 217.

⁸⁸ Factum of the Attorney General of Ontario, 1981, para. 69.

narrow as it does not clarify the position of the provinces who joined Confederation after 1867 or those who were created by the federal government.⁸⁹ In fact, those provinces which were created by the federal government contradict the very premise of the compact theory – the idea that the provinces are sovereign and autonomous, and maintained such status in joining Confederation.

The arguments of the federal government and the provinces of Ontario and New Brunswick are reduced to the idea that there is no rule of law which gives the provinces powers beyond that which is clearly located in the BNA Act.⁹⁰ Since there is nothing explicitly written in the BNA Act which demands or requires provincial consent, the federal government is therefore able to proceed unilaterally in putting into effect the proposed Canada Act. The federal government, in relying upon this legal positivist argument, subordinated the constitutional role of the provinces vis-à-vis the UK and more importantly, the federal government. Further, they outright dismissed the converse conclusion which can be arrived at by applying the same logic – nothing explicit in the BNA Act empowers the federal government to unilaterally amend the Constitution where the amendments affect federal-provincial relation and/or provincial powers. In fact, in the Senate Reference, a unanimous Court ruled that such power does not belong to the federal government.

The federal government rather relied upon a convention establishing that the British Parliament will only amend the Constitution upon the request of the federal government alone. This convention had been established and accepted by all parties involved. Since this convention is presented as a truism as is the argument that provincial

⁸⁹ Factum of the Attorney General of Canada, 1981, para. 215-216.

⁹⁰ Factum of the Attorney General of Canada, 1981, para. 214.

consent is not constitutionally required the federal government is in actuality affirming and even creating a hierarchy between the two orders of government with regard to the Constitution and amending it; the federal government assumes then that ultimate sovereignty, as it has the power to affect federal-provincial relations and provincial powers without the prior consent of the provinces, rests with the federal government. It is this reality not considered either explicitly or implicitly by the federal government when it quickly dismissed the first question by arguing that the new Constitution does affect the provinces, but it does so in a manner that benefits the provinces. It completed this dismissal of the provinces and the role they play in the federation in its challenge and subsequent disregard of both the provinces understanding of provincial sovereignty and the obligations emerging from the compact theory of Confederation. In short, the federal government did not consider how a unilateral patriation of the Constitution can and probably will affect the position of the provinces in relation to the federal government in the federation.

This was coupled with Trudeau's ability to mobilize English Canada behind the need for a new Constitution which responds to the demands for a renewed federation, including a charter.⁹¹ Specifically, the Trudeau government was able to portray that the vision of pan-Canadianism embodied in its proposed constitutional package was a direct response to Quebec and its expressed desires of renewed federalism.⁹² The rejection of the separatists, according to the government of Canada was a 'predictable one', thus English Canadians need not worry about such dissidence. Similarly, the federalists in

⁹¹ Upon reviewing and analysing the public's participation in the special parliamentary hearings held on the Constitution and the interest the public seemed to have in a charter of rights, both McRoberts in *Misconceiving Canada: The Struggle for National Unity* and Russell in *A Constitutional Odyssey: Can Canadians Become a Sovereign People?* 2nd ed., conclude that the public seemed keen on a charter.

⁹² McRoberts, *Misconceiving Canada: The Struggle for National Unity*, 169.

Quebec were portrayed as “misguided or [having] crypto separatist tendencies.”⁹³ In addition to this, the Trudeau government depicted the premiers (forming the gang of eight) as power hungry and selfish individuals and governments wishing not to relent their powers to the people through an entrenched charter.⁹⁴ To some degree, Trudeau was able to deflect attention from his unilateral plan and the unpopularity of it and place the focus on the need to patriate the Constitution and protect the human rights of all Canadians. Such mobilization, coupled with a resurgence of Trudeau’s political career and his commitment to patriate the Constitution created an environment most favourable to Trudeau’s vision of Canada during this time.

THE S.C.C.: ANSWERING THE CALL

On September 28th, 1981, on live television, indicating the magnitude and anticipation of its decision, the S.C.C. rendered its opinion on the matter⁹⁵. The Court, in a case closely watched by both the political actors involved and society, returned with a seemingly balanced decision. It provided both sides with a little something enabling them both to claim victory. However, upon closer analysis of the decision, it becomes quite obvious that faced with two distinct visions of the Canadian federation, the Justices

⁹³ Ibid., 169.

⁹⁴ Ibid., 167.

⁹⁵ Also indicative of the eagerness of political society awaiting for the Court’s opinion and its dependency on it was the attention paid by the print media in reporting delays in the decision release, the fear of Bora Laskin (due to his illness) inability to sit on the bench for the decision. The *Globe and Mail* as early as April of 1981 informed its readers of the buzz and level of focus of the *S.C.C. landmark decision*; such decision will ‘help dictate the nation’s future’. (Canadian Press, ‘Political spotlight focuses on decision by the Supreme Court on patriation plan’, *Globe and Mail*, [Toronto], 27 April 1981, 8.) Most telling, was the advertisements of the *Globe and Mail* and the *Toronto Star* informing the public when the decision will be released and when the newspapers will provide its readers with an in depth analysis. The *Toronto Star* on September 27, 1981, dedicated one quarter page to advertise that the following week the *Star* will bring to its readers THE BIG DECISION. Such notice was accompanied by a picture of Chief Justice Laskin sitting and just above him was a painting of Queen Elizabeth II (*Toronto Star*, the “The Big Decision”, *The Toronto Star*, [Toronto], 27 September 1981, A4).

improved the constitutional position of the federal government vis-à-vis the provinces. According to the majority in the Patriation Reference, the federal government is legally able to unilaterally amend the Constitution. By way of convention, however, the federal government is required to obtain, at the very least, “a substantial degree of provincial consent.” Thus it is only by way of convention, bearing no legal weight, that the provinces are constitutionally equal to the federal government.

Throughout its opinion, the Court made the relationship between law and convention clear. Conventions, because they are based on political precedents established by government and because, more often than not, are in contrast with legal rules, are not enforced by the courts.⁹⁶ Further, with a breach of a convention, there are no legal repercussions, only political ones. Such reality prevents the crystallization of a convention into law (unless such convention is legalized by way of statute).⁹⁷

Conventions are nonetheless important as “they form an integral part of the Constitution and of the constitutional system; conventions plus constitutional law equals the total Constitution of the country.”⁹⁸

In short, conventions do not necessarily enjoy the privilege of law as they are not enforceable by the courts; they are simply political obligations. Thus a hierarchy between law and politics shapes the weight of this opinion vis-à-vis the obligations of the federal government to the provinces when attempting to amend the Constitution. This is interesting; the Court decided to answer this ‘political’ question, yet it treads carefully, so as, it would seem, the Court would not appear too political by finding for a convention that would arguably stifle or at least delay the patriation of the Constitution.

⁹⁶ *The Patriation Reference*, 84-85.

⁹⁷ *Ibid.*, 86.

⁹⁸ *Ibid.*, 87.

THE COURT RESPONDS . . . TO LAW

Step one: The proposed act, not action

In answering question one (and question A from the Quebec Court of Appeal), whether or not the proposals under the Canada Act would affect the provinces, a unanimous Court agreed that a simple answer of yes would suffice. The Court argued that by simple reading of the proposal, it becomes clear that the provincial governments would be affected, both directly and indirectly. The legislative powers of the provincial governments would be directly limited with the entrenchment of a charter of rights and freedoms.⁹⁹ Indirectly, though a charter would affect the powers of both orders of government, “there is an intended suppression of provincial legislative powers.”¹⁰⁰ In addition, though the proposals enhance the legislative powers of the provinces in such areas as taxation and natural resources, they do not diminish the indirect effects.¹⁰¹ In limiting itself to such a superficial analysis of how the proposal affects the provinces, the Court failed to look beyond the literal text of the impugned Canada Act. That is, the Court avoided what I feel is, the heart of the matter – unilateral patriation of the Constitution. As it did in the previous reference, the Court could have scrutinized how such an action could affect not only the legislative powers of the provinces or federal – provincial relations, but also the implicit effects on Canadian federalism - the position of the provinces in the federation, and the political and constitutional dynamics between the two orders of government which may arise if one order of government were able to effect amendments to the Constitution without the prior consent of the other order of

⁹⁹ Ibid., 20.

¹⁰⁰ Ibid., 20.

¹⁰¹ Ibid., 20.

government and where such amendments affect said order and the federation as a whole. The Court is able to avoid such analysis at this point in its reasoning as it had the opportunity to broaden its outlook when addressing the question directly pertaining to constitutional convention. Rather than engaging in more of an analysis of this first step of constitutional analysis, the Court proceeded to the second step, *looking into the Constitution*, to decide whether or not the federal government had the legal power by way of the BNA Act, to unilaterally request an amendment to the Constitution.

Step two: Constitutional ability?

In approaching this legal question, the majority comprised of Justices Laskin, Dickson, Beetz, Estey, McIntyre, Chouinard and Lamer Court considered two aspects: the legal ability of the federal government to initiate this process without the prior consent of the provinces, and the legal power or “want of it” by the UK Parliament to act without the prior consent of the provinces.¹⁰² Adopting a narrow, legal, positivist view of the law, the majority concluded that because the law was and is silent on the matter, there is no restriction on the federal government to proceed unilaterally. Nor, is there any legal obligation on the federal government or on the UK Parliament to await provincial consent before proceeding to amend the Constitution.

Further to this, the majority did not engage in much analysis on the scope of federal powers to legitimately perform such an action. According to Lederman, the majority “took a rather narrow positivist and historically static view of the nature of

¹⁰² Ibid., 21.

Canadian constitutional law.”¹⁰³ That is, it did not, as it did in the previous reference, consider whether or not the federal government had the power to unilaterally effect the patriation of the Constitution. It failed therefore, as Lyon points out, to adequately explain or justify from where this power to unilaterally amend the Constitution was derived.¹⁰⁴ Instead, this majority concluded that the federal government is able to unilaterally patriate the Constitution as nothing in the law explicitly prevents it from asking Britain to amend the Constitution without the prior consent of the provinces. This is interesting. As we saw in the last reference, the Court, adopting the same methodology arrive at an opposite decision – nothing in the BNA Act empowers the federal government to unilaterally abolish the Senate, thus it cannot effect such changes.

Lederman, Russell, Lyon and Monahan, amongst others contend that the majority, in adopting such a narrow view of the law was able to, and in fact did, avoid the issue of Canadian federalism and did ignore the federal principle.¹⁰⁵ This, however, is not entirely true. It is not as simple as the Court *ignored* the federal principle in its opinion on the legal issue. In actuality, the majority did consider this factor in its analysis; it simply viewed Canadian federalism in a strictly centralist terms as it definitely considered and structured its argument around the idea that there exists a hierarchy between the two orders of government.

¹⁰³ William Lederman, “The Supreme Court of Canada and Basic Constitutional Amendment,” in *And No One Cheered: Federalism, Democracy & The Constitution Act*, ed., Keith Banting and Richard Simeon (Toronto: Methuen Publications, 1983) 180.

¹⁰⁴ Noel Lyon, “Constitutional Theory and the Martland –Ritchie Dissent,” in *Politics and the Constitution: the Charter, federalism and the S.C.C.*, ed., Patrick Monahan (Toronto: Carswell, 1987) 61.

¹⁰⁵ To be fair to these authors, Lederman in particular, they do acknowledge that the different ideas of provincial consent and whether or not it was required was rooted in the Judges’ different ideas of Canadian federalism. This acknowledgement of the federalism consideration, however, was restricted to the minority on the first issue and both the majority and minority on the second issue and it did not extend to the majority on the first issue.

This conclusion can be drawn from the logic and the implication resulting from such reasoning of the majority; legally and constitutionally, the federal government is not prevented from unilaterally changing the Constitution, where changes affect provincial powers, federal – provincial relations, and even the federation – thus, constitutionally, the federal government is *stronger* than the provinces. This majority does not deny provincial autonomy; however, its autonomy is limited and does not extend to the legal realm of altering the Constitution if it is not explicitly written. Therefore, it can be inferred that the provinces are subordinate to the federal government in this particular matter. This is especially important considering the potential magnitude of one order of government legally able to amend the Constitution unilaterally even if the amendments affect the other order of government.

In contrast, Justices Martland and Ritchie, forming the minority on this legal question, found that nothing in law permits the federal government to proceed without the prior consent of the provinces. For Justices Martland and Ritchie, the issue at hand is not about legality or illegality; rather, it concerns whether the federal government has the power by virtue of either statute or convention.¹⁰⁶ The minority located their conclusion within the inherent obligation emerging from and implicit to Canadian federalism. Recognizing the role the provinces play in the federation, the minority endorsed the arguments of the eight provinces regarding the powers of the federal government – it cannot do indirectly what it is not empowered to do so directly. “In our opinion, the two Houses lack legal authority, of their own motion, to obtain constitutional amendments which would strike the very basis of the Canadian federal system.”¹⁰⁷

¹⁰⁶ *The Patriation Reference*, 53.

¹⁰⁷ *Ibid.*, 73.

The difference of opinion between the majority and the minority on this first issue was not necessarily a difference in the understanding of the BNA Act or of the constitutional powers. Rather, at the heart of this difference was the way in which the Canadian federation was conceptualized by each side. Informed by the provincialist vision, the minority outright rejected the possibility of unilateralism as it would offend the federal principle based on the idea that the federation is made up of two equal orders of government. The majority on the other hand, dismissed this conceptualization and argued that nothing legally prevents the federal government from unilaterally effecting the patriation of the Constitution.

The majority on the legal issue was able to approach such a legal positivist view of the Constitution and decide as it did because of the following question concerning constitutional convention. In this second question, the majority, this time comprised of Martland, Ritchie, Dickson, Beetz, Chouinard and Lamer, adopted a broader understanding of Canadian federalism to consider the obligations which emerge from it. It is in taking this approach that this majority was able to recognize and find that there is a political obligation on the part of the federal government, emerging from past practices and the principles of federalism, to consult and secure the prior consent of the provincial government before proceeding to formally submit a request to the British Parliament to amend the BNA Act. What is notable of this second opinion is the change or alteration of the convention the Court was asked to consider. Rather than finding that unanimity of the provinces was required, the majority on the second issue found that only a substantial degree of provincial consent is required.

THE COURT RESPONDS . . . TO CONVENTION

The opinion of the majority on the second question – whether or not the proposed action of the federal government to unilaterally amend the BNA Act accorded with convention – actually mirrors the minority’s opinion on the issue of law. Justices Dickson, Beetz, Lamer, Chouinard, Martland and Ritchie forming the majority, saw the total Canadian Constitution, which included conventions, in harmony with classical federalism, defined as an equal partnership between the provincial governments and the federal government. According to the majority, “by virtue of a historical reading of the constitutional practices, one would infer that classical federalism has emerged in Canada.”¹⁰⁸ Past practices indicate that provincial consent was sought and obtained before any changes were made to the federal union.

Adopting the tripartite Jennings’ Test in determining the existence of a convention, the majority found that federalism is the reason for the rule – essentially to maintain the balance between the two orders of government in the federation. Relying upon the examples of amendments used by the provinces, 1930, 1931, 1940, 1951 and 1964,¹⁰⁹ the Court found that no amendment had been effected affecting federal – provincial relations, without the prior consent of the provinces. This finding is corroborated with the four attempts of constitutional amendment, 1951, 1960, 1964 and 1971,¹¹⁰ which were not effected because the federal government lacked the consent it required. Further, the fourth principle listed in the Favreau White Paper “equally and unmistakably states and recognized as a rule of the Canadian Constitution the convention

¹⁰⁸ Ibid., 82.

¹⁰⁹ See Appendix III.

¹¹⁰ See Appendix III.

[...] that there is a requirement for the provincial agreement to amendments which change provincial legislative powers.”¹¹¹

The majority, however, narrowed the potential effects of its opinion by limiting the reach of a convention in general, but in particular the obligations emerging from this specific convention. According to the majority, with regard to this particular convention, that of the required provincial consent when amending the Constitution, the provinces did not imply that unanimity is required as they did when putting forth their arguments concerning the legal obligations.¹¹² In fact, there seemed to exist little consensus amongst the parties submitting arguments. The Canadian federal government as well as the provinces of Ontario and New Brunswick submitted that no constitutional convention existed. The provinces of Manitoba, Newfoundland, Quebec, Nova Scotia, British Columbia, Prince Edward Island, and Alberta all held that the convention existed and that it necessitated unanimity of the provinces. Saskatchewan, agreeing that a convention existed, argued however, that the consent of the provinces need not be unanimous. The majority consequently took this understanding of the mixed arguments of the provinces to mean that the question concerning provincial consent in the convention sense, dealt simply with whether or not provincial consent was required and not necessarily with whether or not unanimity was required. In the final analysis, it agreed with the conclusion put forth by Saskatchewan that only a substantial degree of provincial consent was required, by way of convention, when amending the Constitution, where such amendments affect the powers of the provinces and/or federal – provincial relations.

¹¹¹ *The Patriation Reference*, 99-100.

¹¹² *Ibid.*, 80.

In reaching this decision, the majority looked beyond the Favreau White Paper to the statements of the actors, specifically those of the Right Honourables R.B. Bennett, Mackenzie King, and John Diefenbaker. All, it seemed, expressed resistance to the idea of unanimity. This, however, in my opinion, does not negate the fact that in practice, it was unanimity of the provinces that was sought and obtained prior to effecting an amendment to the BNA Act. In the instances that unanimity was not achieved, the amendment died at the table. It is not necessarily clear how the majority was able to conclude that only a substantial degree of provincial consent was the convention that was stipulated in the Favreau White Paper.

The majority's endorsement of the fourth principle and the subsequent support of the existence of a constitutional convention requiring the prior consent of the provinces to effect an amendment to the BNA Act are akin to the provincialist understanding of federalism, but not necessarily a full endorsement of it. The majority stipulated that the reason for such a rule can be located in the Canadian federal principle. Adopting the JCPC's understanding of federalism in the Hodge case, this majority seems to support the notion that equality exists between the two orders of government. From such equality, emerges an obligation on the part of the federal government to consult and obtain the consent of the provinces prior to amending the Constitution, where such amendments affect either the powers of the provinces or federal – provincial relations. If the federal government were to proceed unilaterally it would offend the federal principle. However, the federal government is not required to obtain unanimity of the province, which is why the majority does not fully endorse the provincialist view. If we recall, the provincialist

view advances the idea that what touches all, must be approved by all. That is, unanimity of the provinces is required when attempting to change the original federal bargain.

The minority comprised of Justices Laskin, Estey and McIntyre, in contrast, understood Canadian federalism differently. According to the historical development of Canadian constitutional law, a partial and incomplete form of federalism emerged in Canada with regard to amendments that altered the Canadian union. The three Justices deny that any one classical model of federalism emerged. Canadian federalism is incomplete and only partial in the sense that the powers in the BNA Act reflect a unitary state. In light of this, the minority concluded that it was not intended for Canada to be a classical federal state.

The convention in question, according to this minority, cannot compare with other essential conventions crucial to the governing of Canada. Such conventions include that of the Prime Minister and of responsible government. These conventions have been widely accepted and recognized by the political actors and the public. The same cannot be said about a convention requiring the consent of the provinces prior to amending the BNA Act, 1867. The latter convention limits the powers of the federal government whereas the others do not. Since the powers of the federal government are limited, clear acceptance on behalf of the government is required. The minority was able to reach such a conclusion as it clearly dismissed or chose to ignore the purpose of Confederation as understood by the JCPC and endorsed by the majority as well as the S.C.C. in the Senate Reference and the evolution of Canadian federalism. Rather, this minority understood both to be rooted in the idea that the provinces, though may be equal to each other, are subordinate to the federal government.

THE COURT'S OPINION REVISITED

In the end, the final decision, which saw (or so the perception was projected) no clear winner emerge, was a fine reflection of the political environment at the time. In other words, the S.C.C. did not stray far from the dominant ideology at the time. In fact, it can be argued that it mirrored well the position and the vision of Canada so dearly held by Trudeau during his career in Canadian politics in general, but particularly to his vision in the last year leading up to the patriation of the Constitution.

Trudeau's vision of Canada – comprised of a single political community composed of individuals – was, simply put, sustained and indirectly promoted by the S.C.C. Throughout its decision, the S.C.C. was clear on the weight of law compared to convention; the former has more bearing than the latter when considering the Constitution of Canada and the ability to amend it. Legally the federal government need not obtain the consent of the provinces; it is only by convention that it is required to. Clearly, the S.C.C. in rendering such a decision handed the federal government the legal backing and thus the upper hand it required to push forth its constitutional agenda and vision.

Andrée Lajoie argues that the perceived victory of Quebec, and I would add of the provinces, was in fact symbolic, if not illusory.¹¹³ She continues to argue that the Court did not feel free to concede entirely to the federal government's demands. Thus it preferred to cut the victory in two. This not only "permitted the state to proceed as it intended and provided Ottawa the indispensable support of the *state maintenance* in the

¹¹³ Lajoie, *Jugements de valeurs: le discours judiciaire et le droit*, 188.

circumstances, but it also protected the government from too bright a victory.”¹¹⁴ She equates this decision to a mitigation of centralism so favoured by the Court. In other words, the Court did not believe that it could include in the fabric of the Constitution full endorsement of the centralist vision for fear that such an interpretation would appear provocative to the point of further putting national unity and the reproduction of the Canadian federal state in jeopardy. The net ideological result was nevertheless to strengthen the apparent neutrality of the Court and by that, of the central government.¹¹⁵ This ensures that there is not necessarily one person’s or one’s institution’s vision of the federation that is promoted, but a vision, rooted in and emerging from the Constitution and constitutional practice that begets such a response.

In the final analysis, the opinion rendered by the Court in this reference provided both sides with the ammunition they needed to continue to remain firm in their respective positions. In other words, both parties were able to, and they did, claim victory in the sense that both parties were able to point to different aspects of the decision and oblige the other to negotiate and attempt to arrive at a consensus. The reaction of the print media and of the political actors directly involved mirrored the opinions and views they expressed to the unfolding of the events, most evident in their replies to the announcements of Trudeau proceeding unilaterally and the provinces, or gang of eight, challenging such ability.

¹¹⁴ Ibid., 188, my translation.

¹¹⁵ Ibid., 188.

Media reacts

Continuing to favour Trudeau, his goal of centralism and a charter of rights and freedoms, Charles Lynch, writing for both the *Gazette* and the *Calgary Herald*, firmly stated, that Trudeau's unilateral action is the only way to ensure that the constitution will get patriated; the Court kept this option open.¹¹⁶ Echoing similar views, editorials in the *Toronto Star* had the tendency to focus upon the federal government – friendly portion of the decision to the neglect of the political and/or constitutional convention aspect. “The Supreme Court has in fact removed the last legitimate obstacle to implementation of the Trudeau's government constitutional renewal initiative.”¹¹⁷ Such generous reading of the Court's decision was also blatantly obvious in an editorial published in the *Gazette* soon after the decision was rendered. Focusing upon the legal portion, to the detriment of the spirit of compromise which seemed to underpin the decision as a whole, it was argued that “the Supreme Court's ruling has made it plain that the federal government not only can, but should proceed with its constitutional package, and that the British Parliament at Westminster should approve it.”¹¹⁸

An editorial published in *Le Devoir* also leaned towards a generous reading of the decision. It, however, focused on the political/convention aspect and not on the legal one. Essentially the decision was understood as preventing the federal government from proceeding unilaterally. “The judgment undermines the fundamentals of the constitutional undertakings of the Trudeau government . . . The judges, contrary to certain evaluations, for not sanctioning the legality of the undertaking; they are content

¹¹⁶ Charles Lynch, “If Trudeau bid fails, others won't try again”, *The Calgary Herald*, [Calgary], September 29, 1981, A6.

¹¹⁷ Editorial, “A legal go –ahead”, *Toronto Star*, [Toronto], 29 September 1981, A8.

¹¹⁸ Editorial, *The Montreal Gazette*, [Montreal], 29 September 1981, 6.

with establishing its non-legality.”¹¹⁹ A *Globe and Mail* editorial chose to focus on the whole decision remaining firm in its original position that a consensus between the two orders of government must be reached and is imminent. “The fact that they are allowed [to proceed unilaterally] does not make [it] desirable or even acceptable.”¹²⁰ It urges the Prime Minister and the federal government to seek a greater consensus. It concludes with “we are a country of parts. The federation which is physical must be recognized politically. Or, how long can it hold?”¹²¹ In a follow-up editorial, still urging for a consensus, it concluded with the following compelling sentence: “In this diverse country the only uniting change is that which arrives by consensus, by convention.”¹²²

The reaction found in these editorials was quite reflective of this quick synopsis of reactions by the political leaders:

Jean Chrétien, remaining firm that the Charter is a good thing for Canada, adamantly stated that the “rights Charter won’t be sacrificed to pacify premiers.” He is willing to amend the Charter, but only if it is an improvement to it.¹²³

Premier Blakeney of Saskatchewan recognized both the good and the bad of the decision; according to him, the decision was positive as it forces political players to arrive at a consensus. However, it may be confusing for the people as they will not be able to decipher who is in the right or in the wrong.¹²⁴

¹¹⁹ Editorial, *Le Devoir*. [Montreal] 29 September 1981 [translations retrieved from *the Toronto Star*, 30 September 1981.

¹²⁰ Editorial, “Legal, but still wrong”, *The Globe and Mail*. [Toronto], 29 September 1981, 6.

¹²¹ *Ibid.*, 6

¹²² Editorial, “Not legality alone”, *The Globe and Mail*, [Toronto], 30 September 1981, 6.

¹²³ Canadian Press, “Rights charter won’t be sacrificed to pacify premiers, Chrétien says,” *The Toronto Star*, [Toronto], 30 September 1981, A22.

¹²⁴ Canadian Press, “Ambiguity of ruling worries Blakeney”, *The Toronto Star*, [Toronto], 30 September 1981, A22.

Premiers Bennett and Lévesque of British Columbia (B.C.) and Quebec make known that both have agreed to continue to fight Trudeau on his rights' charter.¹²⁵

Premier Lyon of informed Trudeau that he was willing to appeal to Westminster if Trudeau decided to proceed unilaterally in amending the Constitution; Trudeau, Lyon warned, must "respect the sanctity of the Constitution."¹²⁶

Premier Lougheed of Alberta, on the other hand, appealed to Trudeau's sensibility and urged him to organize a new conference on constitutional renewal.¹²⁷

What is evidently different in these blocks of editorials versus those prior to the decision released by the Court was the idea of the degree of provincial consent. Prior to the release of the opinion, it was a non-issue – provincial consent was simply required in order to ensure a balanced federation, period. Upon the release of the decision, however, editorials began to express views that unanimity was not necessarily needed; but provincial consent was required. This distinction becomes important in the next chapter when the idea of substantial degree of provincial consent is put under the microscope and called into question by the government of Quebec.

CONCLUSION

The stakes were much higher in this reference than they had been in the previous reference. An obvious or clear winner may have deepened the problems and the intransigence of both orders of government. Whether or not the crisis was manufactured

¹²⁵ Robert McKenzie, "Bennett, Levesque agree to fight PM's charter", *The Toronto Star*, [Toronto] 30 September 1981, A1, A22.

¹²⁶ Lindsay Scotton, "We'll appeal to London with bells on, Lyon says", *The Toronto Star*, [Toronto], 30 September 1981, A22.

¹²⁷ Dan Smith, "Alberta tells Trudeau to call new talks", *The Toronto Star*, [Toronto], 30 September 1981, A22.

by Trudeau and other political actors at the time, national unity was looming in the shadows of this reference. The Court was well aware of the politics surrounding the case; this much was obvious in the various arguments with which it was presented as well for the reasons it possibly decided to hear the case. Russell offers three:

- (1) the country was in the midst of a constitutional impasse
- (2) due to the impasse, it was assumed “by the people and the politicians that a Supreme Court decision was the next essential step in resolving the crisis”
- (3) taking this into account, it may have done “greater damage to the constitutional fabric of the country [by refusing to answer the question] than would stretching the notion of justiciability to embrace what the Court regarded as a constitutional question of a non-legal kind.”¹²⁸

Thus it would be safe to argue that the S.C.C. was conscious of the urgency of patriating the Constitution, the Quebec national ‘crisis’, the desire of Canadians to have a patriated Constitution with a charter of rights and freedoms, and the growing animosity between the federal government and the provinces. In light of this, the S.C.C. did in effect render a most political decision by not seeming to lean more favourably to one side; it “reflected a shrewd political judgment on the part of the Court.”¹²⁹ It gave something to everyone, while maintaining and reinforcing a firm mononational approach to the understanding of Canadian federalism, akin to a vision of Canada often promoted by Trudeau. (We will see that such a political strategy is repeated by the Court in the Secession Reference.) All parties were able to point to certain aspects of the decision, be it in the legal findings or the convention findings, to claim victory and strengthen and flex their political muscles.

Overall, the Court, in rendering an inconclusive and less than definite opinion, given that no one clear winner emerged, effectively encouraged the Prime Minister and

¹²⁸ Russell, “Bold Statescraft, Questionable Jurisprudence,” 6-7.

¹²⁹ Patrick Monahan, *The Politics and the Constitution: The Charter, federalism and the Supreme Court of Canada*, 192.

the provincial Premiers along with the political players to sit down once again and try to come to a consensus. "The Supreme Court's decision all but forced the First Ministers' conference that began on November 2, 1981."¹³⁰ This time, however, it would be a little less difficult as the barriers were weakened; no longer can the federal government legitimately, by way of constitutional convention, threaten to proceed unilaterally. "The federal government had no political hope of going ahead without at least another round of negotiations."¹³¹ And conversely, no longer can the provinces claim that unanimity is constitutionally required.

Further, the Court in this decision successfully maintained and legalized Trudeau's vision of Canada by cutting, to use Lajoie's phrase, the victory, and seemingly the power in two. The brilliance of this decision was the perceived victory handed to the provinces and perhaps to the people of Canada who now can begin to demand their leaders reach a consensus on the matter of patriating the Constitution. The S.C.C., whether conscious of it or not, set the stage for the degree of its involvement with regard to the events which ensued, including the next reference. Further, it solidified the role it began to carve out for itself in the last reference; a role which ensures the S.C.C. a marquee player in helping to establish the rules of the constitutional game and the understanding of Canadian federalism in general and the relationship between the two orders of government and between governments and the Constitution in particular.

¹³⁰ Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada*, 33.

¹³¹ Romanow et al., 1984: 188, quoted in Mandel, *The Charter of Rights and the Legalization of Politics in Canada*, 33.

CHAPTER 5: THE QUEBEC VETO REFERENCE: ENSURING THE JOURNEY HOME

INTRODUCTION

In 1982, the BNA Act, 1867, Canada's Constitution was finally patriated, after approximately fifty years of attempts. April 17, 1982, the day the new Constitution was proclaimed by Queen Elizabeth II, should have been an exuberant day for all of Canada, its citizens and leaders alike; Canada was finally a fully sovereign country as the last piece of the puzzle was put into place – Canada could now amend its own Constitution. As Richard Gwyn of the *Toronto Star* exclaimed, we are now “Masters in our own house!”¹ However, such sentiments of jubilation were not shared nation-wide, particularly not amongst the political elite of Quebec; not only was the Constitution amended without the consent of the National Assembly of Quebec, (at the time under the leadership of René Lévesque of the Parti Québécois), but also and more importantly, the particular demands of Quebec were not addressed in the new Constitution.

Soon after the Supreme Court of Canada rendered its opinion in the Patriation Reference, the First Ministers were all but physically forced to return to the negotiation table to attempt once again to reach a consensus on the patriation of the BNA Act. As a result of the Court's opinion in the Patriation Reference, the federal government was now only required to obtain, not necessarily a consensus among all of the provinces, but only consent from a substantial number of them. Remaining purposely vague on the meaning of such a statement, the Court expressed that it would be for the political actors to iron

¹ Richard Gwyn, “Masters in our own house!” *Toronto Star*, [Toronto], 17 April 1982, A1.

out the fine points of the convention and decide what exactly is meant by *a substantial degree of provincial consent*.

Consequently, the opinion of the Court in the Patriation Reference was steeped in ambiguity; it remains unclear, even today, how the majority on the convention issue found that a convention requiring a substantial degree of provincial consent was required. Adding to this ambiguity was the qualitative vs. quantitative debate which ensued. In other words, does substantial degree of provincial consent entail the consent of a majority (or enhanced majority) of the provinces? Or, do certain provinces, Quebec for example, who claim to be one of the “founding people” need to consent to the proposed resolutions in order to legitimize the process?

It was this very issue that was raised in the Quebec Veto Reference. How ought the finding of a *substantial degree of provincial consent* to be understood, in quantitative or in qualitative terms? If it is the former, then there is definitely the intimation that all provinces are equal to each other and to the federal government. Therefore, substantial degree becomes a numbers game – a majority or an enhanced majority of provincial consent is required; attaining the consent of a specific province is not a necessity. This signals that the country is one nation made up of constitutionally equal sub-units. The ideas of different nations or national minorities do not factor into the equation or the thought process. If, however, substantial degree is interpreted in qualitative terms, then the consent of certain provinces, for whatever reason(s), is needed in order to satisfy the criteria set out and established by the Court. This interpretation entertains such concepts as dualism, multinationalism and/or the idea of a national minority.

The clarity was in fact provided by the political leaders on November 5, 1981, what is now known as either the “night of the long knives” or the “Kitchen Summit”² – consent from nine of the ten provinces plus that of the federal government is sufficient in satisfying the constitutional convention vis-à-vis amending the Constitution. In other words, substantial degree of provincial consent was interpreted, by the political actors, in quantitative and not qualitative terms – the consent of one of the “founding peoples” of Canada, a majority of which lives in Quebec, was not required. Presented with this Kitchen Accord as a *fait accompli*, René Lévesque, recognizing that none of Quebec’s demands were met and engulfed in a sea of humiliation because of the exclusion, did not agree to the changes.

In fact, he and his government decided to challenge the constitutional and political validity of the new deal and of the process, claiming that Quebec’s consent was required in order to legitimize the new agreement and subsequently the new Constitution. Proceeding first with the Quebec Court of Appeal and then to the S.C.C., the government of Quebec submitted that in order to legitimize the process of amending, and thereby the patriating the Constitution where the amendments affect its powers, its consent was required by way of constitutional convention. On December 6th, 1982, eight months after the Constitution Act, 1982, was proclaimed, the Supreme Court of Canada reaffirmed the First Ministers’ interpretation of a substantial degree of provincial consent, thereby

² Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?* 2nd ed., 120: A consensus regarding a domestic amending formula and an entrenched charter of rights and freedoms between the federal government and nine of the ten provinces was reached on the night of November 5th, 1981. After each side made significant concessions, the package was complete and was presented as such to René Lévesque the next morning. The night of the long knives has been used by the Quebec political elite to signal the betrayal of Quebec by Canada. The Kitchen Summit has been used to describe the meeting which took place between Jean Chrétien, Roy Romanow and McMurty in a ‘small secluded room in the conference centre.

giving judicial sanction to a vision of federalism, now constitutionalized with the passing and proclamation of the Constitution Act, 1982.

In this chapter then I look at the Quebec Veto Reference where the question of nationhood outside the Canadian nation-state is put directly to the Court. I begin with a brief account of what led the government of Quebec to challenge the legitimacy of the new Canadian Constitution. I then proceed with an analysis of the arguments presented by the Quebec government, who were joined by the Grand Councils of the Crees (hereinafter the Crees) and L'Association Canadien Française De L'Ontario (ACFO), and then those presented by the federal government.

Through the analysis of these arguments, it will become clear that the federal government remained firm in the position it first presented to the Supreme Court of Canada in the Senate Reference; it continued to advance a positivist reading of the constitutional law and a legalistic approach to Canadian federalism to project the sense that in Canada there is a hierarchy between the two orders of government with the provincial legislatures, in this particular case Quebec, subordinate to the federal government. Quebec, on the other hand offered two lines of argument, one informed by the provincialist vision and the second, underpinned by the binational approach to the understanding of federalism. Relying upon a similar argument to that it presented in the Patriation Reference, the government of Quebec insisted that the consent of all provinces is required. If not all the provinces, at the very least, the consent of the province of Quebec, as it represents one of the two founding nations in Canada, is required. Ensuring Quebec's consent reaffirms Canada's true federal character and remains true to the original compact between these two peoples.

In the final section, I scrutinize the Supreme Court's opinion, an opinion Russell accurately described as a "political response to a political challenge dressed up in judicial clothing."³ In this Reference, as we will see, the Court had its first real opportunity to recognize Canada as a country made up of more than one people and more than one nation. In this opinion, the Court, once again acting as political mediator, arguably ruled against diversity at the constitutional level, in favour of constitutional and political stability for the majority, having the dire result of excluding one of Canada's provinces. As Donald Smiley beautifully proclaimed in a *Dangerous Deed: the Constitution Act, 1982*, "the short-run political impact on Quebec of the constitutional developments between the "consensus" of November 5 and the proclamation of the Constitution Act on April 17, has been to compromise national unity."⁴

In order to fully appreciate the politics and issues surrounding the Quebec Veto Reference as well as the case to be analysed in the next chapter, the Secession Reference, we need to take a step back and look at the rise of the separatist and nationalist movement in Quebec⁵. In other words, what led the government of Quebec to challenge the constitutionality of the process which led to the patriation of the Constitution and to hold two referenda on the issue of sovereignty association?

³ Ibid., 129.

⁴ Donald Smiley, "A Dangerous Deed: The Constitution Act, 1982," in *And No One Cheered: Federalism, Democracy & The Constitution Act*, ed. Keith Banting and Richard Simeon, (Metheun Publications, Toronto, 1983) 77.

⁵ I distinguish between the nationalists and the separatists; Quebec nationalists, to a greater degree than separatists, feel attached to both Canada and Quebec; they do not want to leave the federation; however, they do strongly believe that Quebec should exercise greater autonomy within the Canadian federation (Marc Chevrier, "Canadian Federalism and the autonomy of Quebec: A historical viewpoint," Directions des communications, Ministère des Relations Internationales, 1996. www.mri.gouv.qc.ca/la_bibliotheque/federalisme/fede_canadien_an.html. 3).

QUEBEC NATIONALISM

For the purposes of contextualizing this particular Reference, I have decided to look at Quebec nationalism and its demands for constitutional change and recognition from the Quiet Revolution and beyond, paying specific attention to the period of 1976, the election of the Parti Québécois to the patriation of the Constitution in 1982. It is during this period that Pierre Trudeau and his vision of pan-Canadianism and Lévesque and his vision of Quebec's place in the Canadian federation go head to head.

This is not to say that the evolution of French Canadian nationalism is not important or relevant. On the contrary; such evolution and thoughts on French Canadian nationalism and the role of the Quebec and federal governments remain important in that they underpin current thoughts informing Québécois nationalism. In fact, the roots of the two nation concept of Canada and the idea of Canada founded by two equal peoples (English Canadians and French Canadians), each having a role in protecting and enhancing the dualism underpinning Canadian federalism, can be located in T.J.J.

Loranger's interpretation of Confederation (first published in 1844):

The resolutions of the Quebec conference were founded upon the principle of strict equality or equal authority between the Dominion and the provinces, without the subordination of the latter to the former, within the limits of their respective powers. In the sphere of their local powers, the authority of the provinces was to remain absolute, as the federal power was to be within the limits of its general powers. It was on these conditions that the provinces and especially Quebec consented to enter the Federal Union. The Federal Constitution can admit no other interpretation.⁶

This was embraced and built upon by Henri Bourassa who in 1902 argued:

The imperial statute which the current government has given us is only the force of a double contract. One was concluded between the French and the English of the old province of Canada, while the aim of the other was to bring together the scattered

⁶ Honourable Mr. Justice T.J.J. Loranger, *Letters upon the Interpretation of the Federal Constitution known as the British North America Act, 1867*, Quebec: Printed at the "Morning Chronicle" office, 1884, v.

colonies of British North America. We are thus party to two contracts, one national and one political. We must keep a careful eye on the integrity of these treaties.⁷

It is these statements and supporting views which gave birth to the dual compact (of cultures) theory of Confederation which is still referred to today and certainly relied upon in the period to be examined by the political actors to assert that Quebec represents a nation and because of this status, its government should have the powers necessary to ensure the vitality and survival of that nation. Such a vision was subsequently met with visions of Canada centered upon ideas of bilingualism, multiculturalism, and individual rights. Embodied in Trudeau's notion of pan-Canadianism, this vision of Canada projected and protected the concept of Canada as one nation where all individuals, regardless of what province they reside in or what language they speak or the culture with which they affiliate, are equal; and all could identify with Canada as a nation and the federal government representing that nation.

The Quiet Revolution

In 1960, the Jean Lesage Liberals of Quebec won the provincial election; as a result, there was a massive shift in the role the Quebec state played in the everyday life of les Québécois. The Quebec Quiet Revolution was born. In the Sixties, Quebec became more of a "modern society". Consequently, French Canadian nationalism took on a new form mirroring a liberal ideology; in fact, the Quiet Revolution of the Sixties was nationalism combined with liberalism. This new nationalism demanded a re-examination

⁷ Henri Bourassa, *Le Devoir et la guerre: le conflit des races* (Montréal 1916, 3, as quoted in Ramsay, Cook, *Provincial Autonomy, Minority Rights and the Compact Theory, 1867-1921*, (Studies of the Royal Commission on Bilingualism and Biculturalism, Ottawa, 1969) 57.

of the political structures in Quebec. The French Canadians of the provinces wanted full equality with the Anglophones.⁸

The new middle class, suppressed under the Duplessis regime, began to implement their ideas of how the Quebec state ought to operate in order to “catch up” (to the rest of Canada).⁹ In essence, the Quebec state would begin to assume the role and duties traditionally exercised by the Catholic Church. Recognizing the fiscal restraints it faced, the Lesage government began to call for a reforming of the Canadian federation.¹⁰ As Gagnon points out, beginning with the Lesage government, Quebec governments sought “a clear definition of Quebec’s powers and responsibilities and protection of the French language and the francophone culture.”¹¹ Quebec nationalists at this point wanted a redefinition of the Canadian relationship, not a termination. They were committed to a “major restructuring of Canadian federalism so as to accommodate the new Canada” and reflect Canada’s dualist nature.¹² Understanding Canada in binational terms began to enter the constitutional realm as the government of Quebec began to demand a recognition of its role in providing for and defending the French Canadian nation.

The cornerstone of this new nationalism was the idea that the Quebec state alone is the only legitimate state that is able to protect, enhance, and promote the Québécois citizen, their goals, interests, and way of life. French Canada soon became equated with Quebec. Quebec nationalists soon came to realize that “only in Quebec could there be a

⁸ McRoberts, *Misconceiving Canada: The Struggle for National Unity*, 32-34. See also Kenneth McRoberts, *Beyond Quebec: Taking Stock of Canada*, (Montreal: McGill-Queen’s University Press, 1995).

⁹ This period is often referred to as “rattrapage” (catching up)

¹⁰ Chevrier, “Canadian Federalism and the autonomy of Quebec: A historical viewpoint,” 2.

¹¹ Alain-G. Gagnon, “Quebec-Canada: Constitutional Developments, 1960-1992,” in *Quebec: State and Society, 2nd Edition*, ed, Alain G Gagnon (Scarborough: Nelson Canada, 1993) 98.

¹² McRoberts, *Misconceiving Canada: The Struggle for National Unity*, 35.

real well-organized and authentic modern French-speaking society.”¹³ Seemingly, in the 1960s, the wishes and demands were to a certain extent accommodated within the Canadian federation under a federal government led by Lester B. Pearson. I will return to this point below. This is not to say that the desire for a distinct Quebec nation, separate from the Canadian one did not exist. The sentiments were brewing; however, just a small minority wished for separation. Only when René Lévesque, leader of the Parti Québécois, proposed his idea of a new Canadian union, consisting of an independent Quebec with economic association with the Canadian state, did the separatist movement seem more palatable and begin to gain public support in Quebec.¹⁴

In the Sixties, Quebec nationalism was not great cause of political worry as it did not threaten the status quo or the nation-state – that is, the idea of Canada as a one nation state was not being challenged. This, however, does not necessarily mean that talk of dualism or Quebec as a distinct society did not circulate; it was in fact present amongst the political elite. Under Pearson, however, such a vision was accommodated; at least an attempt to accommodate was present, within the nation state. National programs were set up which permitted the Quebec government to opt out with full compensation provided it set up a program similar in principle to the program established by the federal government. Such arrangements enabled the Quebec government to administer its own programs and fulfill its ideal of *maître chez nous*.¹⁵ A notable example includes the Canadian Pension Plan/Quebec Pension Plan.¹⁶

¹³ Balthazar, Louis. “The Faces of Quebec Nationalism, in *Quebec: State and Society, 2nd Edition*, ed, Alain G Gagnon (Scarborough: Nelson Canada, 1993) 9.

¹⁴ McRoberts, *Misconceiving Canada: The Struggle for National Unity*, 36.

¹⁵ Masters of our own home – a theme which emerged from and fueled the Quiet Revolution

¹⁶ For a description of these two plans and the consensus arrived at by the Canadian and Quebec governments please see Kenneth McRoberts, *Misconceiving Canada: The Struggle for National Unity*.

Pierre Trudeau felt that such asymmetry leading to special status for any one province or 'people'¹⁷ is dangerous. According to Trudeau, it potentially threatens Canada as a one nation state as it accommodates individuals and collectives identifying with a government other than the national one. He believed that the interests of French Canadians in and outside of Quebec are best accommodated within the present framework. From such thoughts were born his idea of pan-Canadianism where all Canadians are equal to each other and all can identify with the Canadian state and the government which represents this state to advance, protect and promote their interests. Despite his past criticism of nationalism as an ideology, Trudeau proved to be quite active in promoting a Canadian nationalism in hopes of strengthening the Canadian state and thwarting Quebec nationalism during his time in office.¹⁸

Upon gaining office in 1968, Trudeau went quickly to work to implement this pan-Canadian vision. His agenda consisted of a rejection of Pearson's idea of accommodating provincialist notions, not only from Quebec, but from other provinces as well. Rather, he and like minded individuals, including future Prime Minister Jean Chrétien, began calls for bilingualism throughout Canada; "*French power* in Ottawa and constitutional entrenchment of individual rights as alternatives to the transfer of powers sought by Quebec nationalists".¹⁹ The idea of a "revised constitution [which] entrenches the rights of individuals, guarantees of equal status of the English and French languages

¹⁷ Trudeau in fact rejected the notion that Quebec formed a nation and that les Québécois formed a people distinct from the Canadian state. He in fact rejected nationalism as he felt that it could be quite dangerous to the fabric of the country. Further to this, he felt that nationalism, in general, but particularly in Quebec, was exclusive and benefited the political elite alone (Stevenson, *Unfulfilled Union*, 245).

¹⁸ In *Federalism and the French Canadians* (Toronto: Macmillan), Trudeau is quite critical of nationalism in general and Quebec nationalism in particular arguing that it can lead to dangers and disunity. A similar argument is also presented by Trudeau in Pierre Trudeau, "New Treason of the Intellectuals", in *Against the Current: Selected Writings 1939-1996*, ed., G. Pelletier (McClelland & Stewart Inc., Toronto) 150-181.

¹⁹ Stevenson, *Unfulfilled Union*, 242. my emphasis.

and [which] reforms federal institutions such as the Senate and the Supreme Court to more adequately reflect the diversity of the country” was favoured by the federal government under Trudeau.²⁰

Arguably, it was not until the 1976 provincial election in Quebec, which saw the Parti Québécois win the election and eventually form the government that Quebec nationalism as a real threat materialized both in and outside of Quebec.²¹ The constitutional mandate of the Quebec government changed; under René Lévesque, the Quebec National Assembly²² began promoting the idea of sovereignty-association.²³ The nationalism of Quebec began to openly clash with that of Canada’s, specifically Trudeau’s. A good example of this clash is represented in the National Assembly’s passing, implementation and enforcing of Bill 101; the ultimate goal of which was the francisation of Quebec through such measures as restricting outdoor business signs to the French language, the requirement of all immigrant children and all Quebec citizens whose parents were not schooled in English in Quebec, to attend French language schools;²⁴ unilingualism and not bilingualism was the intent. As McRoberts states, “never before had the integrity of the Canadian state been so directly challenged.”²⁵

²⁰ Ibid., 245.

²¹ It should be noted that the Parti Québécois did not necessarily win on an agenda of sovereignty-association of exclusively Quebec nationalism. Rather, the party campaigned on good government. For an account of the 1976 Quebec provincial election, see McRoberts, 1993, op. cit.

²² With the Quiet Revolution, the discourse surrounding the Quebec government and relevant institutions took on a nationalist tone. For example, the Quebec legislature was and is often referred to as the National Assembly, Quebec City is referred to as the National Capital. This also spilled over to the international stage where the Quebec set up national assemblies in various international cities and participates in certain international bodies, la francophonie is a good example, as an entity independent from the Canadian state.

²³ Chevrier, “Canadian Federalism and the autonomy of Quebec: A historical viewpoint.”

²⁴ For more on PQ policies under Lévesque’s first regime please see McRoberts, *Quebec Social Change and Political Crisis*, chapter, 8; as well as Garth Stevenson, *Unfulfilled Union*, chapter 5. For Quebec policies from the Quiet Revolution and on, see also, Part III and IV of Alain G Gagnon, *Quebec: State and Society*, 2nd Edition, (Scarborough: Nelson Canada, 1993).

²⁵ McRoberts, *Quebec Social Change and Political Crisis*, 263.

On May 20th, 1980, the nationalism conceived by Lévesque and his supporters went head to head with the nationalism understood by Trudeau and his followers in the first referendum held in Quebec on sovereignty-association.²⁶ The end result saw the federalists win with a 59.6% - 40.4% victory over the separatists.²⁷ Two years later, the Canadian Constitution was patriated without the consent of the National Assembly. The night of the long knives²⁸ signaled to many Québécois that “its very existence as a nation, people or distinct society did not count.”²⁹

For Quebec nationalists, the legitimacy of the patriation process was questionable; it eroded the basic principle of federalism: consent of all partners. The 1982 process excluded one of its partners, because the Constitution Act, 1982, enshrined only one vision³⁰ of the original compact.³¹ Gagnon argues: “opposing any form of special status

²⁶ Ibid., 322:

The Quebec electorate was asked:

The government of Quebec has made public its proposal to negotiate a new arrangement with the rest of Canada, based on equality of nations;

This arrangement would enable Quebec to acquire the exclusive power to make its laws, administer its taxes and establish relations abroad – in other words, sovereignty – and at the same time to maintain with Canada an economic association including a common currency;

No change in political status resulting from these negotiations will be effected without approval of the people through another referendum;

On these terms, do you give the Government of Quebec the mandate to negotiate the proposed agreements between Quebec and Canada?

Yes.

No.

²⁷ Ibid., 327;

For a more detailed account of the referendum campaign and the associated controversy, please see: Gagnon, *Quebec: State and Society*, 2nd Edition; McRoberts, *Quebec Social Change and Political Crisis*; Guy Laforest, *Trudeau and the End of a Canadian Dream* (Montreal & Kingston: McGill University Press, 1995); Keith Banting and Richard Simeon, *And No One Cheered: Federalism, Democracy and the Constitution Act*, specifically, Gerard Bergeron, *Quebec in Isolation* and Donald Smiley, *A Dangerous Deed: the Constitution Act, 1982*.

²⁸ See supra note 2; also refer to Keith Banting and Richard Simeon, *And No One Cheered: Federalism, Democracy and the Constitution Act*, specifically, Gerard Bergeron, *Quebec in Isolation* and Donald Smiley, *A Dangerous Deed: the Constitution Act, 1982*.

²⁹ Chevrier, “Canadian Federalism and the autonomy of Quebec: A historical viewpoint,” 12.

³⁰ Ibid., 14:

The Constitution of 1982, ‘based on the principle that there is a single nation in Canada comprised of individuals enjoying equal constitutional rights from sea to sea’.

³¹ Ibid., 16.

for Quebec be it entrenched in the Constitution or through international recognition, Trudeau shut Quebec out.”³² The response of the Quebec government was to challenge, in vain, this process in court.

The continued dissidence of the Quebec government,³³ however, did not prevent the federal government from pursuing the ratification of the new constitutional package. On December 2nd 1981, the Act passed in the House of Commons with a vote of 246 to 24.³⁴ The Quebec government responded by ordering that all Quebec flags be flown at half mast in the province.³⁵ On March 8th, 1982, after having rejected pleas from Lévesque and the Lévesque government to delay the ratification of the Canada Act until the S.C.C. rendered its opinion on the matter,³⁶ the U.K. House of Commons passed the bill – thus approving Canada’s Constitution to be sent home. In style, the Quebec government informed the public that it would send 76 toilet bowls to Parliament Hill “to mark the arrival of the new Constitution – one for each Quebec Liberal MP.” The

³² Gagnon, “Quebec-Canada: Constitutional Developments, 1960-1992,” 104. For additional reading see Laforest, *Trudeau and The End of a Canadian Dream*, and Banting and Simeon, *And No One Cheered: Federalism, Democracy and the Constitution Act*.

³³ Gagnon, Gagnon, “Quebec-Canada: Constitutional Developments, 1960-1992,” 122: In order to render this now “fait accompli” more palatable to Lévesque and to the Quebec government, two changes were made to the original Kitchen Accord:

(1) compensation for any provinces opting out; this, however, only applied when the matter at hand concerned a transfer of powers in the areas of education and culture;
 (2) allow the Quebec government to educate its immigrant children in French schools.

In addition to the two changes offered to Quebec, two other changes were made to the original accord to appease the women’s and Aboriginal groups: one, section 28 of the Charter, which guarantees the equality between men and women was now exempt from the notwithstanding clause; two, there was the restoration of aboriginal and treaty rights which was originally left out of the Kitchen Accord.

The government of Quebec refused to accept the Accord even after it was given two weeks to consider the package and the changes to the package.

³⁴ Bill Fox and David Vinneau, “Champagne flows as jubilant MPs toast new constitution,” *The Toronto Star*, [Toronto], 3 December 1981, A1-A17.

³⁵ *Ibid.*, A1-A17.

³⁶ On December 19th, 1981, Lévesque sent a letter to British Prime Minister, Margaret Thatcher, asking her not to approve the constitutional package (the Toronto star – Dec 22):

It was reported on February 12, 1982, that the Quebec government sent a fourteen page memorandum to all British MPs urging them not to patriate the BNA Act ‘before the Supreme Court renders its ruling’ (Canadian Press, “Chrétien expects U.K. to act fast on the constitution,” *The Toronto Star*, [Toronto], 12 February 1982, A3.)

Quebec government wanted to remind them of their promises made during the 1980 referendum and how they said that they would put their seats on the line. In a resolution issued on March 13, the Quebec National Assembly stated “after what they have given us, we don’t think there is any other type of seat they should sit on.”³⁷ On April 17th, 1982, in a ceremony held on Parliament Hill, the Constitution Act, 1982, was proclaimed by Queen Elizabeth II.

THE MEDIA REACTS. . .

Initially the media seemed reserved to the idea of a Constitution “with a diluted rights charter,” as the headline read on November 6th, 1981, in the *Toronto Star*, and with no consent from Quebec. “After 114 years, Canada is finally going to bring its Constitution home with a watered down charter. The price of full fledged nationhood could be a divisive referendum on Quebec independence.”³⁸ Similarly, W.A. Wilson writing for the *Calgary Herald* expressed some reservations about the success of the new deal; “but that important political factor, the Quebec problem, raises again the question whether the process [of Patriation] should ever have been started.”³⁹ Claude Ryan, leader of the Opposition in Quebec, claimed that the deal left Quebec in the weakest position ever; “never before have all the other provinces told Quebec we’ll go ahead with our agreement, even if you don’t.”⁴⁰ John Grey of the *Globe and Mail* also indicated that the isolation of Quebec could be dangerous; “but the agreement leaves Quebec dangerously

³⁷ Canadian Press, “PQ tries to make MPs flush”, *The Toronto Star*, [Toronto], 14 March 1982, A1. Also, the government of Quebec announced that it will also organize a protest in Montreal on the day that the Constitution is proclaimed.

³⁸ David Vinneau and Bill Fox, “The Constitution’s price: A diluted right charter, Lévesque is lone dissenter”, *The Toronto Star*, [Toronto], 6 November 1981, A1.

³⁹ W.A. Wilson, “Worrisome cloud hangs over constitutional pact,” *The Calgary Herald*, [Calgary], 6 November 1981, A6.

⁴⁰ Canadian Press, “Quebec left in weakest position,” *The Toronto Star*, [Toronto], 6 November 1981, A1.

isolated from the rest of Canada, which prompted premier René Lévesque to warn that the “consequences could be incalculable.”⁴¹

Jean Louis-Roy, of *Le Devoir* argued that the new constitutional deal signalled to Quebec that its consent and consequently the province are dispensable; further its ideas of dualism are but a mere dream:

Il met aussi fin à une conception du pays qui faisait de consentement du Québec une condition indispensable juridiquement et politiquement à tout réaménagement, même limite, du régime fédéral. [...]

Il faudra conclure que ce Canada a deux qu'évoquait jadis Daniel Johnson ce Canada de la dualité constitutive évoque par les commissions Laurendeau-Dunton et Pepin-Robarts, est une vision poétique et minoritaire, une bougie en plein soleil. L'alliance née dans la nuit de mardi à Ottawa entre la porte parole de l'autre Canada excluait brutalement le Québec⁴²

Native groups also expressed their shock; they were disappointed that the federal government would bargain away their rights. “Native leaders expressed shock, disbelief, and finally disgust yesterday on learning the federal government had bargained away hard-fought native rights in exchange for a constitutional agreement with most of the provinces.”⁴³

These sentiments of reservation and/or betrayal, however, were not unanimously held by the print media. An editorial appearing in the *Globe and Mail* perceived the agreement as a positive one because it was arrived at in a federal manner; “the process is at last right. The process under Prime Minister Pierre Trudeau’s original resolution had been wrong. He proceeded to act unilaterally. [...] The Prime Minister and nine premiers yesterday acted in a federal way.”⁴⁴ An editorial in the *Calgary Herald*

⁴¹ John Gray, “Battle for patriation is over: Quebec alone in opposing accord; U.K. officials expect swift passage,” *The Toronto Star*, [Toronto] 6 November 1981, 1.

⁴² Jean-Louis Roy, “Le Québec exclu et isole,” *Le Devoir*, [Montréal], 6 Novembre 1981, 6.

⁴³ Canadian Press, “Native leaders shocked,” *The Globe and Mail*, 6 November 1981, 11.

⁴⁴ Editorial, “The federation stands,” *The Globe and Mail*, [Toronto], 6 November 1981, 6.

commended the efforts and accomplishments of the premiers and Prime Minister; “Negotiation and compromise in the classic Canadian tradition provided the agreement with which all parties, with the single exception of Quebec, feel reasonably at home. That, in this light of the past decade of frustration, makes the achievement a truly remarkable bit of education rights.”⁴⁵

Whatever initial reservations held by the media with regard to the exclusion of Quebec, quickly vanished when the Constitution was proclaimed; uncertainty was replaced with expressions of bliss and delight. The headline appearing on the front page of the *Toronto Star* exclaimed “3 cheers for Canada,”⁴⁶ and the follow-up headline on page 8 read “At last Canada is truly independent.”⁴⁷ The headline in the *Globe and Mail* read, “A new Constitution, a grand occasion.”⁴⁸ In addition, pages and pages of the print media were dedicated to the reporting of the ceremony held on Parliament Hill marking the proclamation of the new Constitution.

In the meantime, at a protest held in Montreal and attended by 22 000 people, “[Lévesque] declared Constitution Day “the deepest moment of our history as a colonized people, and the beginning of the end.”⁴⁹ He further went on to exclaim, (this however, was not reported in the English newspapers reviewed) ‘Si on a pas le pays qu’il faut, on fera le pays qu’il faudra.’⁵⁰ Similar sentiments of rejection were also expressed by various Aboriginal groups in their boycott of the festivities claiming: “it’s the worst day

⁴⁵ Editorial, “Constitution consensus at last!, *The Calgary Herald*. [Calgary], 6 November 1981, A6.

⁴⁶ The *Toronto Star*. “3 cheers for Canada,” *The Toronto Star*. [Toronto], 18 April 1982, A1.

⁴⁷ *Ibid.*, A8.

⁴⁸ *Globe and Mail*, the, “A new Constitution, a grand occasion,” *The Globe and Mail*, [Toronto], 19 April 1982, 1.

⁴⁹ Olivia Ward, “22, 000 cheer as René promises ‘our own country’,” *The Toronto Star*, [Toronto], 18 April 1982, A8.

⁵⁰ Pierre O’Neill, “Lévesque aux manifestants On fera le pays qu’il faudra . . .,” *Le Devoir*, [Montréal], 19 April 1982, 1.

in the history of the Indian people because our mother (Queen Elizabeth) is turning us over to someone (the Canadian government) who has not dealt with us in a fair and humanitarian manner.”⁵¹

GOING TO COURT

As promised, the Lévesque government challenged the legitimacy of Canada’s newly patriated Constitution⁵². After the Quebec Court of Appeal on April 7th, 1982, unanimously rejected Quebec’s contention that its approval was needed in order to legitimize the proposed amendments, the Quebec government appealed the decision to the Supreme Court of Canada, asking:

Is the government of Quebec, by convention, constitutionally required for the adoption by the Canadian Senate and House of Commons of a resolution whose object is to amend the Canadian constitution in such a way as to affect:

- (i) the legislative authority of the Quebec legislature by virtue of the Canadian Constitution;
 - (ii) the status or role of the Quebec legislature or government within the Canadian federation;
- and, does Quebec’s objection render such a resolution unconstitutional in the conventional sense?⁵³

QUEBEC ARGUES

Asserting that the questions ought to be answered in the affirmative, the Attorney General of Quebec presented a two tiered argument: first, the consent of the province is

⁵¹ David Vienneu, “Natives consider ex MP traitor, *The Toronto Star*, [Toronto], 18 April 1982, A8.

⁵² The Quebec government, it should be noted, was not the only one to question the new constitutional package. Aboriginal groups, including the Blackfoot, Blood and Cree tribe and the Indian Association of Alberta launched their own challenges. Unlike the government of Quebec, however, these challenges took place through the judicial system in Britain. Such opposition to the new Constitution, however, was in vain as the cases were decided against the Aboriginal peoples. The Trudeau government, however, did promise to hold conferences, dealing specifically with the concerns of the Aboriginal peoples, once the Constitution was patriated.

⁵³ *The Quebec Veto Reference*, 385.

required because of the principle of dualism. Canada was founded by two peoples, one of which the majority resides in Quebec. Thus any change to the original contract requires the consent of both peoples. Second, the consent of the province is required as the unanimity of the provinces is obligatory. The former is underpinned by a binational understanding of Canadian federalism promoting essentially the idea that Quebec is a nation equal to the Canadian nation. The latter, very much akin to the position Quebec advanced in the Patriation Reference, is informed by the provincialist vision affirming the Canadian federal principle centered on the notion of the equality of the provinces and the equality of the two orders of government.

The Attorney General began by setting out the boundaries and the framework in which the question ought to be considered. This reference is situated within the first reference, the Patriation Reference, specifically the Court's opinion of the need for a substantial degree of provincial consent. The Attorney General of Quebec held that the situation leading to the patriation of the Constitution does not satisfy the convention pronounced by the Court.⁵⁴ Adopting the Jennings' test framework⁵⁵ that the S.C.C. used in the Patriation Reference and relying on the dualism principle, Quebec argued that the consent of the province of Quebec is necessary to effect the patriation of the Constitution; the dualism principle informs and justifies the convention requiring the consent of Quebec. Further to this, a convention requiring unanimity of the provinces also leads to the conclusion that the consent of the Quebec government is mandatory.⁵⁶

⁵⁴ *Ibid.*, 6.

⁵⁵ Sir Ivan Jennings, *The Law and the Constitution*, 5th ed. (1959), quoted in *the Patriation Reference*, 90: First, what are the precedents? Second, did the actors in the precedents believe that they were bound by a rule? Third, is there a reason for this rule?

⁵⁶ Government of Quebec. Department of Justice. "Factum of the Attorney Generals of Quebec in the matter of Reference: Re Objection by Quebec to Resolution to Amend the Constitution, [1982]." In *Factums of the Attorney General of Canada and of Quebec concerning the Constitution of Canada*.

Dualism demands Quebec consent

According to the Quebec government, the core of Canadian federalism is the principle of dualism. This principle recognizes and has recognized since before Confederation that Quebec forms a distinct society.⁵⁷ Because of this, dualism becomes the reason for the constitutional convention requiring that the province of Quebec consent to any changes to the BNA Act that affects its powers. Therefore, the third part of the Jennings' test, the reason for the convention, is satisfied. In September of 1981, the Court decided that the federal principle was the reason for the constitutional convention requiring a substantial degree of provincial consent where the amendments affect provincial legislative powers; "as far as this is true, dualism is the *raison d'être* for the convention requiring the consent of the Quebec government."⁵⁸

It was argued that the people of Quebec felt that its language and culture were and are protected by the BNA Act.⁵⁹ The Attorney General of Quebec held that these realities and guarantees in the BNA Act constitute Quebec's will of dualism. This will, and in turn, the principle of dualism can be found behind all and every power which was attributed, in 1867, to the Quebec legislature.⁶⁰ "It would falsify history, the constitutional understanding of 1867 and the reality which prevails today to reduce dualism, as the new Constitution does, to only a linguistic and cultural dimension."⁶¹

The necessity of Quebec's consent is strengthened and affirmed, according to Quebec, when considering the compact at the time of Confederation; a compact which

Canada: Supreme Court, Ottawa, 1982. (Factum of the Attorney General of Quebec, 1982), 7 (my translation).

⁵⁷ Ibid., 8.

⁵⁸ Ibid., 8, (my translation).

⁵⁹ Ibid., 8.

⁶⁰ Ibid., 9.

⁶¹ Ibid., 9 (my translation).

saw the participation of two equal cultures, which Quebec equates to two equal nations. The ability of the French Canadians, Quebec argued, to express themselves as a people and as a majority in the province became a condition of Confederation. Thus their consent is required if the amendment affects their *volant*.⁶² This desire and *volant* of the French Canadians residing in Quebec is reflected in the guarantees of dualism in the BNA Act.⁶³

The ACFO affirmed the reality that Quebec is the home of French Canada; thus Quebec has a constitutional veto.⁶⁴ Believing that there is a French Canadian people, and accepting the Quebec government as the spokesperson for this people, the ACFO argued that Quebec has a constitutional veto which cannot be taken away from it without their consent.⁶⁵ It went on to argue that only respect of this principle can ensure the protection and survival of the French minority in Canada.⁶⁶ The ACFO asked the Court to protect the rights of the Franco – Ontarians; this can be done through the recognition that the rights of Quebec in patriating the Constitution have been violated.⁶⁷ Consent of the

⁶² Ibid., 16.

⁶³ Ibid., 22-23:

According to the A.G. of Quebec, the BNA Act guarantees dualism and the development of Quebec's system and institutions. This is reaffirmed by the following sections following in the jurisdiction of the provinces:

S92(12 and 92(13) guarantees marriages and property and civil rights respectively;

S94 states that Canada's provinces are governed by common law, with the exception of Quebec which retains its tradition of civil law

Ss 22(4), 23(6), 80 and 133 acknowledge the distinct nature of Quebec and assure the protection of the anglophone minority in Quebec.

In short, the BNA Act, 1867, 'acknowledges Canadian dualism and assures that Quebec has the ability to express its values within its own institutions' (my translation)

⁶⁴ Association Canadien Française De L'Ontario (ACFO), "Mémoire de L'Intervante Association Canadien Française De L'Ontario." In *the matter of Reference: Re Objection by Quebec to Resolution to Amend the Constitution, [1982]*." Ottawa. (Memoire de L'ACFO, 1982) 31 March 1982, 105.

⁶⁵ Ibid.

⁶⁶ Ibid., 121.

⁶⁷ Ibid., 121.

Quebec government is not only required by a constitutional convention, but it is intrinsic to the 1867 agreement.⁶⁸

Since this reference and the project in question are similar to the 1981 Reference, Quebec decided to use the same examples used in that Reference. The Attorney General of Quebec held that the examination of these examples demonstrate that the consent of Quebec was always sought and obtained before proceeding to amend the Constitution and the objection of Quebec either delayed or ended the constitutional amendments. The constitutional convention Quebec asserted is therefore based on the sum of these realities advanced and the guarantees which affirmed the will of the Quebec people for Canadian dualism.⁶⁹ “Historically, the Canadian prime ministers and provincial premiers recognized and respected Quebec’s right of dissidence and they all abstained from modifying Quebec’s powers when Quebec did not consent.”⁷⁰

Dualism thus is the normative character which underpins the constitutional convention. This becomes especially evident when considering five of the nine precedents. These include the amendments of 1940, 1951, 1964⁷¹ and the proposed amendments of 1964-66, and 1971.⁷² These examples clearly indicate that the consent of the Quebec National Assembly was required and is required to amend the Constitution, where the amendment affects its powers vis-à-vis the division of powers. This extends, Quebec argued, to amendments even if their rights as minorities or their identity was not affected.⁷³ Further, and directly relevant to this, the Fulton Favreau Formula and the

⁶⁸ Ibid., 127.

⁶⁹ Ibid., 9 (my translation).

⁷⁰ Ibid., 9 (my translation).

⁷¹ See Appendix III.

⁷² See Appendix III.

⁷³ *Factum of the Attorney General of Quebec*, 1982, 33.

Victoria Charter represent identical situations to the one reviewed in this Reference: nine of the ten provinces agreed to the changes; however, both proposals died when the government of Quebec refused to accept the intended changes.

Unanimity requires the consent of Quebec

In the second part of its argument, the Attorney General of Quebec turned away from the quantitative vs. qualitative debate and appealed to the Court by relying upon the principle of provincial equality. Unlike the first argument advanced, Quebec asked the Court not to lend meaning to its opinion in the Patriation Reference, but rather to reconsider its final decision. Because all of the provinces play an equal role in the federation to each other and to the federal government and because Canada was founded upon this idea of equality of the sub units, all provinces must consent to constitutional amendments, where the changes affect provincial powers. In presenting this argument then, Quebec is arguing that if one province, regardless of which one, dissents to the amendments, the Resolution should be put to rest. Since Quebec did not consent to the changes, then the new Constitution is in fact unconstitutional, by way of constitutional convention.

In asking the Court to reconsider its opinion in the Patriation Reference, Quebec argued that upon careful reading of that opinion, it becomes clear that the Court did not outright reject or dismiss the unanimity rule. In fact, in various parts of its opinion, the majority alluded to the unanimity requirement, but concluded that it was not clear that such principle was accepted by all the political actors.⁷⁴ Furthermore, because the Court indicated that it would limit itself to recognizing that a convention exists and not to

⁷⁴ Ibid., 50.

define the convention, the Attorney General of Quebec concluded that the question of unanimity never formed a major part of the Court's opinion.⁷⁵ Thus the issue of unanimity remained open.

Relying on the Jennings' Test in advancing both aspects of its argument, the Attorney General of Quebec seemed to be endorsing or appealing to two seemingly opposing principles, dualism and provincial equality. In one instance, Quebec argued that it is not like the other provinces; because it represents a majority of French Canadians and because of the history of recognizing this, Quebec is distinct. Thus dualism, which underpins and is at the core of the Canadian federation demands that Quebec's distinct status, crystallizes into the need or requirement of Quebec to consent to all amendments where its powers are affected. Without such consent, the amending process would be, by way of convention, constitutionally invalid. Historical practice of amending the Constitution has shown this to be a fact. In light of this then, the process which led to the adoption of the resolutions and the new Constitution itself are unconstitutional as it does not respect dualism understood narrowly as the acquiescence to such changes by the government of Quebec.

In this instance then, the Attorney General of Quebec is appealing to a quantitative interpretation of the Court's ruling in the Patriation Reference. Because of the dualism principle inherent in the Canadian system, the consent of French Canada, represented by Quebec, is required. The consent of the other provinces, while important, does not seem to be as important as Quebec's. That is, if another province, be it Saskatchewan, Alberta, Prince Edward Island, etc., were not to lend its support to the

⁷⁵ Ibid., 46-47.

resolutions, it would not invalidate the process. Quebec's abstinence, on the other hand does.

In the second instance, Quebec relied upon the provincialist vision. It promoted the idea of equality of all of the provinces to each other and to the federal government. Because of this principle and because of the compact agreed upon by the constituent units and finally because of the precedents which have developed vis-à-vis amending the Constitution, the new Constitution is unconstitutional as all the provinces did not agree to the changes. Quebec, in this scenario is thus viewed as an equal partner, amongst the other provinces, in the federation. She is in fact a province like the others, thus her consent, because unanimity of the provinces is required, is mandatory in order to render the process leading to the patriation of the Constitution valid.

It is not clear how the Attorney General of Quebec would like the S.C.C. to reconcile these two seemingly opposing principles. Arguably, unanimity of the provinces safeguards both the provincial and the founding peoples compacts. In the end, however, Quebec did assert that the new Constitution should be ruled by the S.C.C. as unconstitutional because the province of Quebec did not lend its support to the changes.

The ACFO added an interesting dimension to the argument requiring Quebec's consent. In asserting that the government of Quebec speaks for French Canadians inside *and* outside Quebec, it reaffirmed the notion raised initially by Quebec, that dualism was and continues to be at the core of Canadian federalism. In doing so, the ACFO, along with the government of Quebec (but only in the first part of its argument), put into doubt the mononational vision of the Canadian federation advanced by the federal government and the S.C.C. in the Patriation Reference as well as the vision the two projected in this

Reference. In turn, then it promoted and supported Quebec government's vision of Canada as a dual nation state.

The Crees also added another layer to this argument asserting their role in this process. They embraced the idea that Canada is a dual nation by recognizing and affirming Quebec's special constitutional status; but they too have an important role with regard to the patriation of the constitution. In advancing their argument, they resorted to the constitutional and legal aspect of Canadian federalism and the obligation emerging from various agreements, of which the Aboriginal Peoples were part, signed by the Quebec and federal governments. Both orders of government have a constitutional responsibility to recognize and respect the position of the Crees in Canada and in Quebec.

Relying upon the legal aspects of the agreements entered into by the government of Quebec and of Canada as well as Aboriginal groups, the Crees asserted that, based on the Extensions Acts of 1898, 1912, 1946 and 1947, the area making up Northern Quebec cannot be affected unless both orders of governments agree to the changes.⁷⁶ Further to this, based on the James Bay and Northern Quebec Agreement (JBNQ) of November, 1975, dealing explicitly and specifically with the Natives involved, the consent of Northern Quebec is needed to alter the terms of the Agreement; this is a convention in the constitutional sense.⁷⁷

Therefore, the 1982 agreement requires the consent of the province of Quebec. Though the Crees advanced the notion that the government of Quebec is equal to the government of Canada and both have a responsibility to the Aboriginal Peoples of Northern Quebec, they do not necessarily base the equality of the two orders of

⁷⁶ Ibid., 50-51.

⁷⁷ Ibid., 54.

government on the principle of dualism. Rather they relied upon the treaty and legal obligations and status vis-à-vis the agreements signed and proclaimed into law to assert the need of all three parties, and not necessarily as nations, to agree to any procedural change or change of substance.

Despite the interesting dimension the Crees and the ACFO added to the arguments of this reference, they were unfortunately ignored by the federal government in its factum and the S.C.C. in its decision. Both the federal government and the S.C.C. rejected such a possible vision, be it that of dualism advanced by the ACFO or a broad mononational understanding of Canadian federalism which includes the Aboriginal Peoples as concerned parties, for a seemingly more stable and predictable conception of Canadian federation and the relationship between the two orders of government.

THE FEDERAL GOVERNMENT ARGUES

The federal government, rejecting any possibility that it did not satisfy the criteria set out by the Court in the Patriation Reference, resorted to a similar logic in argument and vision of Canadian federalism it pronounced in both the Senate Reference and the Patriation Reference. Based on a qualitative understanding of *a substantial degree of provincial consent*, the federal government argued that the consent of Quebec is not required. It outright rejected the principle of unanimity and more importantly, that of dualism. Instead, it advanced the notion that Canada is one nation made up of a central government and ten equal provinces; the consent of one province is no more required than the consent of another. The tactic of the federal government in this Reference was

to pit dualism against provincial equality and to elevate the latter so as to render the former insignificant, while affirming its hierarchal role in the federation.

The federal government began by quickly labeling Quebec's challenge and actions leading up to the court challenge⁷⁸ as political opportunism. In doing so, the federal government attempted to devalue and minimize any legal or constitutional validity of Quebec's position. It agreed with Quebec that the resolution affects the powers of the province, but it affects the powers of all Canadian governments including the federal Parliament. The Charter of Rights and Freedoms, because it entrenches the rights and freedoms held by all the people of Canada, limits the "legislative authority of both levels of government with the exception of those sections which a government can invoke section 33, the notwithstanding clause."⁷⁹ Further to this, Quebec under the new Constitution, is guaranteed participation in the federation equal to the other provinces, as well as the option of opting out with compensation in the areas of culture and the language of education for its immigrant children⁸⁰

⁷⁸ Government of Canada. Department of Justice. "Factum of the Attorney General of Canada in the matter of Reference: Re Objection by Quebec to Resolution to Amend the Constitution [1982]." In *Factums of the Attorney General of Canada and of Quebec concerning the Constitution of Canada*. Canada: Supreme Court, Ottawa, 1982. (Factum of the Attorney General of Canada, 1982), 36:

On December 1st, 1981 (tabled November 24th, 1981) the government of Quebec adopted the motion which states: 'the National Assembly speaking on behalf of Quebecers who have the right to determine their own future, refuse to sign the resolution unless it recognizes that Canada is founded by two equal nations and Quebec represents the French nation who essentially forms a distinct society.

On November 25, 1981, the government of Quebec adopted another resolution stating that it has a right of veto over constitutional changes

On the same day it also adopted a resolution authorizing the National Assembly the ability to challenge (in Court) via reference, the constitutionality of the resolutions'.

All these serve political purposes – that 'of fuelling a purely political debate' (para. 38).

⁷⁹ *Ibid.*, para. 26:

Any government, if it so wishes can invoke the notwithstanding clause (s33 of the Charter). This enables the government to override the rights guaranteed in the Charter sections 2 and 7-15. The government, must clearly state which right is being override. Further, there is a five year sunset clause. That is, any law that has been passed using the notwithstanding clause must be re-passed every five years.

⁸⁰ *Ibid.*, para. 26.

In equating Quebec to the other Canadian provinces, the federal government conveniently failed to acknowledge that the constitutional guarantees found in the BNA Act which support Quebec's argument of it that it is unlike the other provinces (civil law for example). Also, the federal government ignored that the Charter has a far greater potential of eroding the legislative authority of Quebec than it does for other provinces. Specifically, the language rights guaranteed in section 23 directly challenges the language provisions found in Quebec's bill 101 and has the potential of dismantling the education and language provision guaranteed in this act.⁸¹ In addition, opting out was only secured in the areas of culture and language of education for immigrant children. This is a far cry from what Quebec has been asking for in relation to the renewal of Canadian federalism and the Canadian Constitution.⁸² The newly patriated Constitution reduced the role of the Quebec government in maintaining and enhancing Quebec distinct or special status in the federation and its understanding of dualism to simply culture and language of education for immigrant children.

The federal government continued its attempts to weaken the position of the Quebec government by pointing out that Quebec's understanding of duality is

⁸¹ Robert Vandycke, in "The 1982 Constitution and the Charter of Rights: A View from Quebec", in *New Trends in Canadian federalism*, ed., Francois Rocher and Miriam Smith (Peterborough: Broadview Press, 1998) 133-154 eloquently argues the disproportionate effects s23 of the Charter have on the National Assembly and on Quebec language laws. A similar argument is presented by Yves de Montigny, in *The Impact (Real or Apprehended) of the CCRF on the Legislative Authority of Quebec*, in *Charting the Consequences The Impact of the Charter of Rights on Canadian Law and Politics* (Toronto: UofT Press, 1997) 3-33. In this article he looks at how the Charter has affected Quebec laws more than any other Canadian government. Specifically, he looks at how the Charter 'has destroyed whole sections of the language regime gradually adopted by the province [of Quebec] over the years' (de Montigny, 1997) 9. Also in chapter 3 of *The Charter of Rights and the Legalization of Politics*, Mandel argues that s23 of the Charter guaranteeing minority language education rights, is in directly interfered in the field of education (a power falling within the jurisdiction of the provinces). Furthermore, s23 was a direct challenge and amendment to the education provisions outlined in Quebec's bill 101 (Mandel, *The Charter of Rights and the Legalization of Politics in Canada*, 105-106).

⁸² Essentially, the government of Quebec, under Lévesque, would have liked opting out with compensation (for all amendments to the Constitution which pose a threat to its powers or the language and culture of Quebec) entrenched in a new Constitution.

misleading; “the true nature of Canadian duality does not support the arguments of the AG of Quebec.”⁸³ Canadian duality, for Quebec is reduced to Canada and Quebec, which is further reduced to the federal Parliament and the National Assembly, and to the compact of cultures, specifically the National Assembly’s understanding of the purpose of Confederation.⁸⁴ Neither of these two, according to the federal government, reflects the true nature of Canadian federalism. It is this misrepresentation and misunderstanding of Canadian federalism which led the government of Quebec to conclude that it has a historical veto over constitutional changes.

The federal government, in challenging this conceptualization, argued that dualism is and should be understood as the “co-existence of two great linguistic communities throughout Canada.”⁸⁵ This principle, however, is but one of many characteristics which underpin Canadian federalism. In this understanding, the federal government, as the government of the nation, plays a primary role, thus asserting its hierarchical position in the federation, in maintaining not only duality, but also the other principles characterizing the federation.⁸⁶ In doing so, the federal government is in actuality lessening, if not outright eliminating the government of Quebec in its role as the spokesperson for French Canada and any priority of the dualism principle as it is equated to the other principles of Canadian federalism.

⁸³ Factum of the Attorney General of Canada, 1982, para. 55.

⁸⁴ Ibid., para. 55.

⁸⁵ Ibid., para. 58.

⁸⁶ Ibid., para. 61:

Other characteristics of Canadian federalism include:

“(a) respect for the diversity and autonomy of different regions;

(b) the legal equality of the provinces;

(c) creation of a vast economic common market;”

The AG Canada simply listed these other characteristics failing to expand upon them.

This assertion in conjunction with the way in which the federal government interpreted substantial degree of provincial consent leads one to logically conclude that the equality of the provinces is paramount to the principle of dualism. Furthermore, the principle of dualism, even if it is given priority over provincial equality, is still rooted in a mononational understanding of federalism as the federal government does not equate dualism with the potential of nationhood or national minority outside the Canadian nation and national identity. Dualism is a characteristic of the Canadian nation and the federal government as the government of this one nation is charged with the responsibility to ensure the vitality of Canada's federal character which includes its dual nature.

The federal government went on to argue that both dimensions of Canada, duality and geography,⁸⁷ are satisfied in the newly patriated Constitution and in the obtaining of a substantial degree of provincial consent.⁸⁸ Though these two dimensions are satisfied, the satisfaction of them is in the strictly legal and constitutional sense; and both, especially the latter, are satisfied only at the federal level. Consequently, the federal government is placing itself in a hierarchical position vis-à-vis the provinces in general and with regard to Quebec in particular. It solidified this assertion when it argued that the federal government is the level of government best equipped to deal with Canadian

⁸⁷ Ibid., para. 62:

The AG Canada argues that Canada should be viewed as having a double dimension:

- (1) duality – which is pan-Canadian meaning it transcends provincial borders; and
- (2) geographic – Canada is divided into ten provinces and two territories, regardless of linguistic duality.

⁸⁸ Ibid., para. 63-65:

Constitutionally, the provinces are all viewed as equal; the minor differences are inconsequential – this satisfies the geographic dimension.

Duality is 'expressed in institutions of Parliament and the government of Canada'. It is also expressed through laws in the provinces of Ontario, Quebec, Manitoba and New Brunswick. Duality is further satisfied in the new Constitution through language rights guaranteed in ss. 16-29 in the Charter; as well s. 23 guarantees linguistic minority education rights.

dualism.⁸⁹ It thus ignored the reality that a majority of French Canadians reside in Quebec and seventy thousand Franco Ontarians represented by the ACFO⁹⁰ look to the Quebec government to promote the French factor in Canada.

The federal government also affirmed its hierarchical position in the federation and its mononational approach to the understanding of Canadian federalism through its dismissal of the arguments of the ACFO by rejecting any claim that the government of Quebec speaks for French Canadians. This is evident also in the federal government dismissal or lack of acknowledgement of the arguments presented by the Crees. Nowhere in its account of the characteristics of Canada and the Canadian federation does the federal government list or recognize the Aboriginal Peoples and/or the treaties and agreements signed by and with the different Aboriginal groups, specifically those mentioned by the Crees in their factum.

The federal government does, in all fairness, acknowledge Quebec's unique character; however, the appreciation for this status is not analogous to the national minority conception projected by the Quebec government. Rather, the federal government recognized Quebec's unique character in so far as it admitted that all the provinces are unique in their own right:

Though it is true that Quebec has unique characteristics (language and culture), but so do all other provinces. In the rest of Canada there exists significant regional and cultural diversity. In reality, it is the specific character of each province which to a great extent explains Canadian federalism.⁹¹

Once again, the federal government is prioritizing the principles of Canadian federalism placing provincial equality above dualism. Further, it diminished dualism and

⁸⁹ Ibid., para. 67.

⁹⁰ Figure extracted from the factum submitted by the ACFO, 1982.

⁹¹ Factum of the Attorney General of Canada, 1982, para. 68.

the role of Quebec as the potential spokesperson for French Canadians by stating that the Quebec legislature is not the only government responsible for the French factor in the federation. The federal government, as pointed out above, also has a role, if not a more important role in promoting not only Canadian dualism, but all the principles which characterize Canadian federalism.

The federal government proceeded to cast doubt upon Quebec's interpretation of Confederation. It argued that the compact of cultures is but one theory of federalism and Confederation.⁹² Quebec's reliance on the Act of Union⁹³ is also misleading as other factors led to the adoption of federalism in Canada.⁹⁴

Furthermore, the federal government diminished Quebec's argument that the BNA Act enshrines duality. In challenging this aspect of the Quebec position, the federal government reduced Canadian federalism to sections 91 and 92. It promoted the idea of equality of the provinces in focusing on the division of powers; however, it continued to assert its primary role in the federation as the federal government is charged with the responsibility, by virtue of its status as the national government, to ensure that all principles of Canadian federalism are equally respected.⁹⁵

In its conclusion, the federal government argued that Canadian federalism is not only concerned with and underpinned by dualism. Rather, the Canadian federation is a

⁹² Ibid., para. 70:

The compact theory of Confederation is a controversial political issue as it has more than one interpretation. The Court in the Patriation Reference recognized such the inconclusiveness of such a theory and stated that history leads to no conclusive end or consistent view.

⁹³ Ibid., para. 72-73:

Pre-Confederation history forms the basis of the AG Quebec argument with concentration on the Act of Union, 1867. The federal government attempts to refute the evidence presented by the AG Quebec: According to the federal government, the period leading up to and including the Act of Union is not relevant in determining if the convention exists in 1982. Further, unlike what Quebec argues, the Act of Union did not lead to a defacto federalism; Confederation changed the face of Canada, both politically (creation of the federal government) and geographically (addition of other provinces).

⁹⁴ Ibid., para. 77-79.

⁹⁵ Ibid., para. 85-87.

complex structure with diversity in areas of language, religion, economics and geography.⁹⁶ The Court in the Patriation Reference rejected the unanimity rule, so Quebec is attempting to re-visit a settled debate. The S.C.C. ought to reject this. The mere reality that ten governments signed onto the new Constitution clearly signals that the political actors did not feel bound by the alleged convention requiring the consent of the Quebec provincial government.

AND THE SUPREME COURT RESPONDS

In this Reference, the Court had seemingly no choice but to reach the decision it did for essentially two reasons. First, politics surrounding the case compelled the Court in this direction. Russell, in reference to the opinion rendered by the Quebec Court of Appeal, argues that “a positive answer [by the Quebec Court of Appeal], would have meant that patriation was being achieved in an unconstitutional manner. The courts, however, have managed to avoid reaching such a politically troublesome conclusion.”⁹⁷ Second, there was an implicit rejection of unanimity in the Patriation Reference. The Court by deciding that a substantial degree of provincial consent is required though did not rule out unanimity explicitly, it did so implicitly. This is inferred by statements made by the majority on the convention issue which indicate that yes, precedents point to unanimity; however, it was and is not clear that unanimity was and is the rule.⁹⁸

The Court, in making sense or giving meaning to its ruling in the Patriation Reference, adopted a very politically pragmatic understanding of the convention it recognized as existing. In a clear rejection of dualism, as understood by the government

⁹⁶ Ibid., para. 90.

⁹⁷ Russell, “Bold Statescraft, Questionable Jurisprudence,” 211.

⁹⁸ Hogg, “Comments on Legislation and Judicial Decisions,” 318.

of Quebec at the time, the S.C.C. rendered a decision that is rooted in a mononational understanding of Canadian federalism; this decision in turn legitimized the vision of Canada held by the provincial premiers (excluding René Lévesque) and most notably by the Prime Minister of the time, Pierre Trudeau.

In promoting such a mononational vision of Canadian federalism, the Court, slowly, but surely, chipped away and minimized the position of the Quebec government. In the end, the decision had the effect of not only silencing Quebec's claims, but also and more importantly, it silenced the debate concerning the principle of dualism in the Constitution in a similar fashion as the political action of the federal government and the nine provinces. This is evident in the Court's deconstruction of the question, its analyses of the new Constitution vis-à-vis Quebec's legislative powers and its demands for explicit evidence.

Deconstructing the question . . .

The S.C.C., from the outset, established its tone for the decision; a tone of dismissal and discredit of Quebec's position. The Court, the Justices pointed out, was asked to address the legitimacy of the process which produced the newly patriated Constitution. In essence then, it tested the constitutionality of the Constitution based on the criteria established by the convention said to exist by the Court in the Patriation Reference. It quickly pointed out that the two questions posed by the Attorney General of Quebec contradicted one another as in one breath the idea of provincial equality was promoted and in another the respect for political and constitutional dualism was endorsed.

While both submissions seek the same answer to the constitutional question, they are alternative ones, as they have to be, for not only are they quite distinct from each other, they actually contradict one another; the rule of unanimity is predicated on the fundamental equality of all the provinces as it would give a power of veto to each of them whereas an exclusive power of veto for Quebec negates the rule of unanimity as well as the principle of fundamental equality.⁹⁹

It is clear here that the Court adopted a formal understanding of equality, one premised on the idea that equality is best ensured by treating all parties concerned as the same. There does not seem to be room for the concept of substantive equality in which equality is ensured through the recognition that certain parties require different treatment in order to secure equality of all.

Nathalie Des Rosiers, presenting a profound argument in *From Quebec Veto to Quebec Secession*, points out that the Court by questioning the logic of the subject matter and the position Quebec introduced, ultimately silenced the Quebec government;¹⁰⁰ and I would add exonerated any responsibility it had in such silencing.¹⁰¹ In other words, it is not the fault of the Court that the convention requiring either unanimity or the explicit consent of the Quebec government does not exist. Rather, Quebec failed to present a coherent and convincing argument, one fraught with misunderstandings of the evidence it used and relied upon.

⁹⁹ *The Quebec Veto Reference*, 392.

¹⁰⁰ Nathalie Des Rosiers, "From Quebec Veto to Quebec Secession: The Evolution of the Supreme Court of Canada on Quebec-Canada Disputes," *Canadian Journal of Law and Jurisprudence*, Vol.XIII, No.2 (July 2000): 171-183.

¹⁰¹ This view is quite akin to the argument presented by Michael Mandel in the *Legalization of Politics*. Through this book, he effectively argues the S.C.C. more often than not, point to the Charter as the main factor in its decision making without acknowledging that it is their interpretation of a Charter right that led to the decision. That is, the Court, hiding behind a veil of objectivity, tends to wash its hands from any responsibility of a decision. For example, it is often claimed that the Charter demands X action. In speaking so non-committal, the Court is able to relieve itself of responsibility. The same is true in this case, in blaming Quebec for not presenting a convincing case and for not understanding the terms or rules of the game properly, it is at fault, not the federal government and not the nine provincial governments and certainly not the Court.

Step one: The effect of the new Constitution

The S.C.C. engaged in no analyses in this first step of constitutional review. It accepted the federal government's qualified admission that the new Constitution does affect the legislative powers of the Quebec government.

This answer is a qualified admission, but an admission nonetheless, that the role and status of Quebec within the Canadian federation are modified by the procedure for amending the Constitution.¹⁰²

Let us recall, however, that the federal government in making such a restricted, if not patronizing admission consequently diminished the effects of the Constitution, specifically the Charter of Rights and Freedoms on the Quebec government. The Court thus concluded that the legislative powers of Quebec are affected by the new Constitution differently than the way in which they were by the resolution reviewed in the previous Reference. Though the Court acknowledged that the two resolutions and the results of the two on Quebec legislative powers differ, it did not feel the need to evaluate the differences.

It is sufficient to note that in spite of these differences and on the whole, the *Constitution Act, 1982*, directly affects federal-provincial relationships to the same relevant extent as the proposed constitutional legislation discussed in the *First Reference*.¹⁰³

As it did in the Patriation Reference, the Court looked at the Resolutions, at face value. It paid little attention to the action of patriating the Constitution with one province dissenting. Instead, it decided it sufficient to look at the impugned Act itself. So the pith and substance of the impugned action and Act in this Reference is identical to that identified in the Patriation Reference despite the differences of both the Act in question

¹⁰² *The Quebec Veto Reference*, 392.

¹⁰³ *Ibid.*, 392.

and the process. The Charter, now entrenched in the newly patriated Constitution, does affect the powers of the province as it restricts its legislative authority and supremacy.

Once the pith and substance was identified as such, the Court proceeded to the next step to review, in this instance, whether or not such affects on the powers of the Quebec provincial government and legislature can be effected without the Quebec government consenting. In other words, does Quebec need to consent to the changes that strain its powers?

Step two: convention or no convention that is the question . . .

The S.C.C. began by setting out the definition and the criteria to be met in determining the existence of a convention. It acknowledged that in the Patriation Reference, a unanimous court adopted a definition of convention first used by the Manitoba Court of Appeal. It once again adopted this same definition.¹⁰⁴ “The main purpose of constitutional conventions is to ensure that the legal framework of the constitution will be operated in accordance with generally accepted principles.”¹⁰⁵

It then proceeded to adopt the words of Sir Ivor Jennings using them, as it did in the previous reference, to determine the existence of a convention.¹⁰⁶ Upon setting this

¹⁰⁴ *Ibid.*, 393:

What is a constitutional convention? There is a fairly lengthy literature on the subject. Although there may be shades of difference among the constitutional lawyers, political scientists, and Judges who have contributed to that literature, the essential features of a convention may be set forth with some degree of confidence. Thus there is general agreement that a convention occupies a position somewhere in between a usage or custom on the one hand and a constitutional law on the other. There is general agreement that if one sought to fix that position with greater precision he would place convention nearer to law than to usage or custom. There is also general agreement that ‘a convention is a rule which is regarded as obligatory by the officials to whom it applies’. Hogg, *Constitutional Law of Canada*, 9. There is, if not general agreement, at least weighty authority, that the sanction for breach of a convention will be political rather than legal” Manitoba Reference [117 D.L.R. (3d)1 at pp. 13-4, 7Man. R. (2d) 269, [1981] 2W.W.R. 193] and quoted at pp. 86-7 D.L.R., p. 883 S.C.R., of the First Reference.

¹⁰⁵ *Ibid.*, 393.

¹⁰⁶ *Ibid.*, 393:

framework, the Court made a point to indicate that this framework is intended to objectively determine the existence of a convention:

In being asked to answer the question whether the convention did or did not exist, we are called upon to say whether or not the objective requirements for establishing a convention had been met. But we are in no way called upon to say whether it was desirable that the convention should or should not exist and no view is expressed on that matter.¹⁰⁷

Revisiting unanimity . . .

Basing its response on the precedent set in the Patriation Reference, a unanimous court rejected Quebec's claim that a convention requiring the unanimous consent of the provinces had developed. The Court began by denying Quebec's argument that the question of unanimity was left open. The Court reiterated two points established and noted in the Patriation Reference: one, the provinces were not unanimous on unanimity, and two, the S.C.C was.¹⁰⁸

The Attorney General of Quebec's reliance upon the Favreau White Paper and emphasizing Favreau's statements and remarks in the White Paper was not compelling enough, according to the Court, to change this conclusion. According to the S.C.C., the Quebec government read such statements out of context; read in context, it becomes obvious that the support for the four principles of constitutional conventions vis-à-vis

"we have to ask ourselves three questions: first, what are the precedents; secondly, did the actors in the precedents believe that they were bound by a rule; and thirdly, is there a reason for the rule? A single precedent with a good reason may be enough to establish the rule. A whole string of precedents without such a reason will be of no avail, unless it is perfectly certain that the persons concerned regarded them as bound by it." Sir Ivor Jennings, *The Law and the Constitution*, 5th ed. (1959), at 136.

¹⁰⁷ *Ibid.*, 393.

¹⁰⁸ To recall, the province of Saskatchewan argued that less than unanimity would suffice. Further, the provinces of Ontario and New Brunswick argued that no such convention requiring the consent of the provinces existed.

amending the Constitution is inconclusive.¹⁰⁹ Focusing on the fourth principle of the White Paper, which the Court understood as “an accurate statement of the rule,”¹¹⁰ the Court stated that it cannot be inferred that unanimity was the accepted rule. If unanimity had been established as a convention, the nature and degree of provincial participation in the amending process would have been fully defined.¹¹¹ The S.C.C. thus reaffirmed its findings in the Patriation Reference that no convention requiring the unanimity of the provinces can be said to have existed or to exist.¹¹²

On to Dualism . . .

The Court reviewed the government of Quebec’s understanding of the dualism principle, but it did not feel compelled to analyze the term any further; this because the idea of requiring specifically the consent of the Quebec provincial government to a constitutional amendment was absent.

It will not be necessary in our view to look further into these matters because this submission must in any event be rejected, the appellant having failed completely to demonstrate compliance with the most important requirement for establishing a convention, that is, acceptance or recognition by the actors in the precedents.¹¹³ But neither in his factum nor in oral argument did counsel for the appellant quote a single statement made by any representative of the federal authorities recognizing either explicitly or by necessary implication that Quebec had a conventional power of veto over certain types of constitutional amendments.¹¹⁴

It then proceeded to emphasize the importance of not just recognition, but explicit and unmistakable recognition of the alleged convention.

¹⁰⁹ Ibid., 399.

¹¹⁰ Ibid., 400.

¹¹¹ Ibid., 400.

¹¹² Ibid., 400.

¹¹³ Ibid., 402.

¹¹⁴ Ibid., 402.

We have not been referred to and were not aware of any statement by the actors in any of the other provinces acknowledging such a convention.¹¹⁵

The Court further reinforced this non-existence by relying upon the positions of the provinces endorsing the unanimity principle in the Patriation Reference. A victim itself of oversimplifying arguments,¹¹⁶ the Court quickly concluded that favour and/or support for unanimity automatically negates a special veto power for the province of Quebec.

Three of them [provinces], Manitoba, Prince Edward Island and Alberta, explicitly pleaded in favour of the unanimity rule in their factums, a position compatible only with the principle of equality among the provinces and incompatible with a special power of veto for Quebec.¹¹⁷

REVISITING THE COURT'S OPINION

The central reason for the rejection of Quebec's two submissions rests on Quebec's inability to explicitly and positively demonstrate that the political actors complied with the conventions Quebec alleged to exist. This begs for further analysis as an unreasonable burden, as Des Rosiers argues, seems to have been placed on the Quebec government. The Court clearly stated the importance of recognition; "recognition by the actors in the precedents is not only an essential element of conventions. In our opinion, it is *the most important element* since it is the normative."¹¹⁸ Acceptance cannot be tacit, but explicit and articulate. According to Marc Gold in *The Mask of Objectivity: Politics and Rhetoric in the Supreme Court of Canada*, the Court may have been mistaken in

¹¹⁵ Ibid., 403.

¹¹⁶ The Court, on more than one occasion argued that Quebec, in presenting its position, often either oversimplified the points it relied upon or read facts, statements etc, out of context so as to fit into its argument.

¹¹⁷ *The Quebec Veto Reference*, 403.

¹¹⁸ Ibid., 404 (my emphasis).

demanding such a requirement. The test used, he argued, was not an objective one as reliance upon such a requirement easily enabled the Court to reject Quebec's claims.¹¹⁹

It is interesting that the Court would demand such explicit recognition for either the unanimity principle, in both this and the previous reference, or a historical veto for the government of Quebec. In the Patriation Reference the majority on the convention issue inferred acceptance of the existence of a convention through the tacit recognition by the political players evident in both the positive and negative precedents it analysed as well as in the acceptance of the Favreau White Paper. Also, and more telling of the inconsistency of its reasoning between the two References is the fact that the Court, in finding that a convention requiring a substantial degree of provincial consent existed based such findings on essentially, nothing. There did not seem to be explicit acceptance of this convention. No empirical evidence of explicit acceptance by the political actors was used by the Court when it found that a convention requiring *a substantial degree of provincial consent* existed. Gold's argument thus proves to be quite profound.

As Des Rosiers argues, "the Court emphatically impose[d] the burden on Quebec and then state[d] that it did not meet the burden, even if meeting such a burden [was] impossible or outside its control."¹²⁰ In setting such an unreachable criterion, one that was not used in the Patriation Reference, the Court set the stage for minimizing the position of Quebec and in turn blaming the lawyers arguing on behalf of the province for the position it presented. And it did so, as reviewed above, in the rhetoric it adopted. That is, by claiming that the Attorney General oversimplified arguments or read comments, phrases et cetera, out of context, he was to blame for the weak arguments and

¹¹⁹ Marc Gold, "The Rhetoric of Constitutional Argumentation," 471.

¹²⁰ Des Rosiers, "From Quebec Veto to Quebec Secession: The Evolution of the Supreme Court of Canada on Quebec-Canada Disputes," 178.

inconsistent arguments presented to the Court; this led to Quebec's loss in the Reference. In doing so, the Court was able to exonerate itself from playing a political role and in turn, it ensured both its legitimacy and its neutrality.

Prior to this final push leading to the Patriation Reference and even to a certain extent, during the last day of negotiations, a tacit appreciation of Quebec's position in the federation seemed to exist. This is evident most obviously in the Fulton Favreau Formula and the Victoria Charter whereby both resolutions proposed for the patriation of the Constitution ended when Quebec government decided not to endorse the packages. In this instance, though the package was presented to Lévesque as a *fait accompli* there was an attempt by the other provinces and the federal government to acquire the consent of Lévesque and his government through last minor changes to the agreed upon package. This opinion rendered by the S.C.C. however, closed the door on Quebec and the question of its position, special or not, in the federation. As a province populated by a majority of French Canadians, distinct by way of law (seen through its civil law tradition and other guarantees in the BNA Act) and distinct by way of language and culture, it did not hold a place in the federation (with regard to the amending formula) other than as a province like the others. More telling and destructive of the decision, is the new reality that its consent is not even needed, regardless of whether or how its powers might be affected.

We are left then with a simple question, why would the Court demand such a level of proof in this reference and not in the previous one? The answer may rest solely in the timing of the case. Almost immediately in the opinion it rendered, the Court acknowledged the reality of the new Constitution already proclaimed and already in

effect and in turn the politics surrounding this particular Reference.¹²¹ The Court, however, in rendering the opinion, did save itself from declaring the Constitution unconstitutional and from questioning a majority support for a newly patriated Constitution.

This was coupled with the enthusiasm of the public. As indicated earlier in the chapter, a majority of Canadians were quite content and relieved that the Constitution was finally patriated. This enthusiasm was coupled with the lack of interest in this particular case. Notable in the reporting of this decision was the lack of analysis engaged in by the print media. Upon the release of the Patriation Reference opinion, if we recall, pages and pages of reports and analysis were dedicated to the decision, advertising the decision day, asserting it as an important decision. The Quebec Veto Reference received very little attention compared to the Patriation Reference and, as we will see, the Secession Reference. The Toronto Star for instance, reported the Court's opinion on page 8 of its edition and did so through reactions expressed by Trudeau on the decision. The same is true of the Globe and Mail; however, the small space dedicated to the case did appear on the front page. The editorial dedicated to the decision, however, merely provided a summary of the story and not an analysis of the opinion.

Le Devoir, not surprisingly, paid a little more attention to the decision than did the English media. The front page of the December 7th edition of the newspaper read "La Cour supreme tranche: le Quebec n'a pas de droit de veto." Jean-Louis Roy ended his editorial with a cautionary note that the debate, though silenced temporarily by the Court, remains and must remain alive:

¹²¹ *The Quebec Veto Reference*, 390.

Le Québec est dramatiquement affaibli. La conception du Canada imposé ces deux dernières années et renforcée par le jugement de la Cour suprême qui n'est pas chargée de statuer sur les règles de convenance ou sur les lignes de conduite opportune sur le plan politique mais bien de définir les règles constitutionnelles, appelle un redressement. Ceux qui croient que la question est enfin réglée se trompent. Elle est en un sens encore plus pressante pour la qualité de l'avenir du Québec et son exigence de justice.¹²²

Considering the politics

To excuse the actions of the Court based on the timing of the Reference and the enthusiasm of the public would be, however, to undervalue the politics of the day, specifically the politics of the two major players at the time, Pierre Trudeau and René Lévesque and the ultimate effect of this opinion. Each had a particular and seemingly conflicting vision of Canada and Quebec's position in the federation. Trudeau promoted a pan-Canadian identity which entailed a strong central government all can identify with as it is the government of Canada. He promised to generate equality of the individual and in turn strengthen the Canadian identity by enabling the galvanization of such ideals through a Charter of Rights and Freedoms, a domestic amending formula, a strong central government with which the individual can identify equality of Canada's provinces, official bilingualism and multiculturalism. The goal is to have all Canadians align their political allegiance and identity to the Canadian nation and to the government which represents the nation.

Contrast this with the vision held by René Lévesque who stressed and urged for the proper role of both orders of government. In other words, Lévesque as well as previous Quebec Premiers insisted upon the strict adherence of the division of powers. This was coupled with the idea that Quebec represented a unique nation because it was

¹²² Jean-Louis Roy, "L'exigence de justice," *Le Devoir*, [Montréal], 7 December 1982, 12.

the home of French Canada. As a consequence, the Quebec government ought to be party to all constitutional changes. "Canada after all was based on a compact, indeed a double compact of which Quebec was a senior party."¹²³ Lévesque's vision thus threatened to destroy this Canada. Rather, he promoted the idea of two nations, equal to each other. This, it seemed, would place the Quebec government above the other provinces vis-à-vis constitutional importance and in turn the Quebec habitant above that of another province. Special status, it was perceived would threaten the equality and just society Trudeau promised. In the end, it was Trudeau's vision which won the battle.

The Court's decision in the Quebec Veto Reference was not so much an endorsement of a mononational understanding of Canadian federalism as it was an outright rejection of the dualism principle and subsequently a binational understanding of federalism in Canada. By not recognizing the role Quebec played in past attempts at patriating the Constitution, the Court in fact rejected the historical role of Quebec and its current place vis-à-vis French Canadians in the Canadian federation. It did so by ignoring the reality that a majority of Canada's French speaking Canadians resides in Quebec; as well as the role the Quebec government plays with regard to promoting and securing this cultural reality. It also did so by dismissing the role of the Quebec government in Northern Quebec Aboriginal affairs and relationship. In the end, the Court ensured that the political legitimacy, and not necessarily the constitutional legitimacy, of the new Constitution was secured.

Lajoie argues that the Court in rendering its decisions must be careful not to offend society's dominant values or risk having its decision and its legitimacy

¹²³ McRoberts, *Misconceiving Canada: The Struggle for National Unity*, 138.

questioned.¹²⁴ The Court in this case chose the safer route; it ensured its role in the federation by opting not only to endorse the status quo of the nation, dearly held by Trudeau and political society at the time, but it also ensured that the status quo endured by recognizing and affirming that it is constitutionally valid. In the end, the Court secured the constitutionality of the new Constitution. But more importantly, it secured, as it does in the Secession Reference, its role as the legitimate guardian of the Constitution.

In addition to this, the Court ensured that its decision was in fact neutral. The Court was not biased: the decision reached by the Court emerged not from preconceived views of the nation state held by either the federal government or by the Court. Rather, this opinion was projected as a correct decision emerging from the evidence, or lack thereof, presented by the Quebec government. In essence, it rooted its response in the idea that dualism and the principle of it appealed by the Quebec government was a political fabrication of the Quebec government and not a political reality located in either the BNA Act or past and present political federal reality.

CONCLUSION

Quebec and the provinces were much more successful in the previous two references because the status quo, the idea of Canada as one nation, was not challenged. In fact, it remained intact and was able to accommodate the arguments of provincial autonomy and exclusive jurisdiction quite successfully within this mononational discourse. Dualism and Quebec's potential status as a national minority forming a nation, as we saw in this reference and in the patriation process as well as in the final

¹²⁴ Lajoie, *Jugements de valeurs: le discours judiciaire et le droit*.

product, does not easily fit into the parameters of the discourse and in fact challenges the very premise of this discourse and the ideology that informs it. In the end, Canada continued to be conceptualized, politically, federally and constitutionally, as a one nation state. Dualism was rejected and in fact potentially more detrimental, perceived as imaginary or as a simple misinterpretation of the political reality of past and present. The status quo remained intact and was not threatened. This vision and perceived stability associated with it, however, would not remain unchallenged. Quebec governments refused to sit idly by as they continuously asserted in the period following the patriation of the Constitution their role as the national government of the Quebec nation.¹²⁵

The struggle over the Canadian identity and how to conceptualize the nation state was temporarily taken out of the political world and thrown into the judicial one in this reference; the S.C.C. was asked once again to define the Canadian nation and in turn Canadian federalism. However, it did not remain out of the political realm for long and it certainly did not end with the Quebec Veto Reference. The struggle over how the Canadian nation is to be perceived remained and culminated to form the basis of the issue central in the Quebec Secession Reference.

¹²⁵ Other cases, it should be noted, also saw the challenging of the nation state. Most notable are the Ford and Devine [(1988), 54, D.L.R. (4th) 577] cases and the Quebec Protestant School Boards [(1984), 10 D.L.R. (4th) 321] in which provisions of Bill 101 were challenged based on the freedom of expression in the Quebec and Canadian Charter of Rights and minority education rights of s23 of the Canadian Charter respectfully. In both cases, the Quebec government argued that as the government of a province where a majority of French Canadians reside, it has the duty to protect the French language and culture. Both cases were decided against Quebec and the nation state remained unharmed.

CHAPTER 6: THE SECESSION REFERENCE: THE CONSTITUTION, THE UBIQUITOUS TRUMP CARD

INTRODUCTION

The previous two chapters intimate that the patriation of the Constitution in 1982 was, unsurprisingly, bitter sweet. One of Canada's original provinces remained, and remains today, the only province not to add her signature to the Constitution Act, 1982. The Quebec Veto Reference was supposed to clarify the issue of Quebec's place in Canada – was it, or is it, a province unlike the others in so far as her consent to the new Constitution was and is required to render the package politically legitimate? Despite the Court's attempts to silence this debate and affirm Quebec's *proper constitutional role* as a province like the others, the issue was far from dormant.

On October 30th, 1995,¹ the true implications of November 15, 1976,² became all too real and tangible for Canadians in and outside of Quebec; the nation nearly came undone. This 'frightening reality', for those Canadians not wishing to witness the 'break-up of the nation,' led directly to the Supreme Court of Canada being pushed into the role of philosopher king and political mediator once again; the federal government wanted it and *needed it* to 'clarify the issues' regarding the legality of a Quebec secession.

Gerard Bergeron in "Quebec in Isolation" states

everything really started with the psycho-political shock of the Quebec election on November 15, 1976. The political situation was unprecedented not only in Canada, but probably in the world: a secessionist party came to power in a federal state strictly on the condition of not seceding from it! However, under the terms of a sort of

¹ The day of the referendum on Quebec secession

² The election of the Parti Quebecois in Quebec

electoral pact, the Parti Québécois promised to hold a referendum on its constitutional option.³

And twice, it did! The first referendum on sovereignty association took place on May 20, 1980, where the sovereigntist camp lost by a 60-40 margin. This loss, however, ended neither the move nor the desire for an independent and/or more autonomous Quebec. On October 30, 1995, the Quebec government, under the leadership of Jacques Parizeau and with the Bloc Québécois (BQ), held the second referendum.⁴ In an extraordinary unfolding of events, the “Yes” camp came very close to being victorious; 50.58% voted against the resolution and 49.42% voted in favour of it. This result forced Canadians to stand up and recognize the growing strength of the Quebec separatist movement. More than ever, in Canadian history, the separation of Quebec became a very real possibility. The federal government felt compelled, like never before, to go on the offence.

Prior to this latest referendum, McRoberts points out, there was a growing sentiment amongst Canadians outside of Quebec that “a democratically expressed desire of Quebecers to secede should be recognized and good faith negotiations should be undertaken to produce an agreement over the terms of Quebec’s departure.”⁵ Canadians were able to express such sympathy and acceptance of Quebec’s demands in the abstract as these sentiments were rooted in the belief that the very event of Quebec independence would never come into fruition. The outcome of the 1995 referendum, however,

³ Gerard Bergeron, “Quebec in Isolation,” in *And No One Cheered: Federalism, Democracy & the Constitution Act*, ed., Keith Banting and Richard Simeon (Toronto: Metheun Publications, 1983) 59.

⁴ McRoberts, *Misconceiving Canada: The Struggle for National Unity* 226:

The people of Quebec were asked:

Do you agree that Quebec should become sovereign, after having made a formal offer to Canada for a new Economic and Political Partnership, within the scope of the Bill respecting the Future of Quebec and of the agreement signed on 12 June 1995?

⁵ Kenneth McRoberts, “In the best Canadian Tradition,” *Canada Watch*, 7, 1-2 (January/February 1999): <http://www.yorku.ca/robarts/projects/canada-watch/> [July 20, 2004].

dramatically changed this tacit acceptance; the possibility of Quebec separation became too close for comfort. According to McRoberts, Canadians, both inside and outside Quebec, began to question whether or not such actions could be sanctioned by law.⁶ This inevitably redirected the debate and discourse of Quebec independence; both were reduced to the rule of law versus the right to decide one's future. The Canadian federal government began to argue that the province of Quebec could not, by constitutional law, effect the secession of Quebec unilaterally. The government of Quebec, on the other hand, continued to argue that it is the democratic will of the people of Quebec that will decide the future of Quebec and its place and role in the Canadian federation.

In the last chapter we saw that the Court was presented with two visions of Canada: Pierre Trudeau's, now constitutionalized in the Constitution Act, 1982, and René Lévesque's, still thriving in Quebec. This time around, these two major players, though not involved in body, were definitely present in spirit through their respective visions of Canada and the relationship between Canada and Quebec. Pan-Canadianism continued to present an obstacle to the aspirations of the nationalists in Quebec. This was particularly evident when the ideal of one nation, embodied in pan-Canadianism championing territorial and political unity, was confronted with the ideal of bi-nationalism, embodied in the concept of partnership between Canada and Quebec. Premised on the notion that Quebec formed a nation with the Quebec government as its representative, the National Assembly, now under the PQ's Lucien Bouchard⁷ and the BQ, under the leadership of Gilles Duceppe, held that Quebec has a right to self determination leading to the right to secede from Canada.

⁶ Ibid.

⁷ Lucien Bouchard took over the leadership of the PQ from Jacques Parizeau soon after the 1995 Referendum. Prior to that he was the leader of the Bloc; once he left, he was replaced by Gilles Duceppe.

The result of these contrasting visions and conceptualizations of nationhood, provincial authority, autonomy and powers, culminated in the federal government's legal initiative; the Supreme Court was charged with the responsibility of settling the matter, in the Secession Reference. So once again, the Supreme Court of Canada, faced with different visions of Canada, was asked to define the parameters of Canadian federalism and Canadian constitutionalism to determine the rights and role of both orders of government in the federation. And once again, the S.C.C., in giving meaning to the Constitution, reaffirmed Canada as a mononation, with the federal government as its spokesperson, while effectively portraying the neutrality of the Constitution and the legitimacy of the Court as a participant in Canada's constitutional internal strife.

In this chapter then, I look at the Court's opinion in the Secession Reference. I open with a discussion of the social and political context beginning with Brian Mulroney's attempt to bring Quebec back into the constitutional family and ending with the reasons, articulated by the federal government, for taking the Reference. In the second section, I review the arguments presented to the Court by the federal government et al. and then by the Amicus Curiae, Joli-Coeur⁸ et. al.

The Attorney General of the federal government and Joli-Coeur presented completely different positions leading to opposite responses; this is not surprising. What is surprising, however, is that despite holding conflicting views on the issue of self-determination leading to the right to unilaterally effect secession, both presented their arguments within a narrow framework in which the parameters are determined by limiting and confining conceptualizations of both constitutionalism and federalism.

⁸ The Quebec, citing the political nature of the issue and legitimacy of the Court in deciding upon such a political matter, decided not to participate in the Reference. As a result, the Court appointed Andre Joli-Coeur, as the Amicus Curiae, to present the argument on behalf of the government of Quebec.

The S.C.C. was able to break free from these narrow parameters of the legal positivism relied upon by both sides to return with an opinion which endorsed tenets of both sets of positions. In the final section then, the Court's decision will be assessed in relation to the S.C.C.'s understanding of Canadian federalism. With respect to dealing with Canada's federal character, the Court returned with a seemingly 'balanced decision'; both sides were able to claim victory, be it an illusory victory or not. The S.C.C. looked within the Constitution, extracted four principles: federalism, democracy, constitutionalism and the rule of law and protection of the minority, and based its response within such a discourse and framework. Arguably, it provided a broader understanding of both federalism and constitutionalism in Canada than those offered by either the federal government or Joli-Coeur. However, as we will see, such expansion was in fact misleading. The Court ultimately resorted to an understanding of Canadian federalism which in the end legitimized both the expression of diversity and, the suppression of this diversity.

APPEASING QUEBEC

Beginning in the post-patriation period and crystallizing in the post 1995 period, the federal government, formed by the Mulroney Progressive Conservatives (from 1984 to 1993) and the Chrétien Liberals (from 1993 to 1998), adopted what is now commonly referred to as Plan A and Plan B⁹ to deal with the 'strife' of Quebecers. Under Plan A, the federal government was and is essentially occupied with the idea of accommodating

⁹ It should be noted that terming these plans as A and B was done so by academia and not necessarily by the federal government; in fact, Ottawa has always denied the existence of Plans A and B.

the demands of Quebec within the federation by renewing Canadian federalism.¹⁰ It was and is concerned with the reconciliation of “competing nationalisms of Quebec, Aboriginal Peoples, and Canadian federalists across the country within a single nation state.”¹¹ Products emerging from this Plan A strategy include, the Meech Lake Accord¹² with the Langevin Accord¹³, the Charlottetown Accord¹⁴, neither of which were ratified;

¹⁰ Daniel Drache and Patrick Monahan, “In search for Plan A,” *Canada Watch*, 7, 1-2 (January/February 1999): <http://www.yorku.ca/robarts/projects/canada-watch/> [July 20, 2004]; Claude Ryan, “Consequences of the Quebec Secession Reference: The Clarity Bill and Beyond,” *CD Howe Institute*, Commentary, no 139, April 2000. <http://www.cdhowe.org/pdf/ryan.pdf> (June 19, 2001); Robert Jackson, and Doreen Jackson, *Canadian Government in Transition*, 3rd ed., (Prentice Hall, Toronto, 2002), pp 114-115.

¹¹ Drache and Monahan, 1999, op. cit., p. 4.

¹² Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?* 2nd ed., 136-137: On June 2nd, 1987, the constitutional negotiations which began in May of 1985 between the eleven First Ministers produced an agreement known as the Meech Lake Accord. It was fully supported by all ten provincial premiers, the federal government as well as the Official Opposition in Parliament. Based predominately on the five conditions set by Bourassa: [(1) constitutional recognition of Quebec as a distinct society; (2) a critical role in the recruitment and the selection of immigrants; (3) a role in Supreme Court appointments; (4) limitations of the spending power; (5) a constitutional veto]

The Meech Lake Agreement included:

- (1) a constitutional recognition of Quebec as a distinct society;
- (2) a constitutional guarantee that three Justices of the Supreme Court of Canada would be from Quebec – these three would be selected from a list submitted by the National Assembly; the other provinces would also have a role in the appointment of Justices of the S.C.C. as they too would submit lists of candidates to the federal government;
- (3) Senators to be chosen from a list submitted by the provincial governments;
- (4) a constitutional veto for all the provinces in the form of the list of amendments requiring unanimity was to be expanded
- (5) all the provinces were guaranteed the constitutional ability to opt out of shared cost programs in exclusive provincial jurisdiction with compensation;
- (6) a greater role for provinces in immigration

On June 23, 1990 with Manitoba and NFLD failing to ratify the document, Meech Lake was dead.

¹³ *Ibid.*, 149

The governments of Manitoba, New Brunswick and Newfoundland were replaced; the new governments were not as enthusiastic of the Accord as were their predecessors.

In order to appease the dissident provinces of Manitoba, New Brunswick and Newfoundland, a companion agreement was attached to the Meech Lake Accord, ensuring:

- (1) a restriction on the understanding and reach of the distinct society clause; essentially, it would not grant the province of Quebec any new powers;
- (2) a sunset clause was to be attached to Senate reform; include was ‘a commitment to drop a Quebec veto over restructuring the Senate if Senate reform as not unanimously agreed to within three years’;
- (3) the inclusion of Aboriginal Peoples and the multicultural dimension in the Canada clause.

Bourassa’s Liberals indicated that the changes were unacceptable. The Mulroney government however, proceeded to endorse the accompanying accord. Such action led Lucien Bouchard to quit the Progressive Conservatives and form the Bloc Quebecois.

¹⁴ *Ibid.*, 154-170

the Calgary Declaration;¹⁵ and other similar initiatives including, the sponsorship program.¹⁶ Such initiatives, however, proved to be insufficient in accommodating competing nationalisms and Quebec's demands. In fact, they backfired; Quebec nationalism continued to thrive. The results of the 1995 referendum on Quebec independence is a testament of such flourishing.

With the near break-up of the country in 1995, the federal government felt it necessary to accompany this strategy of accommodation with a new one; Plan B, dubbed 'tough love'. This new strategy, a complete shift of direction from Plan A, is comprised of efforts and tactics engaged in by the federal government to thwart the secessionist movement in Quebec. One key element of this Plan B is its legal dimension; the federal

On September 24th, 1991, the second attempt to bring Quebec back into the constitutional family and to appease the provinces, interest groups and the Aboriginal Peoples was released to the Canadian public. This later formed the basis of the Charlottetown Accord. Many events led to this agreement; most notable, the adoption of Bill 150 by the National Assembly which obliged the Quebec government to hold a referendum on Quebec sovereignty by October 26, 1992; and the July 7 Accord between the provinces (excluding Quebec), the Aboriginal groups and the federal government.

The Charlottetown Accord can be understood to fall under eight sections:

- (1) the Canada clause, stating 'who we are as a people;
- (2) distinct society clause to be inserted in the Charter and be used as an interpretive clause by the S.C.C.;
- (3) Charter changes to include property rights;
- (4) Aboriginal self-government scope of which to be defined through agreements between Aboriginal groups and the federal government;
- (5) Senate reform mirroring Triple E proposals and including Aboriginal representation;
- (6) changes to the appointment process of Justices to the S.C.C., ensuring a role for the provincial governments; seven, a three part economic union, and eight, changes to the division of powers ensuring a more decentralized federation.¹⁴

McRoberts, *Misconceiving Canada: The Struggle for National Unity*, 216:

On October 26th, 1992, a national referendum on the Charlottetown Accord was held. Simply put, the Canadian people rejected this new constitutional package. In Quebec, 56.7% of eligible voters voted no and 43.3% voted yes; in the rest of Canada, 54.3% rejected the Accord and 45.7 endorsed it.

¹⁵ David Schneiderman, "Introduction" in *The Quebec Decision: Perspectives on the Supreme Court Ruling on Secession*, ed., David Schneiderman (Toronto: James Lorimer & Co., Ltd., 1999) 5:

The goal of this document was to accommodate Quebec's desire to be recognized as a distinct society. When the Calgary Declaration was unveiled in 1997, Quebec was recognized, to its dismay, as having a *unique character*; this was balanced with the principle of equality of the provinces.

See also François Rocher et. al., "Recognition claims, partisan politics, and institutional constraints: Belgium, Spain and Canada in a comparative perspective", in *Multinational Democracies*, eds. Alain Gagnon and James Tully (New York: Cambridge University Press, 2001) 176-200.

¹⁶ Such program involved the promotion of Canada and of the benefits of being Canadian in Quebec.

government is essentially concerned with questioning whether or not the Quebec government has the constitutional power to effect the secession of Quebec unilaterally. The focus of Plan B was to convince the soft nationalist that secession is in fact illegal. The ultimate goal was to divide the Quebec electorate, appealing to the rule of law, to the benefit of the federal government. In realizing this goal, the federal government first intervened in the Bertrand case, and later, referred three questions to the S.C.C. regarding the legitimacy of the proposed plan of the Quebec government –the legal ability of the Quebec government to effect the secession of Quebec unilaterally.

THE LEGAL BATTLE . . . THE BEGINNINGS

Upon the re-election of the PQ in 1994, the government began to claim that Quebec had a positive right to self-determination; the people of Quebec alone could decide their future, including independence. This assertion seemed troublesome to the federal government and other concerned Canadians, both in and outside of Quebec, including Guy Bertrand, a private citizen, once an active member of the sovereigntist movement, living in Quebec.

The Bertrand Case

On August 10, 1995, Bertrand challenged the constitutionality of the Draft Bill,¹⁷ tabled on December 6th, 1994 by the Parizeau government.¹⁸ This was later accompanied

¹⁷ Government of Canada. Department of Justice. "Factum of the Attorney General of Canada" in the matter of *Section 53 of the Supreme Court Act, R.S.C. 1985, Ch 5-26 and in the matter of a Reference by the Governor in Council concerning certain questions relating to the secession of Quebec from Canada [Indexed as: Reference re: Secession of Quebec], [1998]*, (Supreme Court, Ottawa, Canada, February 27, 1997). (Factum of the Attorney General of Canada, 1997), para. 18:

by a challenge launched on October 23, 1995, by Singh and the members of the “Special Committee on Canadian unity.” In response to these two challenges, the Attorney General of Quebec filed motions to dismiss the cases, arguing that the issue was of a purely political and not of a legal nature.

On May 10th, 1996, the Attorney General of Canada decided that it would appear on Bertrand’s behalf in the case to dismiss his motion. On August 30th, 1996, Mr. Justice Pidgeon rendered his ruling; Quebec’s motions to dismiss the cases were rejected. In his decision Justice Pidgeon outlined the pressing matters which should be considered vis-à-vis UDI. It was this which formed the basis of the three questions eventually referred to the S.C.C. by the federal government.

Reasons why the Reference was taken

Formally citing ambiguity enveloping the issue, the federal government argued that clarity was required. Thus the S.C.C. was recruited to provide this “much needed clarity” on whether the Quebec government and legislature has the constitutional ability to unilaterally declare independence.¹⁹ Though it projected a seemingly neutral position,

The Draft Bill: An Act respecting the future of Quebec (later tabled as bill 1) outlined the political course to be taken by the National Assembly; it included ‘the authority of the National Assembly to declare sovereignty unilaterally’.

¹⁸ Bertrand also filed a motion questioning the legality of Quebec holding a referendum. In effect, he wanted the court to put an injunction preventing the upcoming referendum. On August 25, in response to Bertrand’s motion, the AG Quebec filed his own motion to dismiss the request for an injunction. Arguing that the issue of a referendum was purely political, he advanced that it was non-justiciable. On August 31st, 1995, Justice Lesage of the Supreme Court of Quebec dismissed the motion of the AG Quebec arguing that the serious nature of the matter renders it justiciable¹⁸. In response to this, the Quebec government, withdrew from the Bertrand case.

On September 8th, 1995, Justice Lesage ruled that Bill 1, without following the amendment procedure outlined in the Constitution, would affect Bertrand’s rights and freedoms guaranteed in the Charter. The judge however, did not grant the injunction to prevent the referendum from taking place.

¹⁹ According to the federal government it was not clear whether or not the Constitution enabled the secession of a province. Further, it was unclear what would occur in the aftermath of a successful referendum result. That is, if the yes side was victorious, how would the debt be split? How will the

it remains unambiguous that the federal government did in fact have a political agenda. It is arguable that the Chrétien government sought the advice of the S.C.C. to curb the negative attention it received after the ‘near break-up’ of the country – it wanted to show that it was in fact attempting to deal with the nationalist and/or secessionist agenda. The Reference was part of the federal government’s Plan B intended to counteract both the Quebec government’s threat and the appearance of the federal ineptitude in the face of that threat.²⁰ However, the political agenda of the Chrétien Liberals goes beyond simply showing Canadians that they were ‘doing something’.

Aside from the legal clarification sought by the federal government which was and remains doubtful, Schneiderman points to another political motivation underpinning the undertaking of the Secession Reference: if the decision favoured the position of the federal government, (which they probably assumed would be the result considering how the questions were formed)²¹, it could be used as a political bargaining tool if another referendum were to be held; the federal government could point to the S.C.C. decision and argue that secession *is* illegal and unconstitutional. This in turn may serve to win the support of the soft nationalist and possibly make nationalists think twice before voting yes for a sovereign Quebec.²² The Supreme Court decision had the potential of arming the federal government with the affirmation it needed to thwart the secessionist agenda, strengthen its role both within Quebec and within Canada outside Quebec, and reaffirm

boundaries be divided? Will the other provinces and the federal government negotiate with Quebec? Essentially, it was these issues raised by the federal government during the secession referendum campaign in order to create an environment of ambiguity, confusion and fear.

²⁰ Schneiderman, “Introduction,” 1.

²¹ Ibid:

Schneiderman argues that the questions were formed in such a way that only certain answers would emerge. The federal government, however, did not necessarily receive the answers it was looking for.

²² Ibid., 4.

Canada's status as a mononation; this is especially so, if the S.C.C. found Quebec to be subordinate to the Constitution and the vision of Canada it embodied.

At the same time, Schneiderman points out that the Reference did not come without political risks. First, the federal government, by inquiring into the ability of the province to secede, is indirectly questioning its ability to hold a referendum on the matter; thereby interfering directly in Quebec provincial matters. Second, the federal government is resorting to an institution whose legitimacy is questionable in Quebec as it is viewed as a centralist body.²³ In fact, the Quebec government decided not to participate in the Reference citing the authority of the S.C.C. as one of the reasons.

The federal government, however, remained firm in its reasons for seeking a Supreme Court opinion. A statement released by then Justice Minister Anne McLellan after the S.C.C. rendered its opinion reiterated the need for clarity:

The Government of Canada submitted the Reference to the Supreme Court of Canada as a result of the position taken by the Government of Quebec, which asserted that international law gives the Quebec Government the right to take Quebec out of Canada unilaterally; to effect secession without regard to the Canadian legal order. It claimed that under international law it could remove from Quebecers their right to participate in the advantages of being Canadians as well. The Government of Canada believes it had a duty, on behalf of all Canadians, to obtain clarity on these fundamental legal issues.²⁴

And so, such an endeavour was assumed.

On September 30th, 1996, then Justice Minister and Attorney General of Canada, Allan Rock, formally submitted the following three questions to the S.C.C.:

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

²³ Ibid., 5.

²⁴ Anne McLellan, *Statement by the Minister of Justice and Attorney General of Canada, the Honourable Anne McLellan in Response to the Ruling of the Supreme Court*, <http://canada.justice.gc.ca/en/news/nr/1998/mclelle.htm>, [June 22, 2003].

2. Does international law give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec 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?²⁵

MEDIA REACTS

The debate which took place in the print media and amongst political leaders reported in the news was reduced to whether or not clarity over the issues was required; should the federal government pursue such a venture? Stemming from this, whether the federal government ought to seek out the S.C.C. in providing such clarity; is it the legitimate institution to decide a predominant political matter?

An editorial published in the *Toronto Star* was quick to not only fully support the federal government in this initiative, but went so far as to rely upon the discourse engaged in by the federal government to argue that the Reference is mandatory:

it is the right thing to do; the issues need clarity. [Further] if a vote to separate is to have any legitimacy, both domestically and internationally, it must be on a clear question with some agreed-upon level of support. [...] This is not to deny Quebec's right to self-determination but to state that, if it happens it must be according to a set of rules.²⁶

Preston Manning, then leader of the Reform Party, also supported the federal government. The Reform Party was actually active in urging the federal government to

²⁵ *The Secession Reference*, para. 2.

²⁶ Editorial, "Right Move on Quebec," *The Toronto Star*, [Toronto], 27 September 1996, A26.

take legal action. So, it is not surprising that Manning insisted that “The federal government has got to make clear what the consequences [of secession] are.”²⁷

Such support, however, was by no means the consensus. In fact, political and media pundits alike were quick to question the motives of the federal government and the purposes of the initiative. Jeffrey Simpson of the *Globe and Mail* contended:

A favourable ruling has less to do with blocking Quebec secession than giving Canada leverage over Quebec in any eventual negotiation.²⁸

Gordon Gibson, also from the *Globe and Mail*, claimed that the reference is in fact irrelevant:

[referring to the improbability of Quebec bowing down to a supreme court ruling which favours the position of the federal government], far more likely, it is a mistake of serious proportions, another unity misstep in the service of the impending Liberal campaign.²⁹

Not surprisingly, the political actors in and of Quebec denounced this action of the federal government claiming it to be simply a political move. Jean Charest, then leader of the federal Progressive Conservatives, charged Chrétien with politicizing the court. “[He] is using the Supreme Court of Canada for his own short term political gain”. Charest further argued that the S.C.C. will not resolve anything; yet it generates the false sense of security [to Canada outside of Quebec] that everything is under control.³⁰

Similar sentiments were echoed by Daniel Johnson, then leader of the Quebec Liberals adding that the federal government has no business in the phrasing of a Quebec referendum question; “it sends a message from coast to coast, that the federal government

²⁷ Elizabeth Thompson and Terrance Wills, “Quebec scoffs at court test. No judge can stop secession, ministers say”, *The Montreal Gazette*, [Montreal], 26 September 1996, A1.

²⁸ Jeffrey Simpson, “Ottawa hopes for bargaining power with Quebec in court appeal,” *The Globe and Mail*, [Toronto], 1 October 1996, A14.

²⁹ Gordon Gibson, “The Supreme Court reference is irrelevant at best,” *The Globe and Mail*, [Toronto], 1 October 1996, A15.

³⁰ Robert McKenzie, “P.M. ‘politicizing court’: Charest Tory leader blasts bid fro ruling on Quebec secession,” *The Toronto Star*, [Toronto], 28 September 1996 A9.

is not concentrating on renewing Canadian federalism.”³¹ Lise Bissonette of *Le Devoir* added to such sentiments: “toute illusion sur une possibilité de réforme de la fédération est dissipée, remplacée par un bras de fer sur les conditions de l’accession à l’indépendance.”³²

Others, upon recognizing the politicizing of the Court, argued that not only will the decision have little to no effect in Quebec, the Court is hardly the institution to make such decisions; both the neutrality and the legitimacy of the Court were questioned by Quebec politicians and the Quebec media. This scepticism of the federal government’s ‘bid’ and the legitimacy of the Court was coupled with the constant reaffirmation of the rights of Quebec and les Québécois.

Jacques Brassard, then Minister of Intergovernmental Affairs in Quebec, declared that “Quebec’s right to declare independence from Canada without the approval of the rest of the country, by means of a unilateral declaration of independence, is no business of the court.”³³ He further pointed to the disputable neutrality of the questions themselves, “À aucun moment dans les remarques et les questions de M. Rock à la Cour suprême, a-t-il noté, on ne fait même allusion à l’existence d’une nation ou d’un peuple québécois. On peut déjà présumer des réponses quand on pose des questions sur la base d’un tel postulat.”³⁴

Adding to this, Bernard Landry pointed out that “it’s obvious you can’t judge between Quebec and Canada on such fundamental questions through a court appointed 100 per cent by the federal government and working under the constitutional framework

³¹ Robert McKenzie, “Quebec question ‘our business’ Johnson says wording nothing to do with Ottawa,” *The Toronto Star*, [Toronto], 30 September 1996, A1.

³² Lise Bissonette, “Un an plus tard, la clarté,” *Le Devoir*, [Montreal], 27 Septembre 1996, A10.

³³ McKenzie, “Quebec question ‘our business’ Johnson says wording nothing to do with Ottawa,” A1

³⁴ Mario Cloutier, “Un aveu de faiblesse, dit Bouchard,” *Le Devoir*, [Montreal]. 27 September 1996, A1.

that has been imposed on Quebec.”³⁵ Lise Bissonette also raised concern over the potential dangers if the Court were to favour the position of the federal government:

Or il est clair que si la Cour suprême devait entériner cette théorie d'un droit de veto du reste du Canada sur une décision démocratique des Québécois, la démonstration serait explosive quant à l'illégitimité et l'immoralité de la Constitution adoptée en 1982. Elle dirait que le Canada a eu le droit, à l'époque, d'imposer aux Québécois un cadre constitutionnel sans leur consentement mais que ce même cadre constitutionnel, fruit d'un coup de force, oblige absolument le Québec à obtenir le consentement du Canada s'il veut en changer.³⁶

After announcing his government's decision of not partaking in the referendum, Bouchard re-affirmed that, “il n'y a qu'un tribunal pour déterminer l'avenir du Québec et c'est le peuple du Québec”.³⁷ He also claimed that the decision will have little or no effect in Quebec: ‘Cet avis sera sûrement classé dans les archives de la bibliothèque à Québec, a ironisé le premier ministre. Ça ne changera rien à la détermination du peuple du Québec de tenir un autre référendum sur la souveraineté.’³⁸

Despite the questions of whether the federal government should have resorted to the Court to clarify the issue and the legitimacy of the Court in playing a role, the federal government continued as it intended.

TO THE SUPREME COURT OF CANADA

This case was both politically and to a certain extent legally momentous; it had the potential, or at least the impression was portrayed, of defining the future of Canada as a nation with or without Quebec. In light of the political gravity of the case, it is not surprising that many parties apart from the federal government and Bertrand were

³⁵ McKenzie, “Quebec question ‘our business’ Johnson says wording nothing to do with Ottawa,” A1.

³⁶ Bissonette, “Un an plus tard, la clarté,” A10.

³⁷ Cloutier, “Un aveu de faiblesse, dit Bouchard,” A1.

³⁸ Ibid.

interested in the outcome and in participating. Thirteen parties³⁹ were granted intervener status; these included:

1. the Attorney General of Manitoba;
2. the Attorney General of Saskatchewan;
3. the Ministers of Justice of the Yukon;
4. the Minister of Justice of the Northwest Territories;
5. the Grand Council of the Cree (the Crees);
6. Roopnarine Singh et al (Singh et. al.);
7. Guy Bertrand;
8. Kitigan Zibi Anishinabeg (Kitigan);
9. the Minority Advocacy Rights Council (MARC);
10. the Ad Hoc Committee of Canadian Women on the Constitution (AHCCWC);
11. Vincent Pouliot;
12. the Makivik Corporation, representing the Quebec Inuit (Makivik);
13. the Chiefs of Ontario.

As discussed previously, the Quebec government refused to participate claiming that the secession of Quebec is political in nature, and more importantly, it is the democratic prerogative of the Quebec government and the Quebec people to decide their future; in short, it was not and is not a matter for the S.C.C. to decide. As a result, the Court, on July 14th, 1997, appointed Amicus Curiae, a friend of the Court, Andre Joli-Coeur, a lawyer from Quebec City, to present the arguments on behalf of Quebec.

On August 20th, 1998, the Court rendered its much anticipated decision. The simple answer to the three questions, no, no, and no conflict, respectively, were predictable; what was not predictable was the Court rooting its opinion in the four 'self-made' principles of the Constitution; as well as the 'new' obligations on part of both parties, to negotiate.

With little doubt, two certitudes accompanied this particular Reference; first, the case and its ruling were saturated in politics. I indicated above that politics might have motivated the federal government's move to seek the opinion of the Court. Second, the

³⁹ Originally, fifteen, but the Mi'gmaq Nation and Yves Michaud later withdrew from the case.

politics and the magnitude of the issue inevitably meant that the opinion to be rendered by the Court would be a momentous and historic one; it had the potential of outlining the future of Quebec in Canada and of Canada. This was certainly the picture painted by political scholars. According to McRoberts, the purpose of the Secession Reference, at face value, was to determine the status of a Quebec UDI under Canadian and international law. However, it was much more than just the legality of a UDI and Quebec separatism that was “at stake.”⁴⁰ “It had become the central element in a public debate over the future of Canada – indeed whether Canada was to have a future.”⁴¹ According to Robert Young, referring the questions to the Court was in fact *risky business*; the federal government could have fuelled the biggest Quebec backlash of Canadian history. However, “luckily the Court avoided this eventuality.”⁴²

THE FEDERAL GOVERNMENT ET AL. ARGUE . . .

The Attorney General of Canada, arguing that the Quebec government or legislature does not have the power to effect the secession of Quebec unilaterally, structured his argument within a narrow constitutional framework; Canadian constitutionalism and the principles of the rule of law and federalism, the two pillars underpinning it, are understood in a strictly legal positivist manner. Further to this, the role of the Court acting as guardian of these two principles, so as to ensure that neither of the two is eroded, is stressed. In essence then, the Constitution with its two underpinning principles, is given primacy over Quebec’s aspirations and its right, if it has such a right,

⁴⁰ McRoberts. “In the best Canadian Tradition.”

⁴¹ Ibid.

⁴² Robert Young, “A Most Political Judgment,” in *The Quebec Decision: Perspectives on the Supreme Court Ruling on Secession*, ed., David Schniederman (Toronto: James Lorimer & Co., Ltd., 1999) 107.

to self-determination. As a result, Quebec and any other provincial government threatening the constitutional and federal status quo has a constitutionally binding obligation to the two principles and to the other governments which may be affected.

This position, for all intents and purposes, assumes that strict adherence to the Constitution ensures stability and order of the federation whereas Quebec secession, outside a constitutional framework, entices and inevitably leads to chaos. It further assumes that the Quebec government has to not only prove it has a right to self-determination, but also that this right trumps the constitutional framework established in Canada. The constitutional recognition of diversity and meaningful autonomy to which Quebec aspires can only be secured as long as the stability and order of Canada is not upset. Ultimately then, Quebec's goals must respect the territory of Canada, including its Constitution.

In taking such a position, the federal government, Bertrand, the provinces of Manitoba and Saskatchewan, Yukon, the Northwest Territories and the AHCCWC, embraced a mononational approach to the understanding of Canadian federalism. The assumption underpinning their positions, that of symmetry, homogeneity, obligation to the Constitution, and the other *level* of government, limited autonomy and independence and most importantly, the promotion of stability and order, is rooted in a territorial understanding of federalism. Subsequently, ideas of full autonomy, promotion of diversity and heterogeneity and partnership are excluded from the way in which they approached not only the questions referred to the Court, but also, and more importantly, constitutional politics and the theory of federalism which informed their position.

Bertrand, the provinces of Saskatchewan and Manitoba, Yukon, the Northwest Territories, the AHCCWC, and Singh et. al. went beyond the Attorney General of Canada by considering rights of the individual. Similarly, the Crees, the Kitigan, the Makivik Corporation and the Chiefs of Ontario embraced the idea of rights, as well as introduced the notion of nation and nationhood to the discourse. Despite this, however, they all resorted to a constitutional framework which emphasized an appreciation for a particular understanding, rooted in the amending formula, of the rule of law and federalism. It should be noted that the Aboriginal groups embraced a different conception of federalism to include notions of nationhood distinct from the nation-state.

The framework

According to the federal government and echoed by Bertrand,⁴³ Singh et. al.,⁴⁴ the provinces of Saskatchewan,⁴⁵ Manitoba,⁴⁶ the Yukon⁴⁷, and the AHCCWC⁴⁸, the

⁴³ Bertrand, Guy, "Mémoire de L'Intervenant Guy Bertrand" in the matter of *Section 53 of the Supreme Court Act, R.S.C. 1985, Ch 5-26 and in the matter of a Reference by the Governor in Council concerning certain questions relating to the secession of Quebec from Canada [Indexed as: Reference re: Secession of Quebec]*, [1998], (Supreme Court, Ottawa, April 14, 1997). (Mémoire de Guy Bertrand, 1997).

⁴⁴ Singh et., al., "Factum of the Interveners: Roopnarine Singh, Keith Owen Henderson, Claude Le Clerc, Kenneth O'Donnell, Van Hoven, Pettaway", in the matter of *Section 53 of the Supreme Court Act, R.S.C. 1985, Ch 5-26 and in the matter of a Reference by the Governor in Council concerning certain questions relating to the secession of Quebec from Canada [Indexed as: Reference re: Secession of Quebec]*, [1998], (Supreme Court, Ottawa, April 4, 1997). (Factum of Singh et., al, 1997).

Singh et. al. begin their factum by asserting the primacy of the Constitution; UDI requires a constitutional amendment, either directly or indirectly. The Constitution:

'(i) establishes every relevant aspect of Quebec juridical institutions, status and powers;
(ii) imposes its own supremacy [through s55];
(iii) precludes any amendment except through a prescribed amendment process;
(iv) confers upon Quebec an important, but restricted power of constitutional amendment in respect only of its internal institutions and processes of government' (para. 5). Thus, the Constitution prohibits UDI as it explicitly excludes this power.

⁴⁵ Government of Saskatchewan, Department of Justice, "Factum of the Attorney General of Saskatchewan," in the matter of *Section 53 of the Supreme Court Act, R.S.C. 1985, Ch 5-26 and in the matter of a Reference by the Governor in Council concerning certain questions relating to the secession of Quebec from Canada [Indexed as: Reference re: Secession of Quebec]*, [1998], (Supreme Court, Ottawa, April 11, 1997). (Factum of the Attorney General of Saskatchewan, 1997).

Constitution “provides the ultimate legal framework by which Canadians govern themselves;”⁴⁹ any law or action that is inconsistent with it, is invalid.⁵⁰ Since the secession of a province threatens the territorial integrity and political unity of Canada as well as terribly upsetting the current constitutional order,⁵¹ the Constitution then should be the starting point for any analysis dealing with the secession of Quebec. It is the Constitution which “establishes Quebec as a province, governs the institutions of Quebec, grants powers to Quebec and finally sets out the ways in which the Constitution can be amended, even unilaterally by a province.”⁵²

As suggested above, underpinning the Constitution, and specifically this constitutional framework, is both the rule of law and the principle of federalism. Both

The province of Saskatchewan asserts that a UDI would destroy all elements of the Constitution and all the principles that inform it (Factum of the Government of Saskatchewan, 1997, para. 15). Furthermore, the two elements underpinning Confederation, nationhood and federalism, are threatened by secession. This must be considered in answering the questions submitted to the Court. The issue thus becomes whether or not the Constitution empowers the Quebec to effect a secession (para. 25 my emphasis).

⁴⁶ Government of Manitoba, Department of Justice, “Factum of the Attorney General of Manitoba,” in *the matter of Section 53 of the Supreme Court Act, R.S.C. 1985, Ch 5-26 and in the matter of a Reference by the Governor in Council concerning certain questions relating to the secession of Quebec from Canada [Indexed as: Reference re: Secession of Quebec], [1998]*, (Supreme Court, Ottawa, April 11, 1997). (Factum of the Attorney General of Manitoba, 1997), para. 9.

The AG Manitoba argues that ‘the right to secession is implicitly negated in [Canadian] constitutionalism’ as nothing explicitly written in the Constitution confers the powers of effect a secession to the provinces.

⁴⁷ Government of Yukon, Department of Justice, “Factum of the Minister of Justice for the Government of the Yukon Territory” in the matter of Section 53 of the *Supreme Court Act, R.S.C. 1985, Ch 5-26 and in the matter of a Reference by the Governor in Council concerning certain questions relating to the secession of Quebec from Canada [Indexed as: Reference re: Secession of Quebec], [1998]*, (Supreme Court, Ottawa, May 28, 1997). (Factum of the Minister of Justice for the Government of the Yukon Territory, 1997).

⁴⁸ Ad Hoc Committee of Canadian Women on the Constitution. “Factum of the Interveners: Ad Hoc Committee of Canadian Women on the Constitution, in the matter of *Section 53 of the Supreme Court Act, R.S.C. 1985, Ch 5-26 and in the matter of a Reference by the Governor in Council concerning certain questions relating to the secession of Quebec from Canada [Indexed as: Reference re: Secession of Quebec [1998]*. Canada: Supreme Court, Ottawa, April 11, 1997. (Factum of the Ad Committee of Women 1997), para. 8:

The Ad Hoc Committee of Women, adopting a legal positivist view of the Constitution, argued that the Constitution is silent on the matter of secession, thus Quebec, under Canada’s Constitution has no authority.

⁴⁹ Factum of the Attorney General of Canada, 1997, para. 64.

⁵⁰ *Ibid.*, para. 65.

⁵¹ *Ibid.*, para. 79.

⁵² *Ibid.*, para. 78.

these principles are, however, narrowly understood by the federal government. That is, the way in which it conceptualized federalism and the rule of law promotes and allows for only one understanding of the terms. As a result, the federal government denied any other understanding and approach to the rule of law and to Canadian federalism which may embrace history, traditions, socio-political diversity and heterogeneity.

Understanding the rule of law

As one of the pillars of the Canadian Constitution and subsequently, of the constitutional framework devised, the Attorney General of Canada quickly established the supremacy of the rule of law; its observance therefore is mandatory. “Constitutional government is predicated on the rule of law”; the adherence to which is “necessary in order to ensure stability and order.”⁵³ As its starting point, it adopted the understanding offered in the Patriation Reference: “[the rule of law] conveys [...] a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority.”⁵⁴ As we can see, the federal government restricted the rule of law to that which is strictly written down; this is to the neglect of socio-political diversities and maintenance and promotion of this diversity, which may or may not affect its understanding. Instead, it asserted homogeneity of society by assuming that the rule of law and the way it is understood here, is neutral and, more damaging, universal.

It further narrowed the scope of the rule of law by reducing it to s. 45 of the Constitution Act, 1982. Though Part V of the Constitution lists five formal and legitimate procedures in amending the Constitution, the only one pertinent in this case is

⁵³ Ibid., para. 66.

⁵⁴ Ibid., para. 66.

the last one, s. 45 – the power of the provinces to unilaterally amend the Constitution. If s. 45 does not permit the unilateral secession of a province, it is not constitutional and thus is illegitimate and in violation of the rule of law. Under s. 45, a provincial government can unilaterally amend the Constitution provided that the amendment concerns and affects the provinces and its institutions alone.⁵⁵ The secession of Quebec and the affects it would generate are not confined to the province’s borders. Other institutions, outside of Quebec are affected by the secession of Quebec. As such, “unilateral secession is beyond [the scope of powers bestowed upon] the Quebec government.”⁵⁶

In addition to offending the Constitution and the principles underpinning it, Bertrand, the Northwest Territories, MARC and the First Nations groups argued that a UDI would infringe upon the individual rights of the citizens of Quebec people under both the Quebec and the Canadian Charter of Rights; the territorial integrity of Canada and the Aboriginal territory and rights guaranteed in s. 35 would also be offended.⁵⁷ In introducing this aspect to the debate, these groups attempted to expand the understanding of the rule of law to embrace the concepts of rights and fiduciary obligations. So, the

⁵⁵ Ibid., para. 104

⁵⁶ Ibid., para. 114;

This position was echoed by the interveners:

Factum of the Attorney General of Saskatchewan, 1997, op. cit., para. 49:

Saskatchewan concluded that since the secession of Quebec would affect the whole Canadian federation, the government of the province cannot effect secession unilaterally; s45 does not vest such powers onto the province.

Factum of the Minister of Justice for the Government of the Yukon Territory, 1997, op. cit.:

the Yukon territory does add that though secession is not possible under s45, it may be possible under s38 of the Constitution, para. 19:

The Yukon Territory reaffirmed this and furthered the notion that Quebec and its institutions are established by the Constitution; its government, therefore, is bound by it.

Mémoire de L’Intervenant Guy Bertrand, para 95:

Bertrand concluded that Quebec cannot unilaterally amend the Constitution where the amendment affects institutions outside the Quebec province. Since secession does just that, the Quebec government cannot effect secession unilaterally.

⁵⁷ Ibid., para.123-125

focus, as MARC pointed out, should not concentrate solely on how a UDI would affect the Canadian federation as a whole, limited thus far to the division of powers and territory integrity; but also how a UDI involves a change of the rights regime in Canada as the Charter would cease to exist in an independent Quebec.⁵⁸ Even if one cannot predict with certainty, at the least, the Court must, Bertrand insisted, recognize that a UDI would bring about chaos; this would infringe upon a person's s. 7 charter rights – security of the person.⁵⁹ The AHCCWC supported this argument and further stressed the importance of protecting and safeguarding constitutionally guaranteed rights; it is a recognized constitutional convention. Since 1982, the governments have considered the rights of the people guaranteed in the Charter; this convention must be upheld in the case of the secession of Quebec.⁶⁰

Asserting the primacy of the Constitution and of the federal government, Bertrand argued “by virtue of the Constitution in general and s. 52(3) in particular, the federal government has the obligation to declare a UDI of Quebec and law of the new Quebec regime illegal.”⁶¹ A victorious referendum does not render the people of Quebec above the Constitution or the rule of law. Quebec is sovereign, but only within the constitutional framework⁶² which, following the logic employed by Bertrand, must be guarded and enforced by both the S.C.C. in ruling a UDI unconstitutional and by the federal government in ensuring compliance with the Constitution and fighting against

⁵⁸ Minority of the Intervener Minority Advocacy and Rights Council (MARC), “Factum of the Interveners: MARC”, in the matter of Section 53 of the Supreme Court Act, R.S.C. 1985, Ch 5-26 and in the matter of a Reference by the Governor in Council concerning certain questions relating to the secession of Quebec from Canada [Indexed as: Reference re: Secession of Quebec], [1998], (Supreme Court, Ottawa, April 11, 1997). (Factum of the Intervener MARC, 1997), paras. 10-12.

⁵⁹ Mémoire de L’Intervenant Guy Bertrand, 1997, para. 138.

⁶⁰ Factum of the Intervener of Ad Hoc Committee for Women, 1997, para. 16.

⁶¹ Ibid., para. 119

⁶² Mémoire de L’Intervenant Guy Bertrand, 1997, para., 160-161.

unconstitutional actions. UDI is unconstitutional on two levels – it is beyond the scope of powers belonging to the Quebec government and it violates the various rights and freedoms guaranteed by the Charter, most notably, security of the person. Considering its non-constitutionality, the federal government has the constitutional obligation to the people of Canada, especially those residing in Quebec to contest an illegal UDI. If the federal government does not, it too would be violating the principles, values and rights guaranteed in the Constitution.⁶³

In essence then, from this understanding of the rule of law, provincial autonomy guaranteed in the Constitution is understood as controlled or limited autonomy in which limitations are necessary to maintain the political unit and in turn the stability and order of the nation-state. Autonomy of the calibre spoken of and desired by the Quebec government is beyond this scope and therefore perceived as contrary to the rule of law. Furthermore, it is the duty of both the S.C.C. *and* the federal government to ensure the proper adherence of the rule of law.

Federalism à la federal government

According to the Attorney General of Canada, “the need for the Constitution to prevent unilateral changes to the federation lies at the heart of the federal principle,”⁶⁴ where “the federal principle precludes any member of the federation from making significant changes to the federation unilaterally and requires that governmental authority be exercised in a manner consistent with the country’s federal make-up”⁶⁵. The federal government reduced the understanding of federalism to a Wheare-like definition:

⁶³ *Ibid.*, para. 143.

⁶⁴ *Factum of the Attorney General of Canada, 1997*, para. 109.

⁶⁵ *Factum of the Attorney General of Canada, 1997*, para. 71.

“federalism is the constitutional diffusion of powers where the Constitution sets out the sphere of power for each level of government; where each level is supreme.”⁶⁶

As Jean LeClair argues in his analysis of the Attorney General of Canada’s position, this understanding of federalism is one-dimensional; it is viewed merely as a “simple method of distributing powers between the levels of government.”⁶⁷ It did not account for history, moral vision and most importantly the concept of nationhood which historically has always been intertwined with the concept of Canadian federalism.⁶⁸

Rather, the federal principle is confined to the coordinate aspect of federalism represented and reflected in Part V of the Constitution.⁶⁹ In short, because separation upsets and potentially destroys the original political commitment, it offends the federal principle established in Canada. UDI therefore is unconstitutional; it offends both the rule of law and Canadian federalism.

The First Nation Factor

The Aboriginal groups (the Crees, the Kitigan, the Makivik Corporation, and the Chiefs of Ontario) went one step further than either Bertrand or the federal government (including the other interveners) and introduced the concepts of fiduciary obligations, treaty and Aboriginal rights into the debate. Aboriginal groups agreed with the federal government that because it offends both the Confederation agreement and the federal

⁶⁶ Ibid., para. 72.

⁶⁷ Jean LeClair, “The Attorney General’s Vision,” in *The Quebec Decision: Perspectives on the Supreme Court Ruling on Secession*, ed., David Schniederman (Toronto: James Lorimer & Co., Ltd., 1999) 75.

⁶⁸ Ibid., 75.

⁶⁹ It should be noted, in its understanding of federalism, Saskatchewan did acknowledge a degree of diversity. Nonetheless it too, in stressing the national structure, reduced Canadian federalism to Part V and as such adopted a legalistic view of the term.

principle, the secession of Quebec requires a constitutional amendment.⁷⁰ However, the federal government has taken a narrow view of the questions as it restricts the Court's response to s. 45.⁷¹ As a result, the scope of the Reference as well as the implications of a UDI is restricted to the relationship between the two orders of government vis-à-vis the Constitution to the neglect of Aboriginal rights affirmed by the Constitution Act, 1982, as well as other treaty agreements signed with various aboriginal groups⁷²

The Canadian state is not restricted to the division of powers. In addition to looking at the Constitution in answering the question, therefore, the Court must also look at constitutional documents outside of the 1982 Act; including "pre-existing and Indian rights of the Aboriginal peoples, imperial constitutional law, including the Royal Proclamation, 1763, existing treaty obligations and fiduciary obligations" (a special Aboriginal Constitution)⁷³ and the James Bay and Northern Quebec Agreement.⁷⁴ The

⁷⁰ Chiefs of Ontario, "Factum of the Interveners: Chiefs of Ontario", in the matter of *Section 53 of the Supreme Court Act, R.S.C. 1985, Ch 5-26 and in the matter of a Reference by the Governor in Council concerning certain questions relating to the secession of Quebec from Canada [Indexed as: Reference re: Secession of Quebec]*, [1998]. (Supreme Court, Ottawa, April 14, 1997). (Factum of the Intervener Chiefs of Ontario, 1997), para. 80;

Factum of the Intervener Crees, 1997, para. 32-35.

⁷¹ Grand Council of the Crees (Eejou Estchee), "Factum of the Interveners: Grand Council of the Crees", in the matter of *Section 53 of the Supreme Court Act, R.S.C. 1985, Ch 5-26 and in the matter of a Reference by the Governor in Council concerning certain questions relating to the secession of Quebec from Canada [Indexed as: Reference re: Secession of Quebec]*, [1998], (Supreme Court, Ottawa, April 11, 1997). (Factum of the Intervener Crees, 1997), para. 14.

⁷² *Ibid.*, para. 21-23.

⁷³ Factum of the Intervener Makivek, 1997, op. cit., para. 30;

Kitigan Zibi Anishinabeg (Kitigan), "Factum of the Interveners: Kitigan Zibi Anishabeg", in the matter of *Section 53 of the Supreme Court Act, R.S.C. 1985, Ch 5-26 and in the matter of a Reference by the Governor in Council concerning certain questions relating to the secession of Quebec from Canada [Indexed as: Reference re: Secession of Quebec]*, [1998], (Supreme Court, Ottawa, April 14, 1997). (Mémoire de l'Intervenante Kitigan, 1997), para. 32:

UDI is prohibited because of the existence of the 'special Aboriginal Constitution'. This stems from two sources: one, they represent the first inhabitants of the land; and two, the rights respected by the Crown before Confederation including the Royal Proclamation which spawned 'une situation juridique particulière'; from this flowed the respect and recognition of their rights. This second source was reproduced in the BNA Act, giving their rights a unique constitutional dimension (*Ibid.*, 43). Under s92(4), the federal government has complete jurisdiction over Indian affairs; the government and legislature of Quebec has no authority over the Aboriginal peoples unless it is so conferred upon them by the federal

rights demand Aboriginal consideration; that is any secession of Quebec, not only is a constitutional amendment required, but aboriginal groups must be present at the negotiation table.⁷⁵ “In our understanding of the Constitution Act, 1982, s. 35 and other constitutional instruments, Aboriginal peoples and their Aboriginal and treaty rights add a fundamental and critical dimension to the question of unilateral secession.”⁷⁶ In order to remain true to the spirit of Canadian federalism which recognizes and affirms the Aboriginal contingency in the federation, a nation to nation to nation(s) agreement is required in the event of secession. Federalism and the federal principle, oblige both orders of government to consider the Aboriginal nations as nations and not simply as minority groups.

The Kitigan, Makivik Corporation, Crees and Chiefs of Ontario re-affirmed this position in approaching the second question dealing with international law. Under both international and domestic law,⁷⁷ the Aboriginal peoples form a people⁷⁸ whose inherent

government; thus, only the federal government can relinquish its responsibilities to the Aboriginal peoples to Quebec (Ibid., para. 54).

⁷⁴ Factum of the Intervener Crees, 1997, para. 4:

According to the Crees, Quebec secession is incompatible with the JBNQA. The JBNQA was agreed upon in 1975; approved by the federal government in 1977 and by the National Assembly in 1976. This agreement recognized the Aboriginal peoples of Northern Quebec as a nation with its own identity. In the event of Quebec secession, the obligations set out in the Agreement would not be carried out by both the federal government and the Quebec government. A precondition of the JBNQA is that the federal government retains separate and distinct fiduciary obligations; the Quebec government cannot change this unilaterally as it would be a fundamental breach of the Agreement (Ibid., para. 55-59).

⁷⁵ Makivik Corporation, “Factum of the Interveners: Makivik Corporation”, in the matter of *Section 53 of the Supreme Court Act, R.S.C. 1985, Ch 5-26 and in the matter of a Reference by the Governor in Council concerning certain questions relating to the secession of Quebec from Canada [Indexed as: Reference re: Secession of Quebec], [1998]*, (Supreme Court, Ottawa, April 11, 1997). (Factum of the Intervener Makivik Corporation, 1997), para. 20-21.

⁷⁶ Factum of the Intervener Crees, 1997, para. 26.

⁷⁷ Section 35 affirms Aboriginal and treaty rights and inadvertently recognizes them as a people.

⁷⁸ Factum of the Intervener Crees, 1997, para. 81:

Peoples under international law is understood, broadly speaking as having key objective elements: ‘common language, history, culture, race or ethnicity, way of life and territory; and people identifying themselves as such.’

rights and rights as a people must be respected.⁷⁹ In this Reference thus, the Aboriginal peoples should be recognized as such and not be simply grouped as an ethnic, religious or linguistic group as done by the federal government.⁸⁰ The Crees asserted that there is not one single people in Quebec as the Quebec government asserted; and similarly, there is no one single people in Canada as the federal government asserts.⁸¹ “The Canadian Constitution clearly recognizes that there exists more than one people in Canada”,⁸² the Aboriginal peoples have a distinct place in the Constitution and in Canadian political society.⁸³ As such, it would be illegitimate to have the Quebec peoples and the Canadian peoples determine alone the future of the Aboriginal peoples.⁸⁴

Suffice it to say, the federal government did not take Aboriginal issues into consideration, nor did Joli-Coeur. In fact, any discussion on a people outside the Canadian people was absent. Instead, the federal government concentrated on and in turn re-affirmed Canada’s territorial integrity to the neglect of the people residing in this territory.

International Law

In its analysis of international law, the federal government adopted a simplistic and literal understanding of the law. In actuality, it outright dismissed any right of self-determination belonging to the people of Quebec. It was able to do so as it continued to

⁷⁹ Mémoire de l’Intervenante Kitigan, 1997, para. 96-100; Factum of the Intervener Makivek, 1997, para. 100; Factum of the Intervener Crees, 1997, op. cit., para. 80; Factum of the Intervener Chiefs of Ontario, 1997, para. 81.

⁸⁰ Factum of the Intervener Crees, 1997, para. 83.

⁸¹ Ibid., para. 84.

⁸² Factum of the Intervener Makivik, 1997, para. 95.

⁸³ this was recognized in the Van Der Peet Supreme Court decision (*R. v. Van der Peet*, [1996] 2 S.C.R.).

⁸⁴ Factum of the Intervener Crees, 1997, para. 121.

envision Canada as one nation with its people, all equal, sufficiently represented by the nation state.

In asserting that international law does not confer a right to UDI, Attorney General of Canada began by outlining the two aspects of the right, external and internal, neither of which involves the right to secede from an independent state.⁸⁵ The external right is understood as “the right of the people of the state to determine without external interference, their form of government and international status;” this right is enjoyed by all Canadians, including those residing in Quebec.⁸⁶ The internal right involves the “right of people of the state to a government representing the whole of that people on the basis of full equality;” this is also exercised by all Canadians, again, including Quebecers.⁸⁷ Thus, under international law, the federal government concluded that the government of Quebec does not have the right to secede unilaterally from Canada.⁸⁸

Relying upon the division of powers, the federal government argued that the province of Quebec does in fact enjoy a high level of autonomy. Because of the powers conferred upon the government of Quebec, it is able to exercise autonomous power in “social, economic and cultural matters, including linguistic matters;” in addition, it has its own system of civil law.⁸⁹ Consequently, the province of Quebec (and its citizens), is

⁸⁵ Factum of the Attorney General of Canada, 1997, para. 122.

⁸⁶ Ibid., para. 123.

⁸⁷ Ibid., para. 124.

⁸⁸ Ibid., para. 188:

The AG Canada goes through the development of international law to conclude as such: the Charter of the United Nations, 1966, Covenants on Human Rights, the 1970 Declaration on Friendly Relations and the 1993 Vienna Declaration as well as current practices all tie the right to self determination with the territorial integrity of the current national state. In fact, according to the AG Canada, none of these documents sanction the right to unilateral independence by right of self determination if it infringes upon the territorial nation state. Territorial stability is prioritized over the right to self determination leading to the right to secession.

⁸⁹ Ibid., para. 193-194.

neither a colony nor a peoples subject to foreign domination or gross oppression.⁹⁰

Quebec and its people form “an integral part of Canada” which equally participates in Canada’s democratic system.

The federal government is able to avoid the controversial non-signing of the Constitution by the Quebec government and the failure of Meech,⁹¹ which may arguably lead to the position that the Quebec people have in fact been prevented from exercising their right to internal self-determination, by simply arguing that these events have no bearing on international law. This is an interesting argument advanced by the federal government as it enables it to carefully select which documents and procedures have a bearing on international law. However, such picking and choosing does remain consistent with the federal government’s focus upon the territorial integrity of the nation, rooted in a one nation vision of Canada. This then enabled it to advance the next argument: both the Constitution and the Meech Lake Accord including its failure, complied with the democratic structure of Canada.⁹² Again, the focus is upon the territory and the Constitution and not necessarily on the aspirations of the people or of the Quebec government. Because of its narrow view of the right to self-determination and because of its prioritizing of territorial integrity, the federal government easily concluded that there is no right to unilateral secession emerging from the right of self-determination in a nation state where all peoples are represented equally and without distinction.⁹³

⁹⁰ Under international law, only colonized, oppressed peoples or those subject to alien domination have, stemming from the right to self determination, the right to secede unilaterally.

⁹¹ This position was a response to an argument advanced by Daniel Turp who posited that the patriation of Constitution and the failure of the Meech Lake Accord are clear indication that the internal right to self determination was denied to the people of Quebec.

⁹² Factum of the Attorney General of Canada, 1997, para. 197.

⁹³ *Ibid.*, para. 186.

Three assumptions underpin the arguments reviewed thus far. First, secession requires a constitutional amendment; a procedure in which the government of Quebec must partake; the aspiration of the Quebec people can neither override nor bypass this procedure. Second, all accept the role of the Court in finding such authority bestowed in the Constitution in general and the amending formula in particular. That is, the juridical legitimacy of the Court remains a truism and is left undisturbed. Third, Canada is perceived to be one nation. With the exception of the Aboriginal groups who perceived Canada in multinational terms, the federal government et. al. at no time regarded Quebec (or the Aboriginal groups) as anything but a minority group. Joli-Coeur, joined by Pouliot, challenged all three assumptions by affirming the primacy of international law, by questioning the legitimacy of the Court vis-à-vis this matter, and finally by asserting Canada's binational status.

THE AMICUS CURIAE ET AL. RESPOND . . .

By structuring their argument on the notions of legitimacy and constitutional principles, Joli-Coeur and Pouliot were able to step outside the confining framework established by the federal government. This does not necessarily mean that they broadened the framework; quite the contrary. Both structured their arguments within a narrow, albeit different, understanding of constitutionalism and federalism. For Joli-Coeur constitutionalism is reduced to the principle of effectivity and the majority will. Federalism, though underpinned by the dualist vision, is, similar to the federal government, reduced to the division of powers.

For Pouliot, distinct from Joli-Coeur but similarly narrow, constitutionalism and federalism are reduced to a narrow conception of the rule of law. They are simply understood in terms of the Senate and its constitutional mandate of representing the regions at the centre and the strict adherence of the division of powers by both orders of government. The rule of law is maintained in so far as, first, the Senate, acting on behalf of the provinces, thereby, truly representing them at the centre, fulfills its constitutional role, and second, the federal government respects the heads of powers entrusted to the provinces in s. 92 of the BNA Act. Any deviation from these two criteria erodes the rule of law.

Four main concepts underpin Joli-Coeur's position: Quebec forms a people who desire to be constitutionally recognized as distinct;⁹⁴ the hierarchy of the division of powers; the eminence of popular will; and finally, the supremacy of international law. Before engaging into the main substance of his position, Joli-Coeur quickly went on the offence by raising and seriously questioning the issue of legitimacy in three crucial areas: first, the legitimacy of references, more specifically the constitutionality of s. 53 of the Supreme Court Act; second, the legitimacy of the S.C.C. with regard to this particular Reference; and finally, the legitimacy of the questions referred to the Court.

The issue of legitimacy

According to Joli-Coeur, "le pouvoir du Parlement Canadien [under s. 101 of the Constitution] se limite à la création d'une Cour général l'appel."⁹⁵ An appeal implies

⁹⁴ Mémoire de L'amicus Curiae, 1997, para. 5.

⁹⁵ Ibid., para. 11.

hearing a past judgment and not reference cases, as this is a new jurisdiction.⁹⁶ A reference case is not an appeal. In addition, the second part of s. 101 clearly prevents the S.C.C. from being both a court of appeal and an additional court reviewing legislation.

Even if the Court can review legislation, it can only review the *laws of Canada*, meaning federal laws. This clearly exempts international law from being reviewed by the S.C.C.⁹⁷ International and domestic laws are both distinct and parallel; the former is interpreted and applied by international bodies, the latter by Canadian bodies. Canadian bodies can interpret international law if and only if it pertains to domestic laws. This, however, is not the case with the second question.⁹⁸

According to Joli-Coeur, the Court should in fact refuse to answer any of the questions as they force the Court into a role it is not meant to play. The questions and the arguments which they generate are too speculative. In fact, Joli-Coeur argued, the whole process is saturated in politics; the federal government has an ulterior motive – to curtail the aspirations of the Quebec people. The questions have no basis in law; they are purely and simply political.⁹⁹ The Quebec government, recognizing this political agenda, chose not to justify the farce with its presence.¹⁰⁰

In addition to the three categories listed above, Joli-Coeur proceeded to argue that the Court should refuse to hear the reference based on the constitutional principle of parliamentary privilege. “The National Assembly is the lone judge of its debates.”¹⁰¹ This ability and right rests within the division of powers, which he viewed above the

⁹⁶ Ibid., para. 13.

⁹⁷ Ibid., para. 14-15, my translation.

⁹⁸ Ibid., para. 46-50.

⁹⁹ Ibid., para. 39.

¹⁰⁰ Ibid., para. 28-29.

¹⁰¹ Ibid., para. 54 (my translation).

federal government's ability, already put into doubt, to refer these questions to the Court. Further, the principle of parliamentary privilege is paramount to the Court's ability, again previously questioned, to answer this query. As such, the *Amicus Curiae* viewed the autonomy of the National Assembly and the Quebec provincial government located in the division of powers as absolute and not controlled.

In raising these points of legitimacy, not only is Joli-Coeur putting into doubt the role of the Court on this matter, but he attempted to expose the federal government's assumption that it is in a hierarchical position vis-à-vis the province of Quebec by having the S.C.C. at its disposal to confirm and endorse its political agenda. It is this questioning that forces the Court to work especially hard to legitimize its role not only with regard to this Reference, but also and arguably more crucially, in the eyes of the Canadian society, both inside and outside of Quebec.

Answering the questions

Joli-Coeur began by asserting that if the questions should be addressed they should be asked and answered in the reverse. Since the answer to question three will affect the way in which one and two are answered, the relationship between the two bodies of law should be addressed first. Joli-Coeur pointed out that "in international law, international principles have precedence."¹⁰² Since the secession of Quebec is a matter of international law, international law takes precedence over Canadian domestic law.¹⁰³

In light of the fact that the secession of Quebec is an international matter to be governed by international law, Joli-Coeur proceeded to answer question two. In

¹⁰² *Ibid.*, para. 68.

¹⁰³ *Ibid.*, para. 72.

responding to the first part of this question, *does the Quebec government have the right to secede*, Joli-Coeur adopted a legal positivist view of the law. Where the federal government concluded that since it is not written, there is no right to secession; Joli-Coeur argued that since it is not explicitly prohibited, the Quebec government does have the ability to effect secession of the province from Canada unilaterally.¹⁰⁴

In actuality, Joli-Coeur argued, it is not a matter of international law prohibiting or permitting secession; rather, it concerns whether or not there is a privilege to it and there is.¹⁰⁵ It is facilitated by the principle of effectivity. He strengthened this point by advancing the notion that the *existence of a state is a matter of fact, not law*. Essentially, the Quebec government needs to exercise effective control of its powers. Once it does this, the secession of Quebec would be effective.¹⁰⁶ Thus, the first part of question two should be answered in the affirmative.

Relying upon the argument of Daniel Turp, Joli-Coeur argued that Quebec's internal right of self-determination was denied in 1982 when the Constitution was patriated without the consent of its representing government. Ignoring the Court's ruling in the Quebec Veto Reference, Joli-Coeur insisted that the consent of the National government was imperative as the French people it represents is one of Canada's "founding nations". Since this internal right of self-determination was denied, the Quebec people have the right to exercise its external right of self-determination. This in turn, paves the way to secession as the right to self-determination coupled with the principle of effectivity will enable Quebec to be viewed in the international arena as a

¹⁰⁴ Ibid., para. 79.

¹⁰⁵ Ibid., para. 81.

¹⁰⁶ Ibid., para. 87-90.

sovereign state.¹⁰⁷ According to Joli-Coeur, because the Quebec government and its people are armed with the political and moral legitimacy to assert effective control, the new Quebec state will be recognized as legitimate; this “transcends territorial integrity.”¹⁰⁸ For Joli-Coeur the unilateral patriation by English Canada and the secession of Quebec are equitable.

The government of Canada is bound to accept and respect Quebec’s right to self-determination as Canada is party to various relative international agreements. Since Quebec has the right to self-determination, it alone can and does determine its political future.¹⁰⁹ On this question therefore, the Court should answer that “l’exercice du droit a l’autodétermination du peuple Québécois fait partie du processus de la sécession éventuelle du Québec.”¹¹⁰

Proceeding with *whether or not, under domestic law, the Quebec government can effect the secession of Quebec from Canada unilaterally*, both Pouliot and Joli-Coeur found that such a right can be located within the principles and guarantees of the Constitution of Canada centred upon a particular conception of the rule of law. For Pouliot, the rule of law is understood as a promise by all parties involved at the time of Confederation, to ensure the protection of diversified interests of the provinces and security of efficiency, harmony and permanency of the union.¹¹¹ More specifically, this manifested itself through the security of the autonomy of the provinces, assurance of

¹⁰⁷ Ibid., para. 110.

¹⁰⁸ Ibid., para. 109.

¹⁰⁹ Ibid., para. 106.

¹¹⁰ Ibid., para. 112.

¹¹¹ Poulet, Vincent. “Factum of the Intervener: Vincent Poulet”, in the matter of *Section 53 of the Supreme Court Act, R.S.C. 1985, Ch 5-26 and in the matter of a Reference by the Governor in Council concerning certain questions relating to the secession of Quebec from Canada [Indexed as: Reference re: Secession of Quebec]*, [1998], (Supreme Court, Ottawa, April 14, 1997). (Factum of the Intervener Poulet, 1997), para. 28.

regional representation at the centre and a provincial role in law-making at the centre.¹¹² The rule of law then remains rooted in the respect for the compact agreed upon at the time of Confederation.

According to Pouliot, this promise, giving substance to the rule of law, has not been respected by the federal government.¹¹³ Federal spending in provincial jurisdiction violates the autonomy of the province. Additionally, the Senate as a system of securing regional representation and a provincial role in lawmaking at the centre is a failure.¹¹⁴ According to Pouliot, the Senate was unlawfully constituted when it agreed to request the patriation of the Constitution; the agreement was not on the request of the province of Quebec.¹¹⁵ In light of this, the federal government, acting beyond its mandated powers, did not respect and in turn was not in accordance with the rule of law. So, if the federal government “is not subject to the rule of law under the Constitution, then neither are the provinces.”¹¹⁶ Further to this, if the people of Quebec no longer wish to be subject to the rule of law, because the federal government does not seem to be subject to it, then it cannot be legitimately enforced;¹¹⁷ the federal government must respect this. For these reasons UDI is legal.

Joli-Coeur responded to this first question based on the assumption that the Quebec government could by-pass the Canadian Constitution and the rule of law, as understood by the Attorney General of Canada, to effect the secession of the province. This is made possible through the principle of effectivity coupled with the principle of

¹¹² Ibid., para. 36.

¹¹³ Ibid., para. 46.

¹¹⁴ Ibid., para. 46-47.

¹¹⁵ Ibid., para. 55.

¹¹⁶ Ibid., para. 60 (my translation).

¹¹⁷ Ibid., para. 68.

majority will. That is, the principle of effectivity is valid if the people of Quebec in a democratic vote express their desire to exercise their right to self-determination, which he has already established to exist for the Quebec people under international law. The principle of effectivity is a British common law, applicable in Canada by way of the preamble of the BNA Act, 1867.¹¹⁸ Thus, it is a part of the Canadian Constitution; it is, in fact fundamental to it.¹¹⁹

This principle, bearing a meta-constitutional status, is pertinent to the eventual secession of Quebec¹²⁰ where the amending formula is not. The secession of a province involves issues much deeper than a simple amendment to the Canadian Constitution can address. Secession would change the Constitution fundamentally; thus it is not practical to use the amending formula.¹²¹ The principle of effectivity is compatible with the rule of law; further it is a manifestation of the principle of necessity, also compatible with the rule of law.¹²² Question one then should be answered in the affirmative.¹²³

As alluded to and demonstrated above, Joli-Coeur understood the rule of law to constitute a respect for the will of the majority, the importance of the division of powers and respect for the principle of effectivity. Such understanding is rooted in both a binational conception of Canadian federalism and a mononational outlook of the Quebec nation. Joli-Coeur's responses are important as they represent a different approach to both Canadian federalism and the rule of law. If we recall, for the federal government, constitutionalism and the rule of law was reduced to Part V of the amending formula

¹¹⁸ *Mémoire de L'amicus Curiae*, 1997, para. 115.

¹¹⁹ *Ibid.*, para. 135.

¹²⁰ *Ibid.*, para. 136.

¹²¹ *Ibid.*, para. 137.

¹²² *Ibid.*, para. 138.

¹²³ *Ibid.*, para. 139.

which was further narrowed to part (e). Joli-Coeur, in his factum, quickly rejected this narrow conception and offers one, just as narrow, to argue the exact opposite. Joli-Coeur, victim himself in offering a restricted outlook of the rule of law, reduced the principle to include the principle of effectivity and majority will. Majority will is understood simply as 50% plus one. In such understanding of the rule of law, he assumed Quebec to be a one homogeneous nation state with a people all driving towards an independent state in order to effectively exercise and enjoy their right to self-determination; self-determination is understood to be exercisable through the government of Quebec. The government of Canada in Ottawa, it would appear, plays no role in fulfilling the right to self-determination belonging to the people of Quebec.

What we are presented with is the struggle between constitutional principles; that is the rule of law understood as the amending formula and the strict adherence to it versus an understanding rooted in the principle of effectivity and majority will paving the way to a Quebec UDI. And a further struggle exists between the vision of Canada between a one nation and a two nation state. Stemming from this is the role of Quebec in the former and the role of the central government in the latter. In short, the Court was presented with competing visions of the rule of law and the role of each order of government in ensuring the effective exercise of this principle. All this of course was clouded with the legitimacy issue raised by Joli-Coeur. Did the Court, with authority, present society a satisfactory balance between these struggles? Did it provide sufficient answers to the questions, whilst maintaining and re-affirming the legal scope of the issues? Lastly, did the Court maintain its legitimacy, not necessarily with regards to the matter of secession, but in the eyes of the Quebec people, so as not to raise doubt over its allegiance?

THE SUPREME COURT OF CANADA: FACING THE CHALLENGE . . .

The S.C.C.'s decision in this Reference can be reduced to two, albeit oversimplified, points; both rooted in the four constitutional principles which, the S.C.C. claimed, emerge from the Constitution: democracy, federalism, constitutionalism and the rule of law and protection of the minority. First, if a clear majority on a clear question exists, then the pursuit of secession is democratically legitimate; second, if the pursuit is legitimate, then all parties are obliged to negotiate. In short then, the Court demanded, duly or not, clarity. Such oversimplification of the Court's opinion however, does not do justice to the arguments employed, the vision of Canadian federalism endorsed and the understanding of Canadian constitutional principles.

The beginnings . . .

Succinctly capturing the spirit of the Secession Reference in its opening statements, the Court asserted: the questions go to the heart of the system. The case, specifically, question one, "combines legal and constitutional questions of the utmost subtlety and complexity with political questions of great sensitivity."¹²⁴

The Court began by addressing the jurisdiction area. It was quick to silence the concerns raised by Joli-Coeur by invoking the paramountcy principles and reaffirming the hierarchical position of both the S.C.C. and the federal government. The Court stated that s. 101 takes priority over s. 92(14), thus the S.C.C.'s original jurisdiction and advisory function does not conflict with the original jurisdiction of the provincial superior

¹²⁴ *The Secession Reference*, para. 1.

courts; nor “does it usurp the normal appellate process.”¹²⁵ Even if it does, the federal government’s power under s101 is paramount.¹²⁶ The Court then proceeded with a positivist reading of both bodies of law to argue that nothing in the Constitution or international practice prevents the S.C.C. from undertaking an advisory function; thus s. 53 is constitutionally valid.¹²⁷ In light of this advisory role, the Court is able to respond to the second question because the S.C.C. is simply providing an advisory opinion and not a binding one, so it is not acting as an international tribunal.¹²⁸

On the matter of justiciability, the Court found that though the questions deal with issues not yet ripe,¹²⁹ they do deal with legal issues; thus they are justiciable.¹³⁰ The questions raise “issues of fundamental public importance.”¹³¹ The Court then argued that they [the questions] are not too imprecise or ambiguous; sufficient information has been provided to enable the Court to answer the questions.¹³² In short, the Court chose to answer the questions, simply because it was asked to; it tried to employ reasons, the logic of which were shaky, to suggest otherwise, but it remains as the Court initially stated that the questions speak to the heart of the system; in a sense then, maybe they felt compelled to answer the questions.

It further carved out and affirmed a role for itself over the matter when we consider the Court’s decision on when to hear the case. The federal government wanted the case to be heard on the eve of Quebec’s national holiday – St. Jean Baptiste, June 23rd. Justice Lamer, aware of the political controversy that may have arisen, stated that

¹²⁵ Ibid., para. 11.

¹²⁶ Ibid., para. 11.

¹²⁷ Ibid., para. 13.

¹²⁸ Ibid., para. 19.

¹²⁹ Ibid., para. 25.

¹³⁰ Ibid., para. 28.

¹³¹ Ibid., para. 31.

¹³² Ibid., para. 31.

the Court would decide when to hear the case. As Lajoie argues, yes the Court asserting as such re-affirmed its independence from the state; however, it could also be interpreted as the Court looking out for the federal government who apparently was not fully aware of the controversy which may arise.¹³³ I would add that the Court in affirming its independence, asserted its role in Canada's constitutional democratic state as a major player in defining the terms of the Constitution, and perhaps it was also looking out for its own legitimacy in the public eye.

Step one – the matter of secession and sovereignty

The S.C.C. began with the assumption that secession can only be legitimate, legally and subsequently politically, within a constitutional framework. Consequently, the principle of effectivity does not take priority over the Canadian Constitution in general and the amending formula in particular. According to the S.C.C., the principle of effectivity does not apply to the first question; it fails to “provide an extant explanation of justification for an act.”¹³⁴ To accept this principle is essentially an acceptance that Quebec is above the law “simply because it asserts the power to do so.”¹³⁵

Upon reviewing the definitions of secession and unilateral, the Court resolved that the question in this reference is simple: does the Quebec government have the authority under Canadian law to unilaterally effect the secession of the province from Canada without negotiating the terms of separation with the rest of Canada? Secession is understood as “the effort of a group or section of a state to withdraw itself from the political and constitutional authority of that state with a view to achieving statehood for a

¹³³ Lajoie, *Jugements de valeurs: le discours judiciaire et le droit*, 188.

¹³⁴ *The Secession Reference*, para. 107.

¹³⁵ *Ibid.*, para. 107.

new territorial unit on the international plane;” it is both a legal and political act.¹³⁶

Unilateral is understood as “the right to effectuate secession without prior negotiations with the other provinces and the federal government.”¹³⁷ The issue of this case thus is unilateral action understood as such.

Step two: Uncovering the principles

In order to answer this question and to contextualize the issues pertinent to this Reference,¹³⁸ the Court began by outlining the purpose and significance of the Constitution, how the federation evolved, and the fundamental nature of Canada.

Understanding Canada

In discussing the significance of the Constitution, the Court seemed to embrace the provincialist vision of the federal bargain, purpose of Confederation and subsequently federalism in Canada. To begin, the S.C.C. pointed out that the Fathers of Confederation decided upon a federal form of governance to secure acceptance from Canada East and the Maritime colonies looking to ensure the security of both their autonomy and diversity.¹³⁹ Sir John A. Macdonald and his camp, on the other hand, were looking towards a unitary state to avoid the civil unrest occurring in the United States.¹⁴⁰ In essence then, federalism was adopted in order to manage conflict and appease all parties involved. As the Court argued, federalism was a legal response to the underlying

¹³⁶ Ibid., para. 83.

¹³⁷ Ibid., para. 86.

¹³⁸ Ibid., para. 33.

¹³⁹ Ibid., para. 37.

¹⁴⁰ At the time undergoing a civil revolution believed to be caused because the constituent units were granted too much autonomy.

political and cultural identities that existed at Confederation and continues to exist today.¹⁴¹ The federal-provincial division of powers was a legal recognition of the diversity.¹⁴²

In addition to federalism as a form of governance ensuring the protection of minorities, federal institutions and federal guarantees were established to enable the expression of diversity, having the effect of reaffirming its protection. According to the Court, this was secured through “guarantees to protect the French language and culture both directly [by making the French language the official one in the province of Quebec and in Canada as a whole]¹⁴³, and indirectly [by allocating jurisdiction over education and property and civil rights in the province to the Provinces].”¹⁴⁴

The Court, however, did not recognize the constituent units (Quebec and the Maritimes) as nations. It did, nonetheless, recognize them as autonomous and diverse units looking to secure both and able to do so through a federal form of governance. In the S.C.C.’s understanding of Confederation and the purpose of it, we are left with the impression that the constituent units came together as equal partners to form a central government equal to their pre-existing governments. In this sense then, the Court understands Confederation and the aspiration of the units in territorial federalism terms in which provincial equality is prioritized. Further, through federalism, these constituent units were not only able to maintain regional identities, but were also able to express these identities and diversities, mainly through the protection of the French language and through the division of powers.

¹⁴¹ *The Secession Reference*, para. 43.

¹⁴² *Ibid.*, para. 43.

¹⁴³ Whether this came into meaningful and harmonious fruition is a different, albeit important, debate.

¹⁴⁴ *The Secession Reference*, para. 38.

Taking such a simplistic view of the federal bargain enabled the Court to consider it at superficial level. That is to say, on the surface, all of which the Court indicated is true. The French language was secured at the federal level; the provinces were, in theory equal partners in the federal bargain; the division of powers would enable the maintenance and expression of diversity. However, the Court is able to view Confederation in such terms because it denied the imperialist undertones of the BNA Act and it did not look specifically at the BNA Act or Canadian federalism in practice.

As Ryan argues, the Court had a “narrow view of recent history. It quickly glossed over a number of factors that contributed to the rise of the sovereignist feeling in Quebec.”¹⁴⁵ A broader and deeper understanding of the evolution of Canadian constitutional history could have better contextualized the Court’s response having the ultimate effect of perhaps being more open and accommodating and less restrictive to duality.

Nonetheless, flowing from this understanding of the evolution of Canadian constitutional history, the Court argued that “the evolution of Canada’s constitutional arrangement has been characterized by four principles: adherence to the rule of law, respect for democratic institutions, the accommodation of minorities, insistence that governments adhere to constitutional conduct and a desire for continuity and stability.”¹⁴⁶ Consequently, these four principles must guide any approach to the questions and consequently the actions of governments. Since, as the Court stressed, principles are un-stated assumptions which inform and sustain the constitutional text,¹⁴⁷ respect for

¹⁴⁵ Ryan, “Consequences of the Quebec Secession Reference: The Clarity Bill and Beyond,” 13.

¹⁴⁶ *The Secession Reference*, para. 48.

¹⁴⁷ *Ibid.*, para. 49.

these principles is essential to the growth of the Constitution,¹⁴⁸ they are all equally important as no one principle trumps the other.¹⁴⁹ In short, principles are equal or equated to constitutional obligations; in turn they limit government action.

'Principles in Practice'

According to the Court, “the secession of a province from Canada must be considered, in legal terms, to require an amendment to the Constitution, which perforce requires negotiations.”¹⁵⁰ It argued that the right of one government does not trump the rights of Quebec and vice versa. Thus, the majority of Quebec cannot trump the majority of the rest of Canada. The same is true in reverse. The application of the four principles, as understood by the Court, led it to find that secession requires principled negotiations rooted in the Constitution of Canada if a clear majority on a clear question expresses such desire.¹⁵¹ The Constitution, and subsequently, the S.C.C. as the guardians and interpreters of the Constitution, seems to be above the will of both parties involved. In fact, when the Court speaks of the two majorities within the context of the duty to negotiate, it is within the framework of hierarchy; the two majorities are subordinate to constitutional principles, as they are understood by the Court.

Federalism

For the Court, Canadian federalism enables the expression, maintenance, and flourishing of socio-political diversity, secured through provincial governments. It is

¹⁴⁸ Ibid., para.52.

¹⁴⁹ Ibid., para. 49 – 50.

¹⁵⁰ Ibid., para. 84.

¹⁵¹ Ibid., para. 93.

defined as “a political and legal response to the underlying social and political realities.”¹⁵² The Court recognized the diversity of the component parts of Confederation and the autonomy of the provincial governments to develop their societies within their respective spheres of jurisdiction. “The principle of federalism facilitates the pursuit of collective goals by cultural and linguistic minorities which form the majority within a particular province”.¹⁵³ Such a vision is compounded when considering its next observation: “the federal structure adopted at Confederation enables French-speaking Canadians to form a numerical majority in the province of Quebec and so exercise the considerable provincial powers conferred by the Constitution Act, 1867 in such a way as to promote their language and culture”.¹⁵⁴ However, implied in the Court’s view is that this expression of diversity, if it threatens to upset the federal status quo, is not acceptable or permissible. Ultimately, the expression can only be meaningful and come into fruition if it is exercised within the parameters of the Constitution in general and the amending formula in particular.

Protection of the minority

The Court provided a simplistic definition of the principle, arguing that it has always been considered; it is a product of historical compromises. Such consideration was reinforced in 1982 with the entrenchment of the Charter of Rights and Freedoms.¹⁵⁵ However, such understanding is quite narrow in the Canadian context in general and in the context of this Reference in particular.

¹⁵² Ibid., para. 58.

¹⁵³ Ibid., para. 59.

¹⁵⁴ Ibid., para. 59.

¹⁵⁵ Ibid., para. 79.

By virtue of its understanding, supported by the Charter, the Court seemed to support the principle on an individual basis. At no time did it acknowledge group rights of Aboriginal peoples specifically, or the arguments which were presented on this matter. Further, at no time did the Court view minorities as anything but the concern for the individual both in and outside of Quebec. Quebec was further viewed as a province like the others. Aboriginal peoples were viewed, it would seem, as any other socio-political minority group.

As Millard points out, the Court recognized Quebec collective goals and aspirations, but it did not equate it to national minority interest; it understood such interests as falling under the protection of the minority.¹⁵⁶ Further to this, and more detrimental, the Court, in applying this principle to the conclusion of 'a duty to negotiate' ensured the minimal reach of this principle. Because diversity is only viewed at the provincial or individual level and not of the national minority calibre, diversity embodied in the minority and the expression of it, was only acknowledged as legitimate when done within a constitutional framework. This is also true of its, at best minimal, acknowledgment of the Aboriginal peoples. The Court, did not, at any point of its decision, speak of the need for Aboriginal presence at the negotiation table in order to ensure full respect for this principle. Rather, in the Court's understanding, the First Nations were viewed as a minority, but not necessarily an ethno-national minority. A multinational vision of Canada requires the recognition of the existence of national and ethno-national minorities.¹⁵⁷

¹⁵⁶ Gregory Millard, "The Secession Reference and National Reconciliation: A Critical Note," *The Canadian Journal of Law and Society*, 14 No., 2 (Fall 1999):13.

¹⁵⁷ *Ibid.*

In short, federalism coupled with the protection of minorities, we begin to recognize, as Ryan argues, that the Court speaks of diversity not of duality;¹⁵⁸ the former term is safer as it has fewer implications on the Canadian constitutional order. In speaking solely of diversity and not distinguishing it with duality, the Court weakened the importance of duality.¹⁵⁹ I would add that the Court also neglected the reality of the concerns raised by and the status of Aboriginal peoples in the federation. Ryan goes on to ask, “How could it [the S.C.C.] completely avoid the use of the word duality in such a long text¹⁶⁰ except on purpose?” Duality is a political reality. Everything considered then, we recognize that Canada, for the Court, is viewed as one nation with minorities and not necessarily a bination or a multination consisting of national minorities.

This conclusion is further strengthened when considering the Court’s understanding of democracy and constitutionalism and the rule of law. It claimed that no one principle trumps the other, yet in its insistence on a clear majority on a clear question and a constitutional amendment, it would seem that the Court placed these two principles, with greater emphasis on the rule of law, above those of federalism and respect for minorities.

Democracy

The Court began with a traditional and positivist view of democracy; it is “the process of representative and responsible government and the right of citizens to participate in the political process as voters.”¹⁶¹ Further, the Court asserted that because

¹⁵⁸ Ryan, “Consequences of the Quebec Secession Reference: The Clarity Bill and Beyond.”

¹⁵⁹ *Ibid.*

¹⁶⁰ Characterizing Canada’s constitutional structure.

¹⁶¹ *The Secession Reference*, para. 65.

the rule of law is tied to the democratic principles reaching beyond simply majority rule, democratic institutions need to appeal to moral values which are embedded in Canada's constitutional structure.¹⁶²

The Court continued to argue that discussion and negotiations are important; in the end the voice of the minority must be considered. The two legitimize democratic institutions.¹⁶³ Further, the Court argued that the existence of democracy and its underlining principles "imposes a corresponding duty on the participants in Confederation to engage in constitutional discussions in order to acknowledge and address democratic expression of desire for change in the province."¹⁶⁴

The Court narrowed its conception of democracy when applying it to the idea of 'a duty to negotiate'. In asserting that the will of the majority in this case the people of Quebec wishing to secede demands a duty to negotiate on the part of the other parties, the Court qualified this duty by demanding clarity. That is, the Court was quite adamant in stating a *clear majority* implies a duty. The Court viewed *clear majority* as a qualitative evaluation; "the will must be free of ambiguity both in terms of the question asked and in terms of the support it achieves."¹⁶⁵ In the past two referenda the democratic principle of 50 per cent plus one constituting a majority was not questioned. By demanding clarity, it intimates that this principle is not sufficient to legitimize a desire for secession. In this sense then the government does not have the duty to acknowledge Quebec's desires if the minimum criterion is not met.

¹⁶² Ibid., para. 67.

¹⁶³ Ibid., para. 68.

¹⁶⁴ Ibid., para.69.

¹⁶⁵ Ibid., para. 87.

Further to this, the Court created and established quite the hurdle for Quebecers by demanding clarity. Clarity because it is fluid and relative, is in fact unachievable; what is clarity? And to a certain extent, it is undesirable. Clarity demands one agreed upon discourse to the exclusion of all others; conversely, “democracy implies a continuous process of deliberation, dialogue, discussion and debate. Terms are not defined with unequivocal certainty, as the comprehension of these terms function in the context which they are used.”¹⁶⁶ To demand clarity, is in fact to demand uniformity. In general, this is difficult to achieve. In Canada, it is much more difficult; Canadians and their political elite, since time immemorial, have had different and often conflicting views of the federation and the role of government. This has been quite evident in the four references reviewed and the conflicting arguments vis-à-vis the nature of Canada presented.

Such a hurdle is further confirmed when we consider the Court’s understanding and application of constitutionalism and the rule of law. It is through these two principles that the Court re-asserts the primacy of the Constitution and in turn the federal status quo.

Constitutionalism and the rule of law

Constitutionalism and the rule of law are similar, but distinct in what each requires: “the constitutionalism principle requires that all government action must comply with the Constitution. The rule of law principle requires that all government action

¹⁶⁶ François Rocher, and Nadia Verrelli, “Questioning Constitutional Democracy in Canada: From the Canadian Supreme Court Reference on Quebec Secession to the Clarity Act,” in *The Conditions of diversity in Multinational Democracies*, ed. Gagnon et al. (Montreal: the Institute for Research on Public Policy, 2003) 212.

comply with the law, including the Constitution.”¹⁶⁷ Thus if Quebec wants to secede, it must do so within a constitutional framework, one that it has yet to agree to.

The Court proceeded to rule out the possibilities of the two extremes: first, all provinces and the federal government are legally obliged to agree to the secession of a province; the parties are not legally obliged to agree; they must, however, conduct themselves according to the four principles.¹⁶⁸ Second, Quebec dictates the negotiations by invoking the right to self-determination; this would not be negotiations at all. If Quebec were to cast unilateral secession as a legal entitlement, it would be negating all other principles.¹⁶⁹ But beyond that, it offered no other clarification. In fact, it decided to hide behind the political skirt to assert that the finer details of negotiations,¹⁷⁰ that is, who in particular is to be involved, which amending formula is applicable and what to do in the event of a stalemate, are beyond their scope.¹⁷¹ The political is no place for the Courts.¹⁷² Despite this declaration, the whole decision *is* political!

This understanding and suppression of diversity for the benefit of territorial integrity and in turn perceived stability and order is affirmed when considering how the Court understood the application of international law to the matter of Quebec secession. In fact, when addressing the second question, the Court takes the opportunity it did not explicitly have in the first question to ensure that territorial integrity trumps UDI. For the first question, constitutional integrity represented the trump card.

¹⁶⁷ *The Secession Reference*, para. 76.

¹⁶⁸ *Ibid.*, para. 91.

¹⁶⁹ *Ibid.*, para. 91.

¹⁷⁰ I am quickly reminded of the age old saying of *the devil is in the details*.

¹⁷¹ *The Secession Reference*, para. 101.

¹⁷² *Ibid.*, para. 101.

International law

The Court, in giving meaning to the body of international law, reaffirmed the arguments originally presented by the federal government in their factum. According to the Court's understanding of international law, importance is placed on the territorial integrity of the nation state. Thus, the creation of states or nations is best determined by domestic law. Furthermore, Quebec's right to self-determination does not give it the right to unilaterally secede. Dismissing Quebec's dissatisfaction with the workings of the Canadian federation, the Court found that Quebec cannot, under international law, unilaterally effect the secession of the province. The right to unilateral secession applies only to those Peoples who are under colonial rule, oppressed by foreign control, or who have no access to government. Since this does not apply to Quebec Peoples, if its government were to secede unilaterally, it would be illegitimate under both bodies of law.

In short, the Quebec government, neither by virtue of international law nor by Canadian law, can effect the secession of the province unilaterally. However, if a clear majority on a clear question expresses the desire to secede then there is a duty to negotiate upon Quebec and the rest of Canada. So, it reached the *much desired balance* – at least it gave the impression to political, legal, and media pundits that it delivered.

Considering such firm declarations, promises and commitments expressed by political actors prior to and upon the release of the decision, it is not surprising that the federal government and its supporters, and the Quebec government welcomed the Court's decision of a *duty to negotiate* if there is a *clear majority* on a *clear question*. Both camps were able to point to different aspects of the Court's opinion and claim to be *victorious*. Jean Chrétien commenting on the clear majority criterion, exclaimed,

“according to the Court, the results could not be ambiguous in any way.”¹⁷³ Lucien Bouchard too rejoiced in the opinion stating that the Court, in recognizing the duty to negotiate, “endorsed what sovereignists have been saying for 30 years – after a Yes vote there will be negotiations.”¹⁷⁴ According to Guy Bertrand, “This decision is for the citizens. You have fundamental freedoms in this country and they are protected now against a unilateral declaration of independence.”¹⁷⁵ Matthew Coon-Come, grand chief of Quebec Cree also found victory in the decision: “I think the courts are very clear that, if there are any discussions, aboriginal peoples have to be involved. The Supreme Court right now has acknowledged and confirmed aboriginal rights.”¹⁷⁶

In the final analysis, we recognize that the Court’s opinion was fraught with assumptions and implications on Canadian federalism in relation to the Constitution and the responsibilities of both orders of government to each other and to the Constitution. The Court in this case seemed to adopt a broad understanding of the four principles. However, it narrows such understanding when employing the principles. It did not recognize the interests and aspirations of one nation pitted against those of another. Instead, it viewed the aspirations of Quebec as a Canadian province against the wishes of the other parties involved as equal entities; this struggle was pitted against the implied obligations arising from the four principles underpinning the Canadian Constitution. (Note that the ‘other parties involved’ is limited to government and not necessarily other groups as the governments have a role to play whereas non government parties need only to be considered). Thus, it would seem, by virtue of this decision, that it is more

¹⁷³ Wendy Cox and Mark Dunn, “Chrétien, Bouchard claim victory,” *The Calgary Herald*, [Calgary], 22 August 1998, A3.

¹⁷⁴ Bernard Descôteaux, “B comme dans boomerang,” *Le Devoir*, [Montreal], 21 August, 1998 A10.

¹⁷⁵ Calgary Herald, “Quotable,” *The Calgary Herald*, [Calgary Herald] 21 August 1998, A6.

¹⁷⁶ *Ibid.*, A6.

important to respect the Constitution and the rule of law, understood in this constitutional framework, than the other principles in order to maintain the integrity of the territory. In short, the expression of diversity is encouraged so long as it takes place within the parameters of the Constitution. Outside the parameters of the Constitution, the expression is illegitimate.

RECEIVING THE DECISION

The media . . . forgetting past reservations

Despite the hesitancy and scepticism expressed by some of the English media, and despite the uncertainty of the initiative and the S.C.C.'s authority on the matter evident in the French media, both camps, with some exceptions, were pleasantly surprised and satisfied when the Court released its opinion. This, of course, is not shocking considering the Court endorsed tenets professed by those on both sides of the debate. It managed to support the federal government while not overly offending and upsetting Quebec.

For the most part, acceptance of the decision by English Canada and by Anglophones in Quebec centred on the notion that not only can Quebec not legally declare independence unilaterally, but also, it now is obliged, in any future referendum to ask a clear question and obtain a clear majority.¹⁷⁷ According to William Johnson of Alliance-Quebec, “on ne peut plus prétendre, maintenant, que seuls les Québécois

¹⁷⁷ Focus on these two aspects of the Court's opinion becomes blatantly obvious when observing the federal government's legislative initiative to clarify the rules. In the Clarity Act, passed in the year 2000, the federal government stressed the importance of Quebec attaining a clear majority on a clear question without defining the criteria. It did so by clearly asserting that the federal government will not negotiate unless the two were sufficiently realized. Relying upon the S.C.C.'s opinion in the Secession Reference, the federal government claimed to be simply reaffirming the views of the Justices. In response to this initiative, the PQ returned with its own legislation. Through Bill 99, the National Assembly affirmed that les Québécois and les Quebecois alone determine their future.

francophones ont leur mot à dire. Et c'est vraiment la fin de la baguette magique de Lucien Bouchard!"¹⁷⁸ According to Robert Bragg of the *Calgary Herald*, the S.C.C. restored democracy in the Canadian federation:

[The decision] helps everybody, including the hardliners, understand that Canada cannot be broken up by stealth or without an open, democratic and fair political process. The future of Canada can no longer be determined by the fanatical plans of a small minority of powerful, unscrupulous people [...] That should make future referendums, if there are any, much less frightening and much less vulnerable to fraudulent manipulation.¹⁷⁹

In a similar fashion, acceptance by the Quebec media and political actors rested on the federal government's duty to negotiate; no longer can the federal government and the rest of Canada threaten 'no negotiation' in the next potential referendum. According to Bernard Descôteaux of *le Devoir*, the Court's decision changed the Canadian constitutional debate. By arguing that the federal government has a constitutional obligation to recognize the results of a referendum, the Court, "donne à ce projet un caractère non seulement légitime mais, ultimement, légal."¹⁸⁰ Michel Venne, also from *le Devoir*, contends that the Court through this decision though did not give Bouchard the electoral arguments he predicted, the sovereignists are still able to gain from the decision. This much was affirmed by Brassard who "a mis en lumière hier le fait que ce jugement rend légitime le combat souverainiste au sein du Canada tout en obligeant le Canada à négocier avec le Québec si une majorité claire, répondant à une question claire, vote en faveur de la sécession."¹⁸¹

¹⁷⁸ Marie-Claude Ducas, "Les Anglophones sont contents," *Le Devoir*, [Montreal], 21 August, 1998, A2.

¹⁷⁹ Robert Bragg, "Canada and Quebec now have a plan to follow," *The Calgary Herald*, [Calgary], 23 August 1998, A14.

¹⁸⁰ Descôteaux, "B comme dans boomerang," A10.

¹⁸¹ Michel Venne, "Un accalmie," *Le Devoir*, [Montreal], 21 August, 1998, A1.

By focusing solely on the different ways in which the media interpreted the decision, we fail to account for the tacit reverence the media gave to the Court for theoretically reaching a good, sensible and well thought-out decision; in fact, the Court's opinion was hailed as "Solomonic" suggesting "that it wisely gave something to both sides."¹⁸² An article published in the Calgary Herald reviewed various editorials published in different newspapers around the country. The general sense emerging from the editorials was one of gratefulness for the Court's sensibility in its balanced decision.¹⁸³ It was perceived that both sides received a piece of the prize. By striking such a supposed balance, the Court was able to secure acceptance of its opinion from both sides; in turn, it reaffirmed its legitimacy.

It should be noted that this sentiment was not universally shared by all editorialists and columnists. Josée Legault actually questions the true implications of the Court's decision. According to Legault, the decision is in fact a return to colonialism as it represents the imposition of the federal government's will onto the people of Quebec. In addition to this will being imposed by the Court through the destroying of Bill 101, the validation of the Constitution Act, 1982, and denying its traditional constitutional veto in 1982, the Court, in this Reference, "soumet notre droit à l'autodétermination au veto d'Ottawa et du Canada anglais."¹⁸⁴

Claire Hoy of Southam News views the opinion as a weapon for the Quebec sovereignists, one "they didn't have before [...] Now thanks to the court ruling,

¹⁸² Michael Mandel, "A Solomonic Judgment?" *Canada Watch*, 7, 1-2 (January/February 1999): <http://www.yorku.ca/robarts/projects/canada-watch/> [July 20, 2004].

¹⁸³ Calgary Herald, "Secession debate now has a legal foot to stand on," *The Calgary Herald*, [Calgary], 22 August 1998, 15.

¹⁸⁴ Josée Legault, "Comme si le Québec vivait une seconde Conquête," *Le Devoir*, {Montreal}, 25 August 1998, p. A7.

[Chrétien] will have to sit down and do just that [negotiate] if the separatists win a ‘clear’ majority in the next referendum.”¹⁸⁵ She ends her article with a rather bleak statement: “for those who truly love this country and want to keep it together, the Supreme Court hasn’t done you any favours.”¹⁸⁶ On average though, the decision was hailed to be a victory for all.

BALANCED DECISION?

A normative assessment by political agents

McRoberts argues that though the Supreme Court decision was incomplete as it did not iron out the politics – which amending formula, the meaning of clear majority – it does however, “provide a leadership that had been wanting among political and intellectual elites alike.”¹⁸⁷ Considering the above analysis, we are left to wonder whether or not McRoberts has an enthusiastic reading of the decision. Can it be safely argued that the Court provided the leadership McRoberts refers to when it failed to provide clarity?¹⁸⁸ Can it be argued to have provided leadership when a particular vision of federalism, perceived to generate stability and order was championed – a vision which supports one side while de-legitimizing the other? As Jose Woehrling argues, “should another separatist government embark on the same strategy, the Supreme Court ruling

¹⁸⁵ Claire Hoy, “Ruling on secession a blow to patriots,” *The Calgary Herald*, [Calgary], 27 August 1998, A15.

¹⁸⁶ *Ibid.*

¹⁸⁷ McRoberts, “In the Best Canadian Tradition.”

¹⁸⁸ Rocher and Verrelli, “Questioning Constitutional Democracy in Canada: From the Canadian Supreme Court Reference on Quebec Secession to the Clarity Act,” 214

will make it easier for the federal government, or indeed any citizen, to challenge its validity or even to ask for a court order prohibiting a new referendum.”¹⁸⁹

The federal government is now constitutionally obliged to recognize a successful referendum on the issue; but how strong is the obligation when clarity remains ambiguous? If it can decide the parameters of a clear question and a clear majority – as it attempts to do in the Clarity Act – then how valuable is this *duty to negotiate* viewed as victorious for the Quebec government, the separatists and the nationalist movement? In short, it remains highly dubious whether the Court provided the much desired leadership to which McRoberts refers. What does emerge clear from the Court’s opinion is the reinforcement of the federal status quo and the Court’s legitimate role in maintaining this ‘norm’.

As Robert Young points out, by showing how the Constitution is infused with these four principles and how it has a right and the jurisdiction to define them, the Court carved out a legitimate role for itself.¹⁹⁰ This legitimacy was further reinforced when the Court affirmed that a yes vote means the federal government has the duty to recognize the results and negotiate. Young argues that the Quebec government and Quebec separatists and nationalists, in using the Court’s arguments of a duty to negotiate, in fact strengthen, solidify and secure the legitimacy of the Court in Quebec.¹⁹¹ As Mandel beautifully states “the Court reads the polls. It knows that the sovereignists have been

¹⁸⁹ Jose Woehrling, “Unexpected Consequences of Constitutional First Principles,” *Canada Watch*, 7, 1-2 (January/February 1999): <http://www.yorku.ca/robarts/projects/canada-watch/> [July 20, 2004].

¹⁹⁰ Robert Young, “A Most Political Judgment,” in *The Quebec Decision: Perspectives on the Supreme Court Ruling on Secession*, 109.

¹⁹¹ *Ibid.*, 110

weakened, and it knows that nothing strengthens weak sovereignists like fresh insults from Canadian institutions. Better to show a little rhetorical generosity.”¹⁹²

Brilliantly portraying balance, the decision cannot be, and was not initially viewed by political and media pundits as a decision rendered by a centralist institution working towards the maintenance of a centralist agenda. Paul Wells of the *Calgary Herald*, recognizes that the Court corroborated the federal government’s position; “Chrétien could not have hoped for a Supreme Court ruling that more closely matched his government’s rhetoric.”¹⁹³ This endorsement of the federal government’s position was reaffirmed through the acceptance or absent outrage from Quebec. What Wells does not acknowledge in his column is that, in its acceptance of the opinion and abandonment of its earlier scepticism vis-à-vis the government’s initiative, the media not only reaffirms the federal government’s position, but also advocated the Court’s sensible, thoughtful and balanced decision.

The Court here has proven to be successful in reinforcing its neutrality. By maintaining what was perceived to be the norm and the status quo, the Court secured that its decision would be accepted by society. Lajoie argues that when the Court makes a mistake on the “acceptable character of values of its audience or community, or even attempts to impose on this audience its will, the Court risks its credibility [...] the legitimacy of the Court then becomes the object of its condemnation.”¹⁹⁴ Considering the reaction of both the media and political pundits, the Court avoided being criticized,

¹⁹² Mandel, “A Solomonic Judgment?”

¹⁹³ Paul Wells, “Judges gave Chrétien & Co. everything they asked for,” *The Calgary Herald*, [Calgary], 21 August, 1998, A19.

¹⁹⁴ Lajoie, *Jugements de valeurs: le discours judiciaire et le droit*, 189, my translation.

discredited or even having its wisdom questioned. In fact, the Court was praised for its decision.

CONCLUSION

Mandel argues that the Court was not biased towards the intentions and agenda of the federal government and it certainly was not in favour of the intentions, aspiration, and agenda of the Quebec separatist movement.¹⁹⁵ Instead, the Court was and “is biased in favour of federalism [and it] will always put the federalist interest first.”¹⁹⁶ In fact, the Court began its definition of federalism by asserting that it is the dominant principle of Canadian constitutional law.¹⁹⁷

This bias towards a concept of Canadian federalism had and has the ultimate intention of keeping the federation intact even if it means curtailing the aspirations of a movement wishing to express its dissatisfaction with the federation in the only way it sees as effective. This does not automatically lead to the conclusion that the Court fully and solely endorsed a mononational approach to the understanding of Canadian federalism. But ultimately, it was informed by an expansive yet qualified mononational understanding in its assertion that secession requires principled negotiations. The S.C.C., under the guise of expanding its understanding of democracy and constitutionalism in Canada, in fact resorted to a similar approach adopted by the federal government, albeit a little more expansive, to the understanding of Canadian federalism.

Maybe the federal government was not completely victorious in this decision, but it was certainly served with the ammunition it needed, and will need, to de-legitimize and

¹⁹⁵ Mandel, “A Solomonic Judgment?”

¹⁹⁶ *Ibid.*

¹⁹⁷ *The Secession Reference*, para. 57

in turn, curtail future endeavours of a secessionist movement or potentially, any movement questioning the nation-state. The S.C.C. did so by asserting on more than one occasion that a clear majority on a clear question was the minimum basis required to effect the duty to negotiate. As Rocher and I have argued, “essentially, the Court, by requiring that the political actors determine if the conditions of clarity are respected, granted one party *un droit de regard* over the other (in this circumstance, the rest of Canada over the Quebec approach).”¹⁹⁸

The genius of the Court in its opinion was its portrayal of a neutral understanding of Canada, if one can be said to exist, while endorsing a restrictive understanding of federalism, one that serves the federal government and the Court well. In the end, the Court reinforced the primacy of the Constitution and the hierarchy of the nation-state while confining the expression of diversity and the fruition of duality.

At this point, the work of Lajoie becomes all the more insightful. In her study on the Court, Lajoie concludes that the S.C.C. could, in good conscience and more importantly, without putting into question its credibility or legitimacy, rely upon and sanction the dominant ideology, understood as the norm, and toss out those which contradict the majority.¹⁹⁹ This is exactly what the Court did. It reinforced the federal government’s vision of Canada and set aside the views of Quebec by insisting that the legitimate expression of diversity must take place within the established and accepted (by the majority) constitutional framework. This all works to validate the federal government and the Court’s implicit support of the federal agenda. The key however, is that such

¹⁹⁸ Rocher & Verrelli, “Questioning Constitutional Democracy in Canada: From the Canadian Supreme Court Reference on Quebec Secession to the Clarity Act,” 213.

¹⁹⁹ Lajoie, *Jugements de valeurs: le discours judiciaire et le droit*, 110.

legitimacy and support of the federal agenda remains unspoken so as to maintain the ideal of neutrality and balance.

Mandel agrees with the various characterizations of the decision as Solomonic by different media analyzers; however, not for the same reasons. Rather, the Court gave the impression of giving something to both sides. In the end, a particular understanding of Canadian federalism was endorsed by the Court; an understanding which substantiated the federal government's position and curtailed the aspirations of the Quebec people.

CONCLUSION

INTRODUCTION

Rainer Knopff argues that “federalism shapes the perception of most public issues in Canada.”¹ This is true not only of the perceptions held by society, but also of those held by the Supreme Court of Canada. Conceptions of federalism in general and ideas of how the Canadian federation ought to operate in particular are not divorced from the Supreme Court’s understanding of how the Constitution ought to be applied when it tests the constitutional validity of government legislation or action.

In the span of eighteen years, the Supreme Court of Canada delivered four opinions, all speaking to the heart of Canada’s federal identity. The opinions rendered in the Senate Reference, the Patriation Reference, the Quebec Veto Reference and the Secession Reference have proven to be influential in the evolution of Canadian constitutional politics and also on the perception of Canada as a federation and ideas of the obligations of each order of government to the Constitution, to Canadian federalism, and to the people. The implications of these opinions seemed to grow, with each one presenting a new challenge for the S.C.C., the Constitution, and for society, its players, and its institutions. Who has power and the ability to alter fundamental features of Canada’s Constitution influences how Canada as a federation understood in theory and how it evolves in practice. Such understanding weighs heavily on the policies of the federal government, the role of federal institutions in the federation, the way in which political players conduct themselves in negotiations with their federal and/or provincial

¹ Knopff, “Federalism, the Charter and the Court: Comment on Smith’s ‘The Origins of Judicial Review in Canada’,” 589.

counterparts, and the support of society for any given political and constitutional agenda, and finally, how the nation is perceived. In all the four references, the Court found itself not only to be in the middle of it all, but also to be the determining institution setting the parameters of potential constitutional conduct and in reaffirming its legitimacy and the legitimacy of the state as a mononational federation.

In this dissertation I have argued that underpinning the decisions of the S.C.C. is a particular conception of Canadian federalism akin to a mononational approach to the understanding of federalism. Emerging from this, I have made three claims. First, the Court, in its support and endorsement of a mononational understanding of federalism, has in fact reinforced the norm and sustained the dominant ideology at any given time. This resulted in the acceptance of a one nation state ideal and the rejection and silencing of any conception of Canada challenging the nation state. That is to say, the expression of diversity is entertained so long as the one nation state ideal is not disturbed.

Second, the Court was pushed into and accepted the role of political mediator. And third, throughout the four references, the Court ensured its legitimacy. In other words, not only did the Court secure its role as a neutral arbitrator and guardian of the Constitution, but it located its opinion within the text of the Constitution. Consciously or not, the Court secured that its vision of the Canadian federation went unnoticed. Herein lays the genius of the Court. Its opinions were not necessarily interpreted as endorsing one vision over another or of sustaining the one nation ideal. Rather, focus remained on how the Court was able to diffuse conflict by rendering “balanced decisions.” By the Court accomplishing such a feat, its neutrality and more importantly, its legitimacy remained intact despite the fact that it was pushed into an essentially political role.

Commenting on the opinion rendered by the S.C.C. in the Senate References, Russell Knopff and Morton indicate that “the decision pointed to possible important longer term consequences insofar as it suggested that the Supreme Court might be a serious obstacle to unilateral federal restructuring of the Canadian Constitution.”² I would argue that such an obstacle would prove to be so for both federal and provincial governments wishing to unilaterally amend the Constitution or wishing to unilaterally prevent the amending of the Constitution when such amendments are akin to the dominant ideology. In other words the Court would be the political mediator to ensure that the status quo is not terribly upset. However, the Court does not portray itself to be the obstacle. Instead it is the Constitution and the principles emerging from the Constitution which prevents the unilateral alteration of the federal bargain and of the Constitution.

At this point the Court’s understanding of the federal bargain becomes important. Though at first glance, the Court may have seemed to have embraced different visions of the federation and of the federal bargain, it in fact leaned on the side that maintained the ideal that Canada is one nation (even when faced with the two nations or multination concept). In turn, it chose a path; one which the Court perceived to ensure the stability of the federation.

REINFORCING THE NATION

Common in the Senate Reference, the Patriation Reference, the Quebec Veto Reference and finally the Secession Reference, is a reaffirmation of a particular conception of the nation state and vision of the Canadian federation. First hinted at in the

² Russell, et al., *Federalism and the Charter: Leading Constitutional Decisions: A New Decision*, 694.

Senate Reference, then pronounced in the Patriation Reference, affirmed in the Quebec Veto Reference and again relied upon by the S.C.C. in the Secession Reference, the federalist agenda of promoting Canada as a one nation state made up of equal individuals and provinces was the victor. Though in three of the four references, the Quebec Veto Reference being the exception, it would appear that the federal government was not the unequivocal or explicit victor, its conception of the Canadian federation was in fact promoted and endorsed by the S.C.C.

In the Senate Reference, the Court, in its opinion, secured the legitimacy of the Senate as an institution made up of federal appointments. In ruling as it did, the Court gave the impression that the provinces have had and continue to have a role at the centre; the federal government alone cannot abolish the Senate. In addition to finding that the Senate cannot be unilaterally altered, where the alterations affect the fundamental nature of the Senate, by one order of government, it also found that a key feature of the Senate is that it is an appointed body. In turn, the Court legitimized the role of the federal government as the sole appointers of an institution which more often than not acts on the behest of the federal government.³ Indirectly then, the S.C.C. strengthened the position of the federal government.

The same is true of the Patriation Reference. At first glance it may have seemed that the decision was a balanced one, giving both sides a leg to stand on. When analysed more closely, however, we recognize that the federal government with its vision of the Canadian federation was the victor. Legally the federal government was able to formally request the British Parliament to patriate the Constitution without the prior consent of the

³As indicated in Chapter three, critics of the Senate often argue that the Senate almost always agrees with the government of the day; this leads to the questioning of the effectiveness of the Senate.

provinces. It was or is only by way of convention that provincial consent becomes mandatory. Politically therefore, the provinces are equal to the federal government. Legally, however, it would seem by virtue of this decision that there is a hierarchy between the two orders of government with the provinces subordinate to the federal government. Confirming this federal victory, the Court throughout its decision clearly stipulated that the law outweighs political convention.

The Quebec Veto Reference was the one case in this study where we witnessed the outright rejection of the constitutional recognition of dualism in Canada. The Court's endorsement of a mononational state affected the province of Quebec and the vision held by its leaders at the time in a way that the other decisions did not explicitly. The Court legitimized the exclusion of one of Canada's four original provinces of Confederation. In doing so, it not only enabled and legitimized the constitutionalization of a pan-Canadian understanding of Canadian federalism, but it also, and more importantly, de-legitimized claims of dualism and the ability to accommodate diversity with unity. The political legitimacy of the new Constitution was therefore ensured.

In the Secession Reference, not only did we witness the rejection of dualism via the Court's placing the Constitution in a hierarchal position vis-à-vis the other tenets of federalism; but the Court also ensured the federal government's position in the federation to de-legitimize, constitutionally, any call for a fundamental change or questioning of the state. The Court did so by demanding clarity and by affirming that any expression of diversity must take place within a constitutional framework, a framework which the province of Quebec has refused to sign on to because it embodies a vision of Canada to which it does not subscribe.

This reaffirmation of the one nation ideal with a hierarchy is further evident when considering how the Court dealt with the silence of the law relating to the particular issue under review of each case. On the surface it may seem that the Court treated this silence differently: in the first case, the silence meant the federal government could not unilaterally abolish or fundamentally amend the Senate; in the second, nothing explicitly written in the Constitution legally prohibited unilateral patriation of the Constitution; the Quebec Veto Reference dealt exclusively with convention and the lack of explicit consensus on the part of the political players meant that there was no constitutional veto for the government of Quebec; in the final reference, the silence was interpreted as prohibiting or not enabling a unilateral declaration of independence. However, upon closer analysis, we recognize that the silence of the law, regardless of the seemingly different interpretation, had the same outcome – reinforcement of the nation state as understood at the time and throughout the years that these four references were heard; legitimization of the Court as a marquee player in Canada’s constitutional game; and the sustaining of the federation and its central institutions understood in mononational terms.

A pattern thus emerges when we look at the four opinions as such. The (one nation) state as long as it is not questioned or shaken will allow for the accommodation of diversity, either politically, but especially, socio politically and culturally. The Court safeguards this ideal. The federal government, which embodies this ideal, promotes it. The provinces, if they can *tweak* their arguments within this ideal can flourish as was the case in the four references, especially the Senate and the Patriation References. The government of Quebec was able to flourish, in the sense that their position was welcomed

by the Court, only because it fit well with the dominant discourse. In the last two references, such accommodation and acceptance was not necessarily available to them.

THE CHOSEN PATH

Path dependency can help us put the opinions of the Court into perspective. That is, the Court did not decide X because it is an institutional fact, or because it was written in the Constitution. How the Court dealt with the silence of the law is indicative of this. Rather, many factors at play, including past decisions led the Court to decide as it did. First, beginning with the Senate Reference, the Court accepted the political mediator role it was asked to play by the governments. Second, in all four references, the Court continued to re-affirm the dominant ideology of the time.

It is at this point where the political environment becomes especially important to this study. That is, it is not enough to argue that the Court in all four referendums rendered opinions which maintained a “balance”. We need to look at the political and social context in which the issues took place. According to Russell, the S.C.C. decided to hear the Patriation Reference for three reasons:

- (1) the country was in the midst of a constitutional impasse;
- (2) due to the impasse, it was assumed “by the people and the politicians that a Supreme Court decision was the next essential step in resolving the crisis;”
- (3) taking this into account, it may have done “greater damage to the constitutional fabric of the country [by refusing to answer the question] than would stretch the notion of justiciability to embrace what the Court regarded as a constitutional question of a non-legal kind.”⁴

It would seem that these reasons apply to the other three references as well. The country, at least the impression was created, seemed to be in a crisis. Because of this impasse, and I would add because of the role the Court carved out for itself in the Senate

⁴ Russell, “Bold Statescraft, Questionable Jurisprudence,” 6-7.

Reference, or maybe even before, there seemed to exist an unspoken assumption that *going to the Supreme Court* was the only next logical step. And finally, because of this expectation, the Court had to answer the questions or risk generating a “greater harm to the constitutional fabric.” They certainly did not seem to shy away from this expectation. In fact, the Court choosing not to “rock the boat” rendered “balanced opinions” and ensured that it would continue to be a player in the constitutional and political wrangling between Canada’s governments.

All four References were rooted in a particular dispute between either the two orders of government or between the Canadian state and the Quebec state. At core of the political impasse were different and conflicting views of the Canadian federation which the Court has to settle. Basically three visions of the Canadian federation emerged. The first held by the provinces and rooted in the idea of provincial equality and autonomy within one’s jurisdiction outlined in the BNA Act, was underpinned by the provincial compact theory of Confederation. Temporarily, it was reconciled and seemed compatible with the second vision held by Levesque and Quebec nationalists. This second vision, rooted in the dual compact theory of Confederation and consequently underpinned by a binational vision of Canadian federalism, also championed provincial autonomy and equality of the two orders of government. However, where it differed from the previous vision and the following vision remains the place of Quebec in Canada. French Canadians, a majority of whom reside in Quebec, claim that Canada was “founded by two great nations,” both equal to the other. Quebec thus is a province unlike the others; the constitutional framework and Canadian federalism should reflect this reality and subsequently Quebec’s distinct nature. I mentioned that the first two visions were

temporarily reconciled; this is based on the agreement reached between Lévesque and the other seven provinces where Lévesque ‘gave up’⁵ Quebec’s historical veto for the constitutionalization of opting out with compensation. Under such a scheme, the Quebec government would have been able to opt out of all and any constitutional amendment when it felt that its autonomy, culture, or language was threatened.

The third vision is centred on Trudeau’s ideas of pan-Canadianism. This vision was eventually reconciled with the first and constitutionalized in the Constitution Act, 1982, where, as we saw in the Patriation and Secession References, the one nation ideal (all individuals and provinces are equal) was affirmed. Trudeau’s vision of Canada centred on the idea of promoting one Canadian identity rooted in bilingualism, multiculturalism, and most importantly, individual rights. All this would be secured with a strong central government with which Canadians, French, English, and other linguistic and cultural groups alike can identify and rely on to protect and promote their individuality. It is this vision, slightly modified with the first vision, which captured society during Trudeau’s reign in office and continues today.

The first vision, similar to this pan-Canadian vision, is as mentioned, rooted in the idea that Canada is made up of one nation – no one province is unlike the other and no individual is different based on their place/province of residence. Because the basis of these two theories is similar, they are compatible.⁶ Provincial autonomy and provincial equality does not threaten the one nation concept, thus the nation state remains

⁵ In defending their actions of the night of the long knives, the nine provincial premiers as well as officials in the federal government, most notable Trudeau and Chrétien, often claim that in this agreement Quebec voluntarily relinquished its demands for a constitutional veto. What they fail to mention in relying upon this argument is the fact that Levesque only agreed to this provided that opting out of constitutional amendments, where the amendments affected their legislative authority, with compensation was secured in a new constitutional package. Thus, this hardly qualifies as a complete relinquishing of the veto as the political actors claimed and continue to claim.

⁶ In this sense they are compatible; but compatibility between the two is not necessarily always ensured.

unchallenged. Dualism and the associated consequences of two nations, distinct society, and different powers for different legislatures on the other hand, have the very real potential of challenging the nation-state and in turn pan-Canadianism. If Canada is believed to be one nation where every individual is equal and the federal government is best equipped to represent the interests of the nation as it is the government of this one nation, then there is no need for any one legislature to have certain powers different from other legislatures in the federation to promote and protect an individual's or collective's interests and identities. However, if Canada is in fact dualist by nature, and from this the idea of two nations equal to each other living side by side is embraced, then each government representing each of the distinct nations or peoples ought to possess the powers and latitude to promote the interests and identities of that nation. The nation-state in this scenario is not only represented by the central government, but by other governments as well so as to better ensure the vitality, strength, and protection of both nations.

The government of Quebec, by bringing forth a challenge based on the dualism principle in the Quebec Veto and the Secession References, challenged the one nation idea. (It was also challenged by the Aboriginal Peoples). In essence then, it was asking the Court to perceive Canada differently from the dominant ideology held by not only the federal government, but by other governments and society outside the nationalist circles of Quebec, and from the Court. The Court was being asked to deconstruct the nation state and reconceptualize it so as to accommodate the two nations theory. It was unlikely that the Court would take on such a political and academic endeavour. Further, it is much more doubtful that the Court would have entertained such a concept which threatens the

status quo, the potential stability of the federation, and a concept which fundamentally repudiates the commonly held perception of Canada. The Court had to consider its legitimacy and its role in the eyes of the society.

Further, in the Secession Reference the arguments of Aboriginal Peoples were all but ignored by the Court. They were addressed by the Court in the category of 'protection of minorities' despite presenting themselves as a nation meriting representation and consideration as a nation. Consequently, the Aboriginal Peoples were perceived not necessarily as a nation or peoples, but as a socio-political minority group. Perceiving them as such ensures that the dominant ideology can accommodate their concerns and demands of the state.

As I indicated in Chapter one, Lajoie claims that the Court, in its reinforcement of the norm, lends the federal government both positive and negative support. Positive support is essentially self-explanatory. The arguments and the position of the federal government put before the Court are unequivocally endorsed by the Court – the Quebec Veto Reference is a good example of this. Negative support is a little more convoluted. The Court by ruling either for or against the federal government or producing an opinion which endorses both sides in fact reaffirms the norm, saves the nation and the ideal of the nation embodied by the federal government. By recognizing that the party who offers a different norm presents a valuable position, the Court assures that the norm remains intact while not handing the federal government too bright a victory. A caveat to such validation to the differing position is that the expression of diversity is confined to the parameters of the Constitution or within the dominant ideology. The Senate, Patriation and Secession References are good examples of how the Court, to use Lajoie's

expression, “gave each side half a loaf,”⁷ all the while sustaining the status quo and ensuring the federation remains un- assailed.

REVISITING THE ROLE OF THE COURT

On the surface, the Court was asked to determine if one order of government has the unilateral power to amend the Constitution. In reality, however, the Court was asked to pick between the visions with which it was presented. Considering the politically charged nature of these four references and considering the legitimacy of the Court which could have been threatened, we need to question if the Court was acting as a neutral arbitrator (the questions in all four references were rooted in a way that begged for a winner take all response) or as a political mediator.

As I indicated in chapter one, essentially there are two interconnected roles of courts, adjudicator and policy maker. As the adjudicator, the judge settles disputes between the two parties by determining who is legally right. As the policy maker, the judge makes policy choices and gives them the force of law.⁸ Both these roles are distinct from the “mediator” whose task it is to come to a resolution that both parties would agree upon.⁹ The main role of the Court nonetheless remains to give meaning to the ambiguous words of the Constitution.

In attempting to understand how courts exercise this formidable task of giving meaning to the words of the Constitution, legal scholars hypothesize a two step process. As I indicated previously, terribly underestimated is the role federalism as a variable plays. By such underestimating, not only were analysts able to conclude that the Court

⁷ Lajoie, *Jugements de valeurs: le discours judiciaire et le droit*, 153.

⁸ Weiler, “Two Models of Judicial Decision Making,” 6-7.

⁹ Russell *The Judiciary in Canada: The Third Branch of Government*.

reached a balanced decision (as this is seen as its role) but also, we run the risk of missing how the Court was able to carve a role for itself as marquee players in Canada's constitutional wrangling and how its understanding of federalism fluctuated.

If it is true that the courts play a political role, then we must revisit Greenwood's self-interest theory discussed in the introductory chapter. Can this theory be applied to the S.C.C.? Certainly these four references lead in that direction. But before anything conclusive can be drawn further study is required. Four references are hardly enough to conclude as Greenwood did vis-à-vis the JCPC.

Further to this, we need to define the "self-interest". For Greenwood the JCPC wanted to maintain their "job." This, however, is not necessarily the case with the S.C.C. What they are, however, concerned with is ensuring the sustainability of the dominant ideology of the time in order to ensure its legitimacy and the legitimacy of its product. Past and recent cases can and should be analysed.

Furthermore, we need to reconsider how the Court goes about adjudicating. In reviewing the two-step process engaged in by judges, Lederman, Swinton, Hogg, Beatty seem to dismiss federalism as a real variable by arguing that the "job" of courts is to maintain a balance in the federation. Certainly the Court in these four references seemed to deliver. Both sides were pleased with the end product and the two-step approach analysis conceivably remains undisturbed.

However, by underplaying federalism as a factor and concentrating on the end product alone, we miss the fluctuating understanding of federalism in all four references. Definitely the idea of the nation as one remained. However, the understanding of federalism in general and the principles emerging from the Constitution (including

federalism) in particular varied, even if slightly, in order to maintain a perceived balance and to ensure the nation continues to be regarded as one.

In the Secession Reference, the Court claimed, that it “has always recognized and respected these principles [democracy, federalism, constitutionalism and the rule of law, and protection of the minority].”¹⁰ What it did not acknowledge, at least not explicitly, is the degree to which these principles have been respected by the Court in the interpretation of the Constitution. It is quite arguable that these principles *did* inform the S.C.C. in both the Senate and the Patriation References; however, the weight they carried differed. In the Senate Reference, obligations emerging from these principles were said to be a matter of the Constitution. In the Patriation Reference on the other hand, respect for these principles was viewed as political goodwill emerging from conventions of the Constitution and not necessarily of the calibre of constitutional law. Finally, in the Quebec Veto Reference, the principles were conceivably non-existent. The Court in the Secession Reference is quite direct in pointing to the weight and importance of these principles: *Principles equal constitutional obligations, which in turn limit government action.*¹¹ The difference in the weight of these principles in each of the references leads us to question whether or not a particular understanding of federalism and the other three principles is embedded in the fabric of the Constitution or wholly objective as Beatty would argue. The evidence of these references perhaps points to no.

Once again the political environment becomes important as it can help shape not necessarily an understanding of federalism, but certainly it has a role in continuing to accept the legitimacy of the Court. If the Court were to produce an opinion/decision

¹⁰ *The Secession Reference*, para. 53.

¹¹ *Ibid.*, para. 54.

which contradicts the dominant ideology it remains questionable if its legitimacy would go unchallenged. In fact, the Court as demonstrated did endorse a vision of federalism and of the nation which best reflected the dominant ideology at the time. As Lajoie argues, judges are able to maintain their neutrality by invoking judicial doctrine. So, it is not the Court which created the four principles or the duty to negotiate in the Secession Reference or a substantial degree of provincial consent in the Patriation Reference for example. But both, and all its decisions, flow naturally from the Constitution. In turn, its vision of federalism went unnoticed and more importantly, its legitimacy was not the issue. In fact, it was reinforced when we consider the reception of the decision and the praises received by the Court for arriving at such *Solomonic judgments*.

The reality remains that in the opinions of all of the four references the nation-state remained untouched and was sustained by the Supreme Court. Canadian federalism understood in mononational terms endures. Further to the assurance that the state remains, the Court facilitated, through these four opinions, that any challenge to the nation-state or the dominant ideology will be de-legitimized not because it cannot be accommodated within the dominant ideology- that would lead to the questioning of the politics of this dominant ideology as its inability to compromise will be exposed; it will not or cannot be accommodated because the Constitution, perceived to be and accepted by society as a neutral document is not compatible with those ideologies or visions remaining on the fringes. However, this incompatibility is projected in the reverse – it is those ideologies or conceptions of the state held by the nationalists of Quebec (and by Aboriginal peoples) that do not conform or are not congruent with the values and principles informing the Canadian Constitution. In short then, discourse informed by and

compatible to the mononational approach to the understanding of Canadian federalism remains legitimate and will therefore be entertained by the Court. The Constitution and governments will, more often than not, emerge victorious. Discourse outside this socially constructed norm will be ostracized for its inability to conform and accommodate to the dominant ideology. The key remains that the dominant ideology continues to be projected as neutral so it is accepted as neutral and thereby a universal truism. This ensures the sustainability and endurance of the norm informed by such ideology rooted in a mononational understanding of the Canadian federation.

THE CRITICS

Arguing that the Court is influenced by the political environment and does have a tendency of promoting a mononational approach to the understanding of Canadian federalism, even when faced with a multinational approach, has its critics. Certainly Beatty would reject such findings and argue that the S.C.C. invokes objective principles. Similarly Baird may argue that judicial doctrine led the Court to rule as it did. Additionally, Saywell and Simeon based on their work vis-à-vis the Court and federalism would possibly argue that the Court's understanding of federalism (if they are inclined to accept that the Court does construct the nature of federalism) is an institutional fact. Canada's Constitution does embody the one nation ideal and there is a centralized form of federalism embedded in the Constitution, thus it is an institutional fact. This may or may not be true. However, this study has shown that the Court altered its understanding of the obligations emerging from constitutional principles (including federalism) to ensure the one nation ideal remains. The way in which it dealt with the silence of the law

and the weight of the obligations emerging from constitutional principles is quite indicative of the Court tweaking its understanding of federalism in general and the obligations emerging from it in particular in order to ensure that the one nation ideal remains. Also, the work of Lajoie and Brouillet reviewed earlier, certainly indicates that the Court has had and continues to have a fluctuating understanding of federalism. In light of this, we need to reconsider preconceived ideas that institutional facts lead to a particular understanding of federalism and of the nation. They too are open for interpretation.

CONCLUSION: FEDERAL-PROVINCIAL RELATIONS AND BEYOND

I have attempted to expose the deeper implications of such use and influence of federalism by pointing out that the Court in fact works to reaffirm and sustain the dominant ideology and status quo rooted in a mononational approach to the understanding of federalism. This has and can have greater implications on the fabric of Canadian federalism than simply granting victory to one order of government or group versus another. Over time, such endorsement can work to silence the constitutional expression of diversity or nationhood outside the nation-state in any meaningful manner.

However, it is not enough to argue that the Court was influenced by a particular vision of the federation rooted in a mononational approach to the understanding of federalism in these four references. Nonetheless, these four references may give us an insight into how the Court deals with cases where the issue concerns the idea of the nation. That is, these four references represent the first step of a potentially larger project: is the Court inclined to conceptualize the federation as a multination where the

issue involves Aboriginal peoples, for example? Would it be open to consider a multinational approach to Canadian federalism, or will it continue to conceptualize the state in traditional terms and not recognize the reality of stateless nations or region states? Further study into how the Court understands the Canadian federation in cases not necessarily dealing with the division of powers may reinforce the findings of this study.

Expanding the area of study inevitably requires a revisitation of the mononational – multinational typology. I have restricted the two categories to the relationship between the two orders of government and to two nations. However, other variables can and potentially do affect a particular approach to the understanding of federalism; identity, globalization and Aboriginal nations are three factors which play such a role in either altering or sustaining the dominant ideology; this by no means is an exhaustive lists of variables which affect an understanding of federalism. The typology developed for this project may prove to be limiting when considering cases beyond the federal-provincial relations or a binational conception. Thus to strengthen it and ensure its use as a theoretical framework, other pertinent variables must be given the attention they warrant.

In the introductory chapter, I listed a few cases dealing specifically with Aboriginal rights, treaty rights and land claims. It would be interesting to analyse how the Court dealt with the idea of the Aboriginal nation. It is not enough to say that the Court recognized the inherent rights of the Aboriginal peoples or that the Court recognized that traditional treaty rights need to be honoured. Rather, we should ask did the Court view the Aboriginal nation(s) as equal to the Canadian nation or simply as a minority group whose rights need to be protected (as was the case in the Secession Reference)?

Similarly, Charter cases and how the Court understands diversity within a province versus universality and equal rights of individuals can have an influence on contemporary understandings of Canadian federalism held by both the Court and society— is Canada a one nation federation with each individual equal to the other? Or, is it a nation made up of different nations or provinces each rich in diversity where group rights may trump individual rights for the preservation and flourishing of cultural and political diversity? Further to this, did the individual or group present themselves as nations or as a minority group?

Cases dealing with the chosen language of instruction may prove to have been influenced by the way in which the nation was understood by the players involved and by the Court. Further analysis will most definitely include *Gosselin (Tutor of) v. Quebec (Attorney General)*, 2005 S.C.C. 15, [2005] 1 S.C.R. 238¹² and *Solski (Tutor of) v. Quebec (Attorney General)*.¹³ Were these groups perceived as a minority group whose Charter rights were infringed upon by the government or as a nation looking to secure language rights?

In addition to adding to the literature regarding judicial review, this study can prove to be beneficial in that it can provide the groundwork for a reconsideration of the role courts play in Canadian society. It is not simply the neutral arbitrator or the guardian of Canada's Constitution. Rather, the Court plays a much more profound role in

¹² *Gosselin (Tutor of) v. Quebec (Attorney General)*, 2005 S.C.C. 15, [2005] 1 S.C.R. 238

¹³ *Solski (Tutor of) v. Quebec (Attorney General)*, 2005 S.C.C. 14, [2005] 1 S.C.R.;

Other cases dealing with the language of instruction include *Mahe v. Alberta*, [1990] 1 S.C.R. 342; *Reference re Manitoba Language Rights*, [1992] 1 S.C.R.

Other cases dealing with language include, *Devine v. Quebec (Attorney General)*, [1988] 2 S.C.R. 790; *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712. This by no means is an exhaustive list. The S.C.C. has heard numerous cases dealing with divisions over language and the role of the government in protecting language rights.

contemporary understandings of the nation, Canadian federalism, and of the relationship between government and between nations.

Recently, the Court in the Employment Insurance Case¹⁴ seemed to have stepped back from the political mediator role to argue that “the task of maintaining the balance between federal and provincial powers falls primarily to governments.”¹⁵ With this decision we are left with the impression that the Court will no longer play a role in maintaining the federal balance. Considering the findings of this dissertation, however, it is questionable if the Court is turning its back on this role or whether it is simply openly expressing that which has been hinted at in previous opinions. “What are regarded as the characteristic features of federalism may vary from one judge to another, and will be based on political rather than legal notions”¹⁶ A particular understanding of Canadian federalism as a principle is not necessarily embedded in the Constitution and more often than not the Court will tend to reaffirm a hierarchy between two orders of government as it did in this reference.¹⁷

So here I return to the very first quote used in the beginning this project: “*When the country gets into trouble, the Supreme Court has been there to come to the rescue*”¹⁸

The question that begs address is, has the S.C.C. come to the nation’s rescue? The answer of course does depend upon on how we understand the salvation of Canada.

¹⁴ Reference re Employment Insurance Act (Can.), ss. 22 and 23, 2005 S.C.C. 56, [2005] 2 S.C.R. 669: In this reference the federal employment statute relating to maternal and paternal benefits was under review. The Court upon evaluation of the statute and the federal government’s power to enact it found the statute to be intra vires.

¹⁵ Ibid., para. 10.

¹⁶ Ibid., para., 10.

¹⁷ Brouillet, “The Federal Principle and the 2005 Balance of Powers in Canada,” 319.

In ruling that the federal government was within its jurisdiction to enact the statute under review, the Court expanded the powers of the federal government over social matters (an expansion not intended by the provinces when they agreed upon the 1940 amendment) At the same time, the Court narrowed the powers of the provinces under s. 92(13), property and civil rights.

¹⁸ Justice Lamer quoted in Kir Markin, Lamer worries about public backlash, Globe and Mail 6 Feb 1999: A4.

Over the years, especially with regard to Canada's constitutional wrangling, the Supreme Court of Canada has been relied upon by both orders of government to settle such matters as division of powers between them, establishing the meaning and the extent of rights found in Canada's Charter of Rights and Freedoms as well as setting the boundaries of how Canada as a federation is conceptualized; all this to say, the S.C.C. has played quite the important role in the evolution of Canada's Constitution and its federation through its sustaining of the dominant ideology. Though it is questionable whether it is Canada's hero saving it from political division and social strife, it certainly proved to be active in controlling the fires when issues of the Canadian nation state and the legitimacy of it were put into doubt and/or got *too hot* for the political actors to manage. The Court in short is an institution which has had and will probably continue to have unequivocal influence on the perception of Canadian federalism and the relationship between the two orders of government and their relationship with the Canadian people.

APPENDIX I

The Constitution Amendment Bill, 1978

What is proposed in the Constitutional Amendment Bill¹?

What follows are the principal proposals regarding the new second chamber that are contained in the Bill.

1. The present Senate would be abolished. (While there are no provisions in the Bill itself to compensate present Senators for their loss of tenure, the Prime Minister has stated that a special commission would be established to review this question and to make recommendations.)
2. A new House of the Federation would be established, composed of 118 seats. The distribution of these seats would be based partly on the four traditional Senate regions, and partly on the principle that the less populous is a province, the more should its share of seats be weighted. While the number of seats for Ontario and Quebec would remain at 24 each, the number for the Atlantic region would be increased by two for a total of 32 (these two additional seats going to Newfoundland), and for the Western region by 12, for a total of 36 (British Columbia and Alberta would get four more each, and Saskatchewan and Manitoba would get two more each). The two Territories would get one seat each, as now. [...]
3. Half of the members of the new House that are to be chosen from any particular province would be chosen by the House of Commons, following a federal general election, and half by the provincial legislature, following the general election in the province, in both cases, the allocation of seats would be made, so far as is practicable, in proportion to the popular vote received in the province by those political parties contesting the election in question and electing at least one member to the legislature. Members from the Territories would be selected by the Governor General in Council after each election the territorial councils. [...]
4. In keeping with long-standing Canadian parliamentary tradition, members of the new House could not also be members of Parliament or of provincial legislatures.
5. the government of the day would not have to command the “confidence” of the new House in order to survive.
6. The new House would have only a “suspensive” veto: that is, after not less than 60 days had elapsed following a negative vote in the new House on a Bill that had been passed by the Commons, the government would, despite the negative vote, have the option of presenting the Bill for the assent of the Governor General, whereupon the Bill would become law. Similarly, if the new House neglects to deal with a Bill, the government may, not less than 60 days after the Bill was presented to the new House, present it for assent. In both cases there is, after the minimum delay of 60 days, a limited period within which the government must exercise this option.
7. It is apparent that there could be an interval as long as 120 days between the passing of a Bill by the Commons and the day when the government may present it for assent over the objections of the House of Federation. This is because the House of the Federation could

¹ Government of Canada. Honourable Marc Lalonde, Minister of State for Federal-Provincial Relations. *Constitutional Reform: House of the Federation*. Ottawa, August, 1978.

defer voting on a Bill until the 60th day after it had received it, and if its vote is negative, the government must wait a further 60 days before presenting the Bill for assent.

8. if the House of the Federation receives a Bill within 45 sitting days of the end of a session, and if it takes no action on the Bill during the session, the government cannot proceed to present the Bill for assent 60 calendar days after the date the new House received the Bill. Instead, the Bill "dies" at the end of the session and would need to be reintroduced in both Houses during the following session.
9. Any urgent Bill which does not have a significant impact on federal-provincial relations, and which is not of special linguistic significance, may, if the action is authorized by a two-thirds vote in the House of Commons, be presented immediately to the Governor General for assent with the Bill having first received the approval of the new House of the Federation. Even in such urgent cases, however, the approval of the Commons for such handling of the Bill must not be sought before the new House has had at least seven days in which to consider the Bill.
10. Members of the new House would be able to initiate legislation. However, like present Senators, they would not be able to originate money Bills.
11. Members of the new House would be eligible for inclusion in the federal Cabinet, as are members of the present Senate. However, contrary to present practice, Ministers from the second chamber would be able to answer questions, and take part in debate (though not vote), in the House of Commons. Ministers who are members of the Commons would likewise be able to speak in the second chamber.
12. The approval of the new House would be required for appointments to the Supreme Court of Canada, once candidates had been selected following the new federal-provincial consultation process which is provided for in the Bill.
13. The approval for the new House would also be required for senior appointments to certain institutions that have been established by Parliament, such as federal crown corporations and regulatory bodies. The institutions in question are those which would be designated by Parliament as ones to which the new approval procedure should apply.
14. Legislative measures or provisions of "special linguistic significance" would require the approval of a "double majority" of members of the new House: that is, a majority of French-speaking members as well as a majority of English-speaking members. Moreover, given the failure of a measure to receive the approval of this "double majority," the government could not proceed after a delay of 60 days to present the measure for the assent of the Governor General, as with other legislation, without obtaining a second favourable Commons vote, and one consisting of two-thirds of the members of the Commons voting on the measure. It has been noted under 9 above that no measure of special linguistic significance may qualify as an urgent Bill. Such measure could not therefore avoid the requirement for action by the second chamber and its "double majority."

APPENDIX II

The Favreau White Paper (excerpts)

Published in 1965, under the authority of then Justice Minister, the Honourable Guy Favreau, a White Paper entitled “The Amendment of the Constitution of Canada”, listed twenty-two amendments or groups of amendments enacted to modify the B.N.A. Act, 1867.

- (1) The Rupert’s Land Act, 1868
- (2) The British North America Act of 1871
- (3) The Parliament Act of 1875
- (4) The British North America Act of 1886
- (5) The Statute Law Revision Act, 1893
- (6) The Canadian Speaker (Appointment of Deputy) Act, 1895
- (7) The British North America Act of 1907
- (8) The British North America Act, 1915
- (9) The British North America Act, 1916
- (10) The Statute Law Revision Act, 1927
- (11) The British North America Act, 1930
- (12) The Statute of Westminster, 1931
- (13) The British North America Act, 1940
- (14) The British North America Act, 1943
- (15) The British North America Act, 1946
- (16) The British North America Act, 1949
- (17) The British North America Act (no2), 1949
- (18) The Statute Law Revision Act, 1950
- (19) The British North America Act, 1951
- (20) The British North America Act, 1960
- (21) The British North America Act, 1964
- (22) Amendment by Order in Council¹

Of these twenty-two, fourteen constitutional amendments were listed as those thought to² ‘have contributed to the development of accepted constitutional rules and principles.’³ Upon review of such amendments, four general principles with regards to amending Canada’s Constitution emerged:

The first general principle that emerges in the forgoing resume is that although an enactment by the United Kingdom is necessary to amend the British North America Act, such action is taken only upon formal request from Canada. No Act of the United Kingdom

¹ *The Patriation Reference*, 91-92.

² *Ibid.*, 98.

³ Government of Canada. Department of Justice. *The Amendment of the Constitution of Canada*. Ottawa, 1965, 10-11 quoted in *the Patriation Reference*, 99.

Parliament affecting Canada is therefore passed unless it is requested and consented to by Canada. Conversely, every amendment requested by Canada in the past has been enacted.

The second general principle is that the sanction of Parliament is required for a request to the British Parliament for an amendment to the British North America Act. This principle was established early in the history of Canada's constitutional amendments, and has not been violated since 1895. The procedure invariably is to seek amendments by a joint Address of the Canadian House of Commons and Senate to the Crown.

The third general principle is that no amendment to Canada's Constitution will be made by the British Parliament merely upon the request of a Canadian province. A number of attempts to secure such amendments have been made, but none has been successful. The first such attempt was made as early as 1868, by a province which was at that time dissatisfied with the terms of Confederation. This was followed by other attempts in 1869, 1874, and 1887. The British Government refused in all cases to act on provincial government representations on the grounds that it should not intervene in the affairs of Canada except at the request of the federal government representing all of Canada.

The fourth general principle is that the Canadian Parliament will not request an amendment directly affecting federal-provincial relationships without prior consultation and agreement with the provinces. This principle did not emerge as early as others but since 1907, and particularly since 1930, has gained increasing recognition and acceptance. The nature and the degree of provincial participation in the amending process, however, have not lent themselves to easy definition.⁴

⁴ *The Amendment of the Constitution of Canada*, quoted in *the Patriation Reference*, 99.

APPENDIX III

Amendments and Attempted Amendments to The Constitution Act, 1867

“Under the agreements confirmed by the 1930 amendment, the western Provinces were granted ownership and administrative control of their natural resources so as to place these Provinces in the same position vis-à-vis natural resources as the original confederating colonies.”¹

“All the Provinces agreed to the passing of the Statute of Westminster, 1931. It changed legislative powers: Parliament and the Legislatures were given the authority, within their powers, to repeal and United Kingdom statute that formed part of the law of Canada; Parliament was also given the power to make laws having extra-territorial effect.”²

“The 1940 amendment [Unemployment Insurance] is of special interest in that it transferred an exclusive legislative power from the provincial Legislatures to the Parliament of Canada. ‘The cooperation of the provinces has been sought with a view to an amendment of the British North America Act . . . (Commons Debate, 1938, p.2).’³

“The 1951 and 1962 amendments changed the legislative powers: areas of exclusive provincial competence became areas of concurrent legislative competence. They were agreed upon by all provinces.”⁴

“Furthermore, in even more telling negative terms, in 1951, an amendment was proposed to give Provinces power . . . Ontario and Quebec did not agree and the amendment was not proceeded with. (Commons Debates, 1951, pp. 2682 and 2726 to 2743).⁵

“The great majority of the participants found the [1960] formula acceptable, but some differences remained and the proposed amendment was not proceeded with (the White Paper, p. 29).”⁶

“In 1964, a conference of first ministers unanimously agreed on an amending formula [the Fulton – Favreau Formula] what would have permitted the modification of legislative powers. Quebec subsequently withdrew its agreement and the proposed amendment was not proceeded with. (Senate House of Commons Special Joint Committees on Constitution of Canada, issue No, 5, August 23, 1978, p. 14, Professor Lederman).”⁷

“Finally, in 1971 [the Victoria Charter] proposed amendments which included an amending formula were agreed upon by the federal government and eight of the ten provincial governments. Quebec and Saskatchewan disagreed . . . The proposed amendments were not proceeded with (Gerald A. Beaudoin, *Le partage des pouvoirs*, Edition de l’Université d’Ottawa, 1980, p. 349).”⁸

¹ *The Patriation Reference*, 93.

² *Ibid.*, 93.

³ *Ibid.*, 94.

⁴ *Ibid.*, 94.

⁵ *Ibid.*, 94.

⁶ *Ibid.*, 94-95.

⁷ *Ibid.*, 95.

⁸ *Ibid.*, 95.

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