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**Formal Constitutional Approaches to Quebec Nationalism:
Reform and Litigation Approaches Since 1982.**

By

Steven Dieter Schwendt, B.A. (Hons.)

**A thesis submitted to
the Faculty of Graduate Studies
in partial fulfillment of
the requirements for the degree of**

Master of Arts

Department of Law

**Carleton University
Ottawa, Ontario
March 1, 1999**

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**Formal Constitutional Approaches to Quebec Nationalism:
Reform and Litigation Approaches Since 1982**

submitted by **Steven Dieter Schwendt, B.A Hons.**
in partial fulfilment of the requirements for
the degree of Master of Arts

Thesis Supervisor

Chair, Department of Law

Carleton University
April 27, 1999

Abstract

The problem of accommodating Quebec nationalism has been a persistent issue throughout Canadian history. Since the patriation of the constitution in 1982 and the adoption of a domestic amending formula and the Charter of Rights and Freedoms, there has been a succession of three formal approaches to Quebec nationalism—the proposed Meech Lake Accord of 1987-1990, the proposed Charlottetown Accord, 1992, and the *Quebec Secession Reference* of 1998. This thesis sets out to identify structural factors that may have contributed to the success or failure of the formal constitutional approaches—described here as reform and litigation—to Quebec nationalism. Once the structural factors have been identified, the formal approaches are contrasted with informal approaches to identify the extent to which the structural factors influence the formal approaches. The thesis concludes that these structural factors have contributed to the failure of the “reform” approaches and are likely to contribute to the failure of the “litigation” approach to Quebec nationalism.

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1. Introduction.

As we approach the new millennium, the prospects for formal constitutional approaches to Quebec nationalism—as a prerequisite to national reconciliation—remain unclear, if not discouraging. The often contentious and persistent “Quebec question” continues to dominate constitutional politics in Canada. Indeed, the 1995 Quebec sovereignty referendum produced a much closer result than the first, with the margin of victory at 0.6 per cent compared with the almost 20 per cent a decade earlier. The possibility of yet another sovereignty referendum appears likely with the election of the Parti Québécois in the Quebec provincial election in 1998. But this time, according to Quebec premier Lucien Bouchard, the timing of the referendum would coincide with what he calls the ‘winning conditions’, which he hoped would almost guarantee a Yes victory.

The present state of affairs in Canada follows from the failure of the proposed Meech Lake and Charlottetown constitutional accords to accommodate Quebec nationalism within Canada. The limited Meech Lake Accord and the more expansive Charlottetown Accord attempted, without success, to enact formal constitutional change as a basis for national reconciliation. The ensuing ‘constitutional fatigue’ that characterizes the current climate in Canada has resulted in the virtual abandonment of the formal reform approach to Quebec nationalism. Although the 1997 premiers’ Calgary declaration suggested that formal amendment might again be considered at some future date, its short term result was limited to fiscal and social programs talks and agreements outside the text of the Constitution.

The recent shift in strategy from formal constitutional reform approaches to the formal constitutional litigation approach to Quebec nationalism was evidenced by the federal government's *Quebec Secession Reference* to the Supreme Court in 1996. The federal government's Reference to the Supreme Court was a response to the attempt of the Quebec government to effect the secession of the province from Canada unilaterally. The reform and litigation approaches to Quebec nationalism are the latest in a series of formal constitutional approaches to Quebec nationalism that began with the accommodations reached under the *Quebec Act, 1774*.

The purpose of this thesis is to elucidate structural factors that may have contributed to the success or failure of the formal constitutional approaches to Quebec nationalism since 1982. To clarify the scope of the thesis it is necessary to define the terms and concepts that will be used by the thesis. For the purpose of the thesis, Quebec nationalism refers to the national aspirations or concerns of the people of the province of Quebec, as illustrated by the various attempts to secure the survival of the French-language and culture in Canada.¹ The most recent manifestation of this nationalism is the movement for independence. "Structural factors" are those contextual factors which relate more to the general form or structure of the approaches than to their specific substantive content. "Formal" constitutional approaches or responses are those which directly involve

¹ As will be seen, Quebec nationalism is extremely complex and multifaceted. For an example of the types of accommodation sought by Quebec nationalism, see Charles Taylor's concept of the 'Politics of Recognition'—*Multiculturalism: Examining the Politics of Recognition* (Princeton: Princeton University Press, 1994) and *Reconciling the Solitudes: Essays on Canadian Federalism and Nationalism* (Montreal & Kingston: McGill-Queen's University Press, 1993)—and the Quebec government's five minimum conditions in Meech Lake, *infra* note 109. For other examples

the formal part of the constitution—the “Constitution of Canada” referred to in section 52 of the *Constitution Act, 1982*; others will be described as “informal”. Two main kinds of formal constitutional approaches are relevant. Formal “reform” approaches or responses are those which involve changes to the Constitution of Canada. Formal “litigation” approaches or responses are those which require interpretation of the Constitution of Canada by the judiciary.

The study of the formal constitutional approaches to Quebec nationalism is intended to contribute to the current debate about national reconciliation. An examination of the modern formal constitutional reform and litigation approaches—the proposed Meech Lake and Charlottetown constitutional accords and the *Quebec Secession Reference* to the Supreme Court—reveals that structural factors appear to have contributed to their success or failure in several important respects. This study will attempt to elucidate the structural factors evident in the formal constitutional approach, and how they contributed to the success or failure of the reform and litigation approaches.

The influence of these structural factors has tended to be given less attention than they appear to warrant in the existing literature. The Meech Lake and Charlottetown constitutional accords have been analyzed separately² or as part of general analyses of the

of both the different kinds of Quebec nationalism and the specific accommodation sought, see *infra* notes 21 and 23.

² See e.g.: Raymond Breton, “Why Meech Lake Failed: Lessons for Canadian Constitution Making” (1992) 35 C.D. Howe Institute, Andrew Cohen, *A Deal Undone: The Making and Breaking of the Meech Lake Accord* (Vancouver: Douglas & McIntyre, 1990), Patrick Monahan, *Meech Lake: The Inside Story* (Toronto: U. of Toronto Press, 1991), McRoberts & Monahan, eds., *The Charlottetown Accord, the Referendum, and the Future of Canada* (Toronto: U. Of Toronto Press, 1993).

national unity crisis.³ Often these analyses concentrate on the particular circumstances of the individual accords, including their substantive provisions and the influence of political circumstances.⁴ The arguments made by Alan Cairns and Kenneth McRoberts do include the influence of the new context of constitutional politics after patriation and its effect on the success of the formal reform approach, but they do not expressly address the set of factors examined in this thesis.⁵ Moreover, the litigation approach in particular has received relatively little attention.⁶ The very recent use of the litigation approach in this context has resulted in few general analyses on its impact on the question of national unity or in relation to the formal reform approach.⁷ As a result, although extensive, the current

³ See e.g.: Alan Cairns, *Reconfigurations. Canada Citizenship and Constitutional Change* (Toronto: McClelland & Stewart, 1995), Cairns, *Charter versus Federalism. The Dilemmas of Constitutional Reform* (Montreal & Kingston: McGill-Queen's U. Press, 1992), Curtis Cook, *Constitutional Predicament* (Montreal & Kingston: McGill-Queen's U. Press, 1994), Kenneth McRoberts, *Misconceiving Canada: The Struggle for National Unity* (Toronto: Oxford University Press, 1997), Peter Russell, *Constitutional Odyssey. Can Canadians Become a Sovereign People?*, 2nd ed. (Toronto: U. of Toronto Press, 1993), Jeremy Webber, *Reimagining Canada: Language, Culture, Community, and the Canadian Constitution* (Montreal & Kingston: McGill-Queen's U. Press, 1994).

⁴ See, for example, the analyses by Patrick Monahan (*supra* note 1) and Andrew Cohen (*supra* note 1) addressing, *inter alia*, the impact of the distinct society clause on the failure of the Meech Lake constitutional accord, and the political circumstances surrounding it.

⁵ When analyzing the Meech Lake and Charlottetown accords, and in discussing national unity in general, these authors stress the importance of the change in political culture brought about by the 1982 constitution. According to Alan Cairns, the *Charter* in particular is responsible for changing the participatory dynamics of constitutional politics. Kenneth McRoberts focuses on the effect of the 'vision' of the 1982 constitution on the political culture in Canada.

⁶ At the time of writing there were no journal or book length analyses of the decision in the *Quebec Secession Reference*.

⁷ The following is a sample of the literature on the legal and political issues surrounding the *Quebec Secession Reference* to the Supreme Court: Robert Howse and Alissa Malkin, "Canadians are a Sovereign People: How the Supreme Court Should Approach the Reference on Quebec Secession" (1997) 76 Can. Bar. Rev. 186, H. Wade MacLauchlan, "Accounting for Democracy and the Rule of Law in the Quebec Secession Reference" (1997) 76 Can. Bar. Rev. 156, Patrick Monahan & Michael Bryant, "Coming to Terms with Plan B: Ten Principles Governing Secession" (1996) 83 C.D. Howe Institute 1, Patrick Monahan, "Cooler Heads Shall Prevail: Assessing the Costs and Consequences of Quebec Secession" (1995) 65 C.D. Howe Institute 1, Harvey Lazar,

literature has tended to treat the formal reform and litigation approaches separately and without much articulation of the influence of structural factors on the success or failure of the most recent formal constitutional approaches to Quebec nationalism.⁸

This thesis attempts to analyze the formal reform and litigation approaches together, and within the context of the most recent national unity efforts. It attempts to pull together the seemingly disparate formal constitutional reform and litigation initiatives in response to Quebec nationalism since 1982, and thus to add to the current national unity debate.

Methodology.

The thesis will examine formal constitutional approaches to Quebec nationalism in order to identify structural factors that may have contributed to the success or failure of these approaches. Because of the scope and nature of the subject matter, it will be necessary to take a research approach which is not limited to specific disciplines on one hand or legal doctrine on the other. The thesis will use an interdisciplinary approach, bridging the disciplines of law, political science, and social science. This interdisciplinary

ed., *Canada: The State of the Federation 1997. Non-Constitutional Renewal* (Kingston: Institute of Intergovernmental Relations, 1997).

⁸ The various "Plan A" and "Plan B" discussions address the existence of both attempts at accommodation and the attempt to clarify the legal rules of secession, but they do so at a more general level, without a comparison of the two specific approaches identified here. See, for example, G. Gibson, *Plan B: The Future of the Rest of Canada* (Vancouver: Fraser Institute, 1994), McRoberts, *supra* note 3 Chapter 9 and Monahan, *supra* note 7.

approach to the study of formal constitutional approaches to Quebec nationalism will be conducted within the larger methodological context of legal studies.⁹

A legal studies approach offers such a research perspective. Legal studies can go beyond the narrower methodological constraints of the traditional disciplines. The broader context of legal studies allows one to examine and analyze a subject with the benefit of various perspectives and methods of analysis. It does not, for example, confine the examination of law to its purely doctrinal sense. It does, however, allow for the examination of questions and issues that would otherwise be outside the scope of a single discipline. This expanded context provides a better means of understanding law in its broader social, political, and public policy context.

While an understanding of technical legal doctrine is important, it is insufficient for an adequate understanding of the constitutional issues that involve broader matters of public policy confronted here. The traditional legal method of inquiry puts primary emphasis on legal doctrine and expository legal reasoning, and is concerned with the technical legal reasoning of decisions. Doctrine combined with legal reasoning is necessary to adjudicate disputes between parties and for the effective functioning of the courts, but is geared to formal resolution of specific cases before the courts. The constitutional matters that the thesis addresses tend to involve broader matters of public policy that require an expanded focus and access to a wider range of sources.

⁹ See Alan Hunt, "What is Legal Studies" (Department of Law, Carleton University, 1990) [unpublished], and Brettel Dawson, "Legal Research in a Social Science Setting: The Problem of Method" (1992) *Dalhousie L.J.* 445.

The examination of the formal constitutional approaches will rely on both primary and secondary sources. With regard to the formal reform approach, the examination of the proposed constitutional amendments will be supplemented by the work of various scholars: in particular, the work of Peter Russell, Alan Cairns, James Hurley and Kenneth McRoberts will be of importance to this study. These authors provide a helpful sample of the secondary literature on this subject. The examination of the formal litigation approach will also rely on primary and secondary sources. However, the available secondary literature on the Reference to the Supreme Court is at this early point limited. As a result, this examination of the formal litigation approach to Quebec nationalism will rely heavily on primary sources. It goes beyond the available literature and includes an examination of the decision of the Supreme Court in the *Quebec Secession Reference*.

Because the purpose of the thesis is to elucidate structural factors, the thesis will not conduct an extensive analysis of either the substantive provisions of the proposed formal amendments or the legal arguments in the Reference. Rather, the thesis will focus on the structural factors evident in the formal reform and litigation approaches. These structural factors are informative but cannot be taken as conclusive. Since the substantive provisions of the amendments and the legal arguments are not examined in great detail, the scope of the thesis is limited to structural considerations. The conclusions drawn from the examination, especially that of the litigation approach, are therefore informative and preliminary but not conclusive.

As well, the focus in the thesis is more on the process or format of possible approaches than on accommodating any particular variety of Quebec nationalism. A truly

exhaustive analysis would have to identify and assess the specific leading forms of Quebec nationalism as well as the varieties of possible approaches. An analogy might be drawn to an account of different modes of transport. A comprehensive picture would require a detailed look at the precise destinations sought as well as at the general travel purpose and the modes of transport available. Moreover, it might be that some Quebec nationalists' goals can be accommodated by only one form of approach. Nevertheless, given the complex and multifold nature of Quebec nationalism, it would be difficult to assume that only one form of response is available. The approach here, therefore, is a modest one. It looks at the kinds of approaches to the general issues of Quebecers' national aspirations or concerns. To use the transport analogy, it may be possible to identify characteristic strengths or weaknesses of different modes of transport for a general purpose, leaving aside—for analytical purposes—the question of the precise destination sought.

Since the thesis seeks to identify the structural factors that may have contributed to the success or failure of the formal constitutional approach to Quebec nationalism, how the success or failure of the approaches is gauged must be clarified. For the reform approach, the immediate criterion of success is whether the proposed reform was implemented. For the litigation approach, the immediate criterion is whether the federal government wins its case. For both kinds of formal approaches, the broader criterion of success is whether the result has been to address Quebec nationalism in a manner that appears to accommodate aspirations or concerns and to defuse the possibility of secession.

The thesis will begin, in chapter two, with a general and historical examination of the phenomenon of Quebec nationalism and the formal constitutional responses it has

generated. The nature and evolution of Quebec nationalism and the formal approach will be examined to demonstrate their interrelatedness in the constitutional development of Canada. In particular, the chapter will conclude with an examination of patriation, focusing on its process and the formal changes it introduced. The examination of patriation is intended to provide a basis from which to understand the formal reform and litigation approaches since 1982.

Chapter three will present an extensive examination of the two main-post 1982 formal constitutional reform approaches to Quebec nationalism—the proposed Meech Lake and Charlottetown constitutional accords. It will examine the proposed constitutional accords to elucidate the structural factors of the formal reform approach.

Chapter four will examine the formal litigation approach—the Quebec Secession Reference to the Supreme Court of Canada. It will consider some typical characteristics of courts and the traditional role of the judiciary in constitutional matters. It will look at the events that led to the reference including the Quebec government's secession legislation and the Bertrand litigation. Finally, the chapter will examine the judgement in the Reference itself.

Chapter five will compare the formal and informal approaches to Quebec nationalism. It will examine several of the most recent informal approaches to Quebec nationalism in order to compare and contrast the structural factors evident in the reform and litigation approaches with those of the informal approach.

Chapter six will summarize the influence of structural factors on the formal reform and litigation approaches to Quebec nationalism, and how these factors are shared by both

approaches. On the basis of these findings, it concludes that the formal constitutional approach should only be attempted with extreme caution.

Chapter 2. Historical Overview of Quebec Nationalism and the Formal Constitutional Approach.

The accommodation or suppression of Quebec's national aspirations has been a central theme throughout Canadian history. From the earliest period, what become known as Quebec nationalism has both influenced and has itself been influenced by the constitutional structure. The various attempts at the formal accommodation of Quebec nationalism pre-date Confederation, arguably going back to the accommodations reached under the *Quebec Act, 1774*, over a decade after the conquest. The Durham Report, Confederation, and policies adopted since have reflected a variety of responses to this persistent issue. As a result, an historical examination of Quebec nationalism and the formal attempts at its accommodation are essential to any analysis of these phenomena in the contemporary period.

The purpose of this chapter, therefore, is to examine the development of Quebec nationalism and the responses it has generated in the form of a general historical overview. The chapter will proceed as follows: The first part will address the phenomenon of Quebec nationalism in general terms. The second will provide an overview of the history of attempts at the formal accommodation of Quebec nationalism, from post-conquest times to 1982.

I. Quebec Nationalism.

The distinct yet interrelated concepts of *nation*¹⁰, *nation-state* and *nationalism* are central to understanding the historical, social, cultural, and political developments in Quebec. The term *nation* has been defined as a “culturally homogeneous community”¹¹ or “a collection of people who on the basis of ethnic, linguistic, or cultural affinity perceive themselves to be members of the same group.”¹² The affinity among members of a community or *nation* may be based along ethnic or cultural lines, and may include an allegiance to one or more political communities: the allegiance of French-Canadians to both Quebec and Canada would be an example.

Peter Emberley suggests that the term *nation* is both “partial and exclusive.”¹³ He says:

It...[nation]...grounds the legitimacy of its principles on a commonality of innate characteristics, or tribal allegiances, or a shared destiny, which is to say that it defines human essence by its rootedness and irreducible belongingness to a place and to a history.¹⁴

¹⁰ Nation, State and Nation-State are all important but highly controversial concepts. For a discussion on the difference between nation and nation-state see: Peter, Emberley, “Globalism and Localism: Constitutionalism in a New World Order”, in C. Cook, ed., *Constitutional Predicament: Canada After the Referendum* (Montreal & Toronto: McGill-Queen’s U. Press, 1994) at 204-207. And for a discussion of all three see: C.W. Kegley, Jr., and E.R. Wittkopf, *World Politics: Trends and Transformation*, 3rd ed. (New York: St. Martin’s Press, 1989) at 36. See also: R. Lévesque, *supra* note 39 for his definition of ‘nation.’

¹¹ Ramsay Cook, *Canada, Quebec and the Political Uses of Nationalism*, 2nd ed. (Toronto: McClelland & Stewart, 1995) at 85.

¹² Kegley, *supra* note 10 at 36.

¹³ Emberley, *supra* note 10 at 205.

¹⁴ *Ibid.*

When used in this context, a *nation* is distinct from the concept of the *nation-state*: a *nation-state* is a sovereign territorially bounded political community, which may contain one or more *nations*. Nation-states are therefore:

...Polities controlled by members of the same nationality recognizing no other authority higher than themselves. The term implies a convergence between territorial states and the psychological identification of people with them.¹⁵

A *nation* therefore may represent a particular characteristic of the nation-state, namely a community or communities as in modern pluralistic *nation-states*¹⁶, but *nations* in a cultural or ethnic sense do not necessarily exercise sovereign control over a territory.

In addition to defining a real or potential political community, a *nation* gives rise to the expression of pride among its members. Nation-states and sub-national units use symbols, such as flags, images or songs to evoke feelings of *nationalism* among the members of a particular community or *nation*. Although the symbols and practices of cultural groups can be quite different, some general characteristics of *nationalism* can be identified. According to Anthony Smith, nationalism¹⁷ is “an ideological movement for the

¹⁵ Kegley, *supra* note 10 at 36.

¹⁶ For a discussion on the subject of the multination-state see generally: Alan, Cairns, *Reconfigurations: Canadian Citizenship & Constitutional Change* (Toronto: McClelland & Stewart, 1995) at 280-314, Jeremy Webber, *Reimagining Canada: Language, Culture, Community, and the Canadian Constitution* McGill-Queen's University Press, 1994) at 40-74, Kenneth McRoberts, *Misconceiving Canada: The Struggle for National Unity* Toronto: Oxford University Press, 1997) at 262-267, and P.J. Monahan, “The Sounds of Silence”, in K. McRoberts and P.J. Monahan, eds., *The Charlottetown Accord, the Referendum, and the Future of Canada* (Toronto: U. of Toronto Press, 1993) at 222-248.

¹⁷ This definition of nationalism reflects a modern understanding of the concept.

attainment and maintenance of autonomy, cohesion and individuality for a social group deemed by some of its members to constitute an actual or potential nation.”¹⁸

Historically, the French-Canadian community or *nation* has exhibited these qualities. Traditional as well as modern Quebec nationalism is fundamentally a movement that seeks to protect the collective identity and special culture of French-Canadians in Quebec from the progressively pervasive influence of English in North America.

Historians have long debated about the emergence of nationalism in Quebec. Susan Mann Trofimenkoff, an historian, describes the difficulty in tracing the origins of nationalism in Quebec to the problems of historical inquiry generally and to the “never entirely persuasive picture of *habitant* behaviour”.¹⁹ The less-than-conclusive history on the subject prompts her to conclude “in any case, in the Lower Canadian political arena there were no self-styled *patriotes* in the 1790s; by the 1830s they cannot be mistaken. Somewhere between the two dates they, as nationalists, and nationalism along with them were born.”²⁰

This nationalism was and still is primarily concerned with preserving the traditional structures of French society and the special culture they represent. With several

¹⁸ Anthony D. Smith, *Nationalist Movements* (London: MacMillan, 1976) at 1.

¹⁹ Susan Mann Trofimenkoff, *The Dream of Nation: A Social and Intellectual History of Quebec* (Toronto: Macmillan, 1982) at 49.

²⁰ *Ibid.* at 50. (*italics in original*). The Quebec Act, 1774—discussed below at p. 22—arguably contained cultural and identity protections which suggest at least a nascent or emerging national community in Lower Canada that was given further impetus in reaction to the British repression during the 1790s. For a discussion of his “garrison mentality” thesis see: F. Murray Greenwood, *Legacies of Fear: Law and Politics in Quebec in the Era of the French Revolution* (Toronto: U of T Press, 1993).

modifications²¹, nationalism in Quebec has maintained as its primary purpose the preservation of Quebecers' way of life and collective identity. The development of nationalism in Quebec is an evolutionary movement that responds to changes that affect French-Canadian society. Ramsay Cook describes the purpose of French-Canadian nationalism as follows:

Nationalism has proven a durable and malleable ideology in French Canada's history. Its content evolved as the society it sought to describe underwent change. But its goal remained consistent: the defence and legitimation of a French-speaking culture in North America. *La survivance* and *l'épanouissement* have been the historic rallying cries of nationalists in Quebec.²²

Until recently, however, nationalists in Quebec worked within the existing structures of government, while today, at least some nationalists advocate the establishment of a separate and independent nation with all the normal characteristics of a nation-state in order to protect French-Canadian society. The evolution of nationalism in Quebec has been described as a movement from an ethnic or cultural nationalism within Canada to a contemporary territorially defined notion termed Quebec nationalism.²³ The different orientation between traditional French-Canadian nationalism and modern Quebec

²¹ I am referring here to both the different kinds of nationalism in Quebec and their specific orientation. See for example: Brian Young, *George-Etienne Cartier: Montreal Bourgeois* (Kingston: McGill-Queen's U. Press, 1981). According to Brian Young, George-Étienne Cartier tried to develop a forward looking, industrial and commercially oriented secular Quebec identity. See also: Louis Balthazar, "The Faces of Quebec Nationalism" in David Taras and Beverly Rasporich, *A Passion for Identity* 3rd ed. (Toronto: ITP Nelson, 1997), Lenihan, Robertson, & Tassé, "Nationalism in Quebec: The Old and the New" in Lenihan et al. *Reclaiming the Middle Ground* (Montreal: IRPP, 1994), Daniel Latouche, "Quebec, see under Canada: Quebec Nationalism in the New Global Age" and Joseph Carens, ed., *Is Quebec Nationalism Just? Perspectives from Anglophone Canada* (Montreal & Kingston: McGill-Queen's U. Press, 1995).

²² R. Cook, *supra* note 10 at 97.

²³ See especially: Louis Balthazar, "The Faces of Quebec Nationalism" in David Taras and Beverly Rasporich, *A Passion for Identity*, 3rd ed. (Toronto: ITP Nelson, 1997).

nationalism is reflected in the type of accommodation sought. Whereas traditional nationalism sought accommodation within the constitutional order of Canada, many modern Quebec nationalists appear to seek independence.

II.

Early expression of nationalism in Quebec was a reaction of French-Canadians to domination by Great Britain. The political and economic power of the anglophones was seen to threaten the traditional way of life for the French majority of Lower Canada. French-Canadian society was traditionally defined in terms of its religious and cultural characteristics. The church was the principal ideological institution of a primarily agricultural economic base with French as the predominant language.²⁴ In this context, nationalism in Quebec was concerned with *la survivance*.

Nationalism in Quebec developed over time and in response to many sources, including the various repressive policies of the Colonial government, particularly the recommendations for the assimilation of French-Canadians contained in the Durham Report. The recommendations were intended to eliminate the tensions between the "two nations warring in the bosom of a single state"²⁵ observed by Lord Durham by absorbing the French community into the English-speaking community of the Canadas.

²⁴ See: Kenneth, McRoberts, *Quebec, Social Change and Political Crisis* (Toronto: McClelland & Stewart, 1988) at 49-50, Ramsay Cook, *Canada, Quebec and the Political Uses of Nationalism* (Toronto: McClelland & Stewart, 1986) at 87-88, Susan Mann Trofimenkoff, *The Dream of Nation: A Social and Intellectual History of Quebec* (Toronto: Macmillan, 1982) at 48.

²⁵ Lord Durham, *British North America Report to the Queen's Most Excellent Majesty* (1839), in G.M. Craig, *Lord Durham's Report* (Toronto: McClelland and Stewart, 1963) at 23.

Mason Wade attributes the rise of nationalism in Quebec to a reaction to the real possibility of the elimination of French-Canadian society from such policies as those advanced by the Durham report. He says:

French Canada produced a national historian, François-Xavier Garneau, and a national poet, Octave Crémazie, at the very moment when a sense of nationality was necessary for survival. A spirit of liberalism and progress infused new life into a traditional culture at the very period when it became essential that that culture should change or perish.²⁶

In 1845, the French historian François-Xavier Garneau published *Histoire du Canada*. Garneau was the first to give the French-Canadians "the essential components of any nationalist ideology: a meaningful past, one with lessons for the present and hopes for the future."²⁷ Later Louis-Joseph Papineau, leader of the *Patriote* party (formerly the Canadian party) which claimed to represent *la nation canadienne*²⁸, established the political and ideological basis for the future development of nationalism in Quebec. Ramsay Cook describes the nature of this nationalism as follows:

Papineau's nationalism was founded on the belief that the French-speaking agricultural society, whose members were over-whelmingly Roman Catholic, was threatened by the English-speaking, commercial Protestant minority backed by the British Colonial office.²⁹

The French-Canadian political movement began by Papineau continued to grow in opposition to the policies of the Imperial government and was consolidated by the election of the *Parti National* in Quebec in 1887 following the execution of Louis Riel. Its leader,

²⁶ Mason Wade, *The French Canadians 1760-1967*, vol. 1 (Toronto: Macmillan of Canada, 1968) at 220.

²⁷ Cook, *supra* note 11 at 88.

²⁸ Cook, *supra* note 11 at 87.

Honoré Mercier, mobilized negative French-Canadian sentiment regarding the Riel affair into a nationalist political movement³⁰ that continued under the leadership of Henri Bourassa in the latter part of the century.³¹ Both Mercier and Bourassa led the nationalist politics in Quebec in opposition to the negative treatment of French-Canadians by the policies of the Imperial government and, in alliance with other provincial rights advocates such as Oliver Mowat, against the centralizing initiatives of John A. Macdonald. This political movement was consolidated by the common injustices perpetrated against the French-Canadians and formed the basis for political action in the elected assemblies.

Although the traditional structures of French-Canadian society were still active at the turn of the century, they were becoming progressively less relevant to an industrialized society. The state was undergoing significant changes and responding to its increased role in the lives of citizens during this period, but was something French-Canadians were reluctant to view as potentially beneficial.³² Under the leadership of Maurice Duplessis, Quebec returned to an earlier time of self-imposed isolation. The growing tensions between the traditional ideology of French-Canadian society and the modernizing world were exposed by the death of Maurice Duplessis.

The Quiet Revolution of the 1960s was the culmination of changes that had been transforming Quebec society since at least the early part of the century. Where the traditional ideology of nationalism (*la survivance*) in Quebec emphasized its religious and cultural nature, the nationalism that emerged from the Quiet Revolution was a secular,

²⁹ *Ibid.* at 87-88.

³⁰ Wade, *supra* note 26 at 419-421.

³¹ *Ibid.* at 560.

political, and economic movement that while still committed to the protection of their collective identity became a progressive movement toward social and economic development.

The state now assumed for Quebecers the role of the ideological centre that had been traditionally performed by the church. As such, "the state of Quebec, the national homeland of French Canadians, or as they now increasingly called themselves, Québécois, could no longer accept a status of one province among many. Instead, it must be accepted as a nation, perhaps as not a fully independent one, though that was a future possibility, but at least as *une province pas comme les autres*".³³

During this period two prominent figures helped define radically different conceptions of what the national consciousness of Quebec should be and how the state (government of Quebec), as the principal ideological institution of French-Canadian society, should go about advancing those interests.

Quebec was central to the political ideology of both René Lévesque and Pierre Trudeau. However, these leaders had fundamentally different views on what measures were appropriate for protecting Quebec and French-Canadians. For Lévesque, the *nation* was defined as "a group of men of the same cultural family with a place on the map."³⁴ He used nationalist symbols and sentiment to further his political ideology and force a solution to the problems of French-Canadians and Quebec. He felt strongly that French-Canadians

³² See: Cook, *supra* note 11 at 88-97.

³³ *Ibid.* at 94. (italics in original)

³⁴ *Ibid.* at 140.

and Quebec were disadvantaged by Canadian federalism and that political independence for Quebec was required to remedy the situation.³⁵

After separating from the Liberal party, Lévesque, a self-described *souverainiste*³⁶, turned his attention to the Parti Québécois. In 1976, with Lévesque as leader, the Parti Québécois won the Quebec provincial election. The separatist government gave expression to its political ideology by holding a referendum on sovereignty-association. Lévesque's concept of sovereignty-association was "political sovereignty combined with a Canadian common market".³⁷ It was intended to attract those who favoured independence, but who were reluctant to support a political project that could potentially have disastrous economic consequences. The Parti Québécois, and indeed its outspoken leader René Lévesque, represented the new Quebec nationalism that had emerged out of the Quiet Revolution. By May 1976, its principal ideological commitment was to protect the special culture of Quebecers by means of political independence.

Pierre Trudeau, on the other hand, emerged from the Quiet Revolution as an intellectual and political force in Canadian politics.³⁸ His conception of the national consciousness for Quebecers was to be found in a new relationship within Canadian

³⁵ See: René Lévesque, "A Country That Must Be Made", in R. Lévesque, *Memoirs* (Montreal: McClelland & Stewart, 1986) at 216-227, and R. Lévesque, "The Way of the Future", in R. Lévesque, *An Option for Quebec* (Toronto: McClelland and Stewart, 1968).

³⁶ *Ibid.* at 144.

³⁷ Cook, *supra* note 11 at 93.

³⁸ See especially: Pierre Trudeau, *Federalism and the French Canadians* (Toronto: Macmillan, 1968), and Pierre Trudeau & Thomas S. Axworthy, eds., *Toward A Just Society: The Trudeau Years* (Markham: Viking, 1990). See also: Robert Bothwell et al., *Canada Since 1945* (Toronto: U of T Press, 1981), Tom Kent, *A Public Purpose: An Experience of Liberal Opposition and Canadian Government* (Kingston & Montreal: McGill-Queen's U. Press, 1988), S.V. LaSelva, *The Moral Foundations of Canadian Federalism. Paradoxes, Achievements, and Tragedies of Nationhood* (Montreal & Kingston: McGill-Queen's U. Press, 1996).

federalism. The concerns of Quebecers, accordingly, could be addressed and resolved within the structures of Canadian federalism. Although Trudeau accepted the special nature of Quebec and the problems associated with it, he rejected the emerging rhetoric of the new nationalists that called for independence to remedy French-Canadian grievances with Canada. In *Federalism and the French Canadians*, Trudeau stated that "it is not the concept of *nation* that is retrograde; it is the idea that nation must necessarily be sovereign."³⁹ His political ideology was thus fundamentally opposed to extreme nationalism, and supported the idea that federal states, Canada included, contain more than one cultural nation, and that they all may be accommodated.

III.

The many manifestations of nationalism in Quebec have all involved a fundamental commitment to the preservation of French-Canadian society. Initially this was cultural and religious in nature, but later became economically and politically oriented. In the process of transition, the church was replaced by the state, and for Quebecers the relevant state was the government of Quebec. To regulate the lives of Quebecers and to promote their identity, this state required provincial autonomy. Nationalists utilized this need for autonomy to promote independence as a means of securing the preservation of French culture and language. The people of Quebec have been asked on two separate occasions (1980 and 1995) whether some form of independence was preferable, and in both instances the answer was no.⁴⁰

³⁹ Pierre Trudeau, *Federalism and the French Canadians* (Toronto: Macmillan, 1968) at 151.

⁴⁰ The margin of victory for the Yes side in the 1980 referendum was significantly greater than that in 1995, but in both instances the people of Quebec rejected the idea of political sovereignty. The

The defeat of the referendums illustrates the complex and evolving nature of nationalism in Quebec. The evolutionary character of Quebec nationalism is explained partly by its influence on the political system in Canada, and partly by how the political system influences Quebec nationalism. This dual trend is evident historically, but has become more pronounced in the last two decades.

II. Formal Constitutional Approaches: Conquest to Confederation.

It is evident from the preceding discussion that a general objective of Quebec nationalism is to preserve and protect the special culture and language of the French-speaking population in Quebec from the majority English-speaking population in the rest of Canada. Since the Conquest, the successive formal constitutional reforms from the *Quebec Act* and the *Union Act* to Confederation have all reacted to this aspiration and, to varying degrees, they have succeeded at accommodating Quebec nationalism. The relationship between Quebec nationalism and the formal attempts at its accommodation, is best characterized as symbiotic.

results of the referendums in 1980 and 1995 were: 59.56% No, 40.44% Yes and 50.58% No and 49.42% Yes. See. Daniel Turp, "Post-Referendum Reflections: Sovereignty is Alive and Well, Partnership Remains the Roadmap to the Future," *Canada Watch*, March/April 1995, at 1.

I.

As early as the Conquest, formal policies were developed to address the very special situation of the unique new British colony after France ceded the territory of New France to Great Britain in the Treaty of Paris, 1763. The Royal Proclamation of 1763 was the first constitution for the "Province of Quebec" and began to establish political and legal institutions based on British models. The Royal Proclamation threatened to effectively exclude French civil law, language, and religion.⁴¹

The *Quebec Act, 1774*⁴² codified in law an Act of the British Parliament that repealed the Royal Proclamation eleven years later with several significant modifications.⁴³ In addition to increasing the territory of the province, the *Quebec Act* represented a change in British policy toward the French-Canadian inhabitants of the colony. Section 4 of the *Act* repealed the provisions of the Royal Proclamation that dealt with the civil administration of the province. It gave explicit recognition to the negative effects of the Royal Proclamation on the French-Canadian population when it declared:

And whereas the Provisions, made by said Proclamation, in respect to the Civil Government of the said Province of Quebec...in consequence thereof, have been found, upon Experience, to be inapplicable to the State and Circumstances of the said Province, the Inhabitants whereof amounted, at the Conquest, to above sixty-five thousand Persons professing the Religion of the Church of Rome, and enjoying an established Form of Constitution and System of Laws.⁴⁴

⁴¹ See: National Library of Canada, "Towards Confederation: Lower Canada (1791-1842)" (www.nlc-bnc.ca/confed/lowercan/elowrcan.htm) at 1, see also, Peter Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1996) at 33.

⁴² Quebec Act, 1774 (U.K.), R.S.C. 1985, Appendix II, No. 2.

⁴³ Hilda, Neatby, *The Quebec Act: Protest and Policy* (Scarborough: Prentice-Hall, 1972).

⁴⁴ Quebec Act, 1774 (U.K.), R.S.C. 1985, Appendix II, No. 2, s. 4.

Section 5 established the religious freedom of the French-Canadian population of Quebec that was excluded under the Royal Proclamation. Section 5 declared:

V. And, for the more perfect Security and Ease of the minds of the Inhabitants of the said Province, it is hereby declared, That his Majesty's Subjects, professing the Religion of the Church of Rome and in the said Province of Quebec may have, hold, and enjoy, the free Exercise of the Religion of the Church of Rome.⁴⁵

The pre-conquest French civil law was restored as the law of Quebec by section 8 of the Act, but English criminal law was retained. The accommodation of the ideological, cultural and religious differences of the French Canadian population by the formal constitutional changes introduced by the *Quebec Act, 1774* was recognition of social and political reality.

In 1791, the *Constitution Act*⁴⁶ was enacted and repealed those sections of the *Quebec Act* that dealt with the form of government in the province of Quebec.⁴⁷ The Act was a compromise between the demands of the growing population of loyalists for a British style government and the concerns of French Canadians. The new Act divided the territory into two Provinces: Upper Canada consisting of a predominately English-speaking population and Lower Canada with a predominately French-speaking population. The Act established an elected assembly for each province, and section 33 provided for the continuity of the laws of the former province of Quebec until changed by the assemblies of either Upper or Lower Canada.⁴⁸

⁴⁵ *Ibid.* s. 5.

⁴⁶ The Constitution Act, 1791 (U.K.), R.S.C. 1985, Appendix II, No. 3.

⁴⁷ Wade, *supra* note 26 at 87.

⁴⁸ Hogg, *supra* note 41 at 34.

During this period, the Colonial government adopted repressive policies toward French-Canadians, partly as a result of what Murray Greenwood calls a growing "garrison mentality." Greenwood says:

Relations between Canadiens and English, particularly in the middle classes, were at a low point. The latter, imbued with...a 'garrison mentality,' feared a Canadien revolution supported by French troops and willingly accepted any authoritarian enactment, court proceeding, or executive action.⁴⁹

The change in attitude on the part of the Colonial government had serious consequences for relations between the French and English:

The tolerant attitude earlier shown to the French Canadians was replaced after 1793 by a fear of everything French, whether Continental or Canadian. As Britain struggled for its life against revolutionary, republican, and imperial France for the next twenty years, an ethnic tension hitherto unknown in Canada was created, which left its mark on the French-Canadian mind.⁵⁰

The Colonial government, having adopted repressive policies toward the French-Canadians in the 1790s to prevent a perceived threat, had in fact provoked a consequence of French-Canadian nationalism involving a struggle for greater political control that took many forms until responsible government was finally achieved in 1848.⁵¹ In fact, the tensions in the elected assemblies that arose from the lack of responsible government under the *Constitution Act* led to political deadlock and constant conflicts.⁵² In 1837 and 1838 these tensions led to armed rebellions in both Upper and Lower Canada and, as a

⁴⁹ Greenwood, *supra* note 20 at 3-4.

⁵⁰ Wade, *supra* note 26 at 93.

⁵¹ Responsible government was achieved not through formal constitutional change, but rather through informal change. It was first implemented in Nova Scotia followed in the same year by the United Province of Canada and New Brunswick. See: Hogg, *supra* note 40, at 221-224.

result, another set of national security proceedings. The emergence of French-Canadian nationalism has been associated with the rebellions in a negative sense, overshadowing its more positive accommodation in the developing constitutional system.⁵³

The Durham Report of 1839⁵⁴ recommended two changes to the system of government of the colonies in response to the rebellions: the establishment of responsible government and the union of the two provinces.⁵⁵ Responsible government would make the executive responsible to the elected assemblies instead of the imperial government: the lack of responsibility of the executive to the assemblies had been a major cause of the crisis that led to the rebellions in 1837-1838. The union of the two provinces was intended to counter French-Canadian nationalism and facilitate the continuity of English rule throughout the colony. Lord Durham wished to resolve the issues that had given rise to the rebellions by assimilating the French-speaking Canadians (a development he saw as inevitable anyway) within a strong political regime based on the British tradition of parliamentary democracy.

The British government initially rejected the recommendations in the Durham Report for responsible government, but did proceed to implement the recommendation for

⁵² See: Peter Burroughs, *The Canadian Crisis and British Policy, 1828-1841* (Toronto: MacMillan, 1972) at 93.

⁵³ *Ibid.*

⁵⁴ See: Lord Durham, *British North America Report to the Queen's Most Excellent Majesty* (1839), in G.M. Craig, *Lord Durham's Report* (Toronto: McClelland and Stewart, 1963). For an informative and critical historical account of Lord Durham and the preparation and reception of the Durham Report see: Ged Martin, *The Durham Report and British Policy: A Critical Essay* (Cambridge: Cambridge University Press, 1972).

⁵⁵ Charles Lucas, *Lord Durham's Report on the Affairs of British North America* (Oxford: Clarendon Press, 1912).

the union of the two provinces. The *Union Act, 1840*⁵⁶ united the two provinces into a united province of Canada under a single Legislature. The objective of achieving a “British-style parliamentary system with an artificial majority”⁵⁷ was to guarantee that the colonies maintain policies favourable to British colonization while also countering the effects of the growing nationalism among the French-speaking population.

The *Union Act* soon produced dissatisfaction among both the English and French inhabitants of Canada. The political effects of the Union Act angered the French-speaking population. Under the terms of union, there was to be equal representation in the legislature from both Upper and Lower Canada despite the former having a smaller population. Equal representation meant that the English minority wielded a disproportionate amount of power relative to their population. This situation contradicted the principles of democracy and encouraged French-speaking *Canadiens* to question the legitimacy of the political regime. Moreover, section 41 of the Act explicitly prohibited the French language for the first time in a formal constitutional text.⁵⁸ The French-Canadian population resorted to civil disobedience including rioting, protests, and petitions to express their dissatisfaction with the *Union Act*.⁵⁹ The reaction from the French-Canadian population was such that in 1848 the imperial government was forced to accept the use of the French language.⁶⁰

⁵⁶ The Union Act, 1840 (U.K.), R.S.C. 1985, Appendix II, No. 4.

⁵⁷ National Library, *supra* note 40 at 7.

⁵⁸ *Ibid.*

⁵⁹ Wade, *supra* note 26 at 220-272.

⁶⁰ National Library, *supra* note 41 at 7.

The English-speaking inhabitants were also critical of the effects of the *Union Act*. With the steady increase in loyalist immigration, Upper Canada soon became under-represented in the legislature. Pressure among the English-speaking population was growing to secure greater representation and status in the legislature according to the principles of democracy. These tensions within the united province soon produced a climate for formal constitutional change based on the desires of both the imperial government and the fractured colonial governments.

II. Confederation.

Both internal and external pressures motivated the proposals for the Confederation of all the British North American colonies. The circumstances included political deadlock in the united province of Canada; the fear of being annexed by the United States; pro-union pressure from Britain; the desire for a strong economic regime; and the need for a transcontinental trade regime.

The various proposals⁶¹ for uniting the regions of British North America represented a compromise between the competing political interests of the various North American colonies, and were also informed by the lessons of the recent American constitutional experience.⁶²

⁶¹ I am referring here to the Charlottetown Conference of 1864 (September 12), the Quebec Resolutions (October 1864), the Parliamentary Debates of 1865 (Third Session, Eighth Provincial Parliament of Canada) and the London Resolutions of 1866/67.

⁶² The delegates at the conferences expressed a desire to avoid several problems they perceived to be caused by the American Constitution. Most notable is the issue of "states rights" which was

The initial proposal for legislative union would have created one central government on the basis that a unitary structure would provide for the efficient management of the country. Although it effectively confronted the problems that had plagued the colonies, it was politically unacceptable. The strong sense of community, culture, and language and the desire to maintain or achieve self-government resulted in the rejection of the proposed legislative union by not only Lower Canada but also other British North American colonies.

The main concern of the French-speaking delegates to the various conferences was to secure constitutional protection against the interference of the use of their language and culture through a political system of divided governance. Each level of government would be responsible for legislating on specific areas of jurisdiction, with the provincial government being of paramount interest to the majority French-Canadian population of Quebec. Although these constitutional protections extended to all provinces, they were especially relevant to Quebec as the requirement for their acceptance of the proposals that allowed Confederation to proceed. As stated in the debates,

All local interests will be submitted and left to the decision of the local legislatures. There will be other exceptions with respect to Lower Canada, and, in fact, all the exceptions in the scheme of Confederation are in favour of Lower Canada. These restrictions in favour of Lower Canada were obtained by the delegates from that province; but they seek no thanks for their conduct, as they consider that in so doing they only performed a duty—a duty incumbent on all true patriots and good citizens.⁶³

commonly assumed to have been a major cause of the American Revolution. "Ever since the union was formed the difficulty of what is called 'states rights' has existed, and this had much to do in bringing on the present unhappy war in the United States." *Canada. Parliamentary Debates on the Subject of the Confederation of the British North American Provinces*, 3rd Session, 8th Provincial Parliament, February 3, 1865, at 33.

⁶³ *Ibid.* at 65.

The objectives of union, therefore, were to balance the desires for a union of the colonies into a centrally based government, whilst maintaining local community diversity through divided governance. For both the majority English-speaking population of Upper Canada and the French-speaking population of Lower Canada, Confederation offered representation by population and separate provincial legislatures. For the French-speaking population of Quebec, Confederation provided exclusive provincial legislative authority over an enumerated list of exclusive provincial jurisdiction controlled by the French majority in the province.⁶⁴

Especially important for the French-speaking population of Quebec was the authority of the provinces over such areas as culture and education. Section 92 (13), Property and Civil Rights, and 92 (16), “Generally all Matters of a merely local and private nature in the Province”; grant to the provinces the power to maintain local community diversity while uniting under a federal system. Section 93 of the *British North America Act, 1867*⁶⁵ established the exclusive authority of the provinces to legislate on matters involving education, with special protection for denominational school rights.

Although Confederation achieved a workable compromise, the new regime was tested as relations between French and English were strained initially by the Manitoba Schools question of the 1890s and the Ontario Schools question of 1912-1916, and

⁶⁴ Section 92 of the *British North America Act, 1867* outlines the 16 areas of exclusive provincial jurisdiction and Section 91 describes the general and specific enumerated list of exclusive federal legislative authority.

⁶⁵ The *British North America Act, 1867* (U.K.) renamed the *Constitution Act, 1867* by the *Constitution Act, 1982*, s.53 (2).

subsequently by the two wartime conscription crises.⁶⁶ The federal response to the Quiet Revolution and its specific variation of Quebec nationalism that emerged from that period is also noteworthy. The repression surrounding the “October crisis” by the invocation of the War Measures Act in 1970 and the various security measures adopted after reflected formal responses to more extreme forms of nationalism that had emerged in Quebec.⁶⁷ These events indicated the fragility of the balance that had been achieved among a divergent group of interests in 1867.

But the formal changes instituted by the enactment of the *British North America Act, 1867* are a testament to the fact that under some circumstances formal “mega-constitutional”⁶⁸ reform approaches can succeed. The varied internal interests combined with external pressure created a suitable context for a workable compromise. Confederation can also be viewed as a formal constitutional response to the prevailing nationalism in Quebec: primarily concerned with the preservation and promotion of French culture, this nationalism in Quebec was characterized by a political ideology that valued cultural and religious freedom. French-Canadian nationalism therefore contributed to the development of the *British North America Act* and would evolve under it.

⁶⁶ See generally: Peter Russell, *Constitutional Odyssey: Can Canadians Become A Sovereign People?* (Toronto: U of T Press, 1993), Mason Wade, *The French Canadians 1760-1967*, vol. 1 & 2 (Toronto: Macmillan of Canada, 1968), and Gordon Bale, “Law, Politics and the Manitoba School Question: Supreme Court and Privy Council” (1985) 63 *Canadian Bar Review*. 461.

⁶⁷ See page 33, below.

⁶⁸ Peter Russell uses this term in a number of his works. “By macro constitutional change we mean attempts to carry out a large-scale restructuring of Canada’s constitution through the negotiation and ratification of a package of constitutional changes. Meech Lake and the Charlottetown Accord were the most recent abortive attempts at macro constitutional change.” Peter Russell has also used the term “mega” to describe the same phenomena. My use of the term(s) corresponds to the meaning described above.

IV. Post-Confederation developments.

The accommodations reached in 1867 formed the basis of the constitutional structure of Canada for the next 125 years. Throughout this period, though, attempts were made to find an acceptable domestic amending formula that would complete the devolution of power from Britain to Canada commenced by the *Statute of Westminster* in 1931.⁶⁹

The process to find a domestic amending formula began with the Balfour Declaration of 1926.⁷⁰ A year later the dominion-provincial conference of 1927 ended with no agreement. The *Statute of Westminster* in 1931 declared that Canada was equal in status to Great Britain and gave effect to this declaration by section 2 (1) which repealed the *Colonial Laws Validity Act*.⁷¹ The power to “repeal or amend imperial statutes”⁷² was granted by section 2 (2) of the Act, but section 7 (1) was inserted on the advice of the Canadian delegates to guard against the possibility of amending the *B.N.A Act* by ordinary statute.⁷³ Section 7 (1) states:

nothing in this Act shall be deemed to apply to the repeal, amendment, or alteration of the British North American Acts, 1867 to 1930, or to any order, rule or regulation made thereunder.⁷⁴

⁶⁹ *The Statute of Westminster*, 1931 (U.K.) R.S.C. 1985, Appendix II, No. 27.

⁷⁰ The Balfour Declaration stated that Great Britain, Canada, Australia, S. Africa, New Zealand, the Irish Free State and Newfoundland were independent communities and as such were equal in status. See. James Ross Hurley, *Amending Canada's Constitution* (Ottawa: Minister of Supply and Services, 1996) at 24.

⁷¹ *Ibid.* at 50.

⁷² *Ibid.*

⁷³ *Ibid.*

⁷⁴ *Ibid.*

Over the next fifty years twelve attempts⁷⁵ were made to find an acceptable domestic amending formula. Two attempts came the closest to agreement. The first was the Fulton-Favreau formula in 1964.⁷⁶ The first ministers at the conference unanimously agreed to the formula. However, after a period of consultations with the Quebec National assembly indicated serious reservations about the formula,⁷⁷ Quebec's Premier Lesage said he would not seek its consent. The second attempt was the Victoria Charter formula. After extensive negotiations an agreement was concluded, subject to ratification by the provincial governments. Quebec withdrew its agreement and refused to ratify the Victoria Charter formula because of concerns about the revised section 94A.⁷⁸

Quebec was one of the major forces for change in the constitutional structure of Canadian federalism during this period. Beginning with the Quiet Revolution, successive Quebec governments reflected the changes that were transforming Quebec through their many proposals for restructuring the relationship between the federal and provincial governments. However, the lack of agreement on a domestic amending formula prevented any restructuring according to Quebec's or any other governments' proposals.

The "October crisis" of 1970 brought to the fore the extent to which matters had developed on the political front in Quebec. The invocation of the War Measures Act⁷⁹ and

⁷⁵ Hurley, *supra* note 70 at v.

⁷⁶ The Fulton-Favreau formula required unanimous consent to amendments that affected the federal division of powers and the use of English or French. Other amendments would be subject to the 7/50 rule. See. Russell, *supra* note 66 at 72-74.

⁷⁷ See: Russell, *Ibid.* at 73-74 and Hurley, *supra* note 70 at 34-35.

⁷⁸ Hurley, *Ibid.* at 40.

⁷⁹ R.S.C. 1970, c. W-2 (replaced by *Emergency Preparedness Act*, S.C. 1998, c.11); see W.S. Tamopolsky, *The Canadian Bill of Rights*, 2nd revised ed., (Toronto: McClelland & Stewart,

the various security measures adopted after to deal with the crisis are examples of a repressive formal response to the more extreme forms of Quebec nationalism that emerged from the Quiet Revolution.⁸⁰ An example of more positive responses to Quebec nationalism was the adoption of official bilingualism in 1969 following a precursor of the modern responses to Quebec nationalism--the Royal Commission on Bilingualism and Biculturalism. The various forms of Quebec nationalism that emerged from the Quiet Revolution posed various possibilities for accommodation depending on the federal government's perception.

The structure of the federation and the constitution itself remained virtually unchanged until an acceptable proposal for an amending formula was finally adopted and the constitution was patriated in 1982.⁸¹ Thus the key formal constitutional approaches to Quebec nationalism under review in the thesis began with the *Constitution Act, 1982*.

1975), esp. at 331-351, and P. Peppin, "Emergency Legislation and Rights in Canada: The War Measures Act and Civil Liberties" (1993) 18 Queen's L.J. 129.

⁸⁰ For contrasting accounts of the crisis, and the repressive measures used to respond to it, see D. Smith, *Bleeding Hearts...Bleeding Country: Canada and the October Crisis* (Edmonton: Hurtig, 1971); and G. Pelletier, *The October Crisis* (Toronto: McClelland and Stewart, 1971).

⁸¹ There were a total of 39 constitutional amendments between 1867 and 1982. Most amendments involved changes to the number of provinces and their boundaries, revisions to either the composition or number of seats in the House of Commons or Senate, or changes to other technical constitutional provisions.

V. Patriation.

The defeat of the sovereignty-association⁸² referendum in Quebec was seen by Prime Minister Pierre Trudeau as evidence that the people of Quebec had rejected the Parti Québécois agenda of independence and had given his government a clear mandate to move forward with proposals for renewed federalism. For Trudeau, the constitution was the basis for countering the decentralizing tendencies of the Canadian political system and especially the negative effects of Quebec nationalism.

The original federal proposals for formal constitutional change would have patriated the constitution, entrenched a *Charter of Rights*, and adopted the Victoria Charter amending formula.⁸³ The proposals embodied Trudeau's ideas about unifying Canada by transferring the allegiance of Quebecers to Canada through national symbols and constitutionally protected rights that would overwhelm and suppress a territorial dimension to identity within Canada. Central to this idea was the *Charter of Rights and Freedoms*, which was an attempt to articulate the common values of all Canadians by explicitly setting out rights in the constitution and the explicit processes for judicial review.

⁸² The Lévesque concept of 'sovereignty-association' was a compromise position consisting of "political sovereignty combined with a Canadian common market." See: *supra* note 31 at 13-14, and Cook, *supra* note 11 at 93.

⁸³ This formula did not require unanimity for any constitutional amendments, but required the approval of the federal government and any provincial legislature that had ever had 25% of Canada's population, the approval of two Atlantic provinces and the approval of two western provinces representing 50% of the west's population. This formula would have given Ontario and Quebec each a constitutional veto over future constitutional amendments.

The federal government announced that it would proceed with patriation unilaterally, with “a few constitutional changes, dubbed the ‘people’s package’”⁸⁴, if an agreement could not be worked out with the provinces. The ‘people’s package’ was sent to a special parliamentary committee, which held televised public hearings.⁸⁵ Interest groups, racial and ethnic associations and concerned citizens appeared before the committee supporting the idea of a *Charter*, which would give them constitutionally, protected rights. In fact, the inclusion of the sections relating to women (s. 28) and Aboriginal Peoples (s. 35(1)) in the *Charter* is evidence of the successful lobbying by these groups.

Public participation in the development of the constitutional proposals through this committee was an attempt to increase the legitimacy of the proposals by appealing directly to the citizens of Canada. This was especially true with respect to the *Charter*, as the federal government depicted it as a source of power for the people:

Constitutional entrenchment of the Charter of Rights and Freedoms limits the power of both provincial and federal governments in favour of the rights of individual citizens. *It gives people the power to appeal to the courts if they feel their rights have been infringed or denied.* The Charter does not transfer any powers or authority from the provincial governments to the federal governments—rather it transfers power to all Canadians.⁸⁶

The ‘gang of eight’⁸⁷ dissident provinces’ opposition to the federal proposals had to do more with the process of patriation than with the substance of the amendments.⁸⁸

⁸⁴ Russell, *supra* note 66 at 111.

⁸⁵ Peter Russell notes that there was extensive public participation in the committee, noting that the hearings were broadcast “a total of 267 hours over fifty-six days—televised” *Ibid.* at 114.

⁸⁶ See: *The Constitution and You* (Ottawa: Government of Canada, 1982) at 12-13.

⁸⁷ The ‘gang of eight’ was comprised of all the provinces except Ontario and New Brunswick.

Their main objection to the federal package was that it violated a constitutional convention, which required provincial consent to amendments that affected provincial jurisdiction. With the federal government's commitment to request the British Parliament to amend the *B.N.A. Act*, the governments of Manitoba, Quebec⁸⁹ and Newfoundland⁹⁰ submitted three questions to their Courts of Appeal.⁹¹ The decisions of the three courts of appeal were mixed.⁹² The federal government agreed to delay its unilateral effort until the Supreme Court had decided on the appeals from the three provinces. The federal government stated that it was prepared to abandon its unilateral action if the Supreme Court found it unconstitutional, but would proceed unilaterally otherwise.⁹³

The Supreme Court found the plan to unilaterally patriate the constitution to be constitutional as a matter of law but unconstitutional as a matter of convention.⁹⁴ The Court held that there was a constitutional convention that required "at least a substantial degree of provincial consent"⁹⁵ for constitutional amendments; but the constitutional

⁸⁸ Webber, *supra* note 3 at 109.

⁸⁹ Two modified questions were submitted to the Quebec Court of Appeal. See: Peter Russell, *Leading Constitutional Decisions* (Ottawa: Carleton University Press, 1987) at 507-508.

⁹⁰ *Ibid.* Newfoundland submitted a fourth question regarding the impact of patriation on the Terms of Union with Canada or section 3 of the B.N.A. Act "without the consent of the Newfoundland legislature or a majority of its people."

⁹¹ The three questions were: (1) Whether the *Constitution Act, 1981* affects the federal-provincial relationship or provincial powers; (2) Whether there is a convention requiring provincial consent for such an amendment; and (3) Whether provincial consent for such an amendment was a constitutional requirement. See: Russell, *supra* note 82 at 502.

⁹² *Ibid.* The three courts answered the first two questions in the affirmative but were mixed on the third: the Manitoba and Quebec courts answered the third question in the negative, while the Newfoundland court answered in the affirmative.

⁹³ *Ibid.* at 503.

⁹⁴ *Reference re: Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753.

⁹⁵ *Ibid.* at 905. The full citation went as follows: "at least a substantial degree of provincial consent"—to be determined by the "political actors", not the court—was conventionally required to amend the Canadian Constitution.

convention requiring provincial consent was not “legally required”⁹⁶. The net effect of the ruling was to initiate a new round of discussions of the constitutional proposals among the federal and provincial governments according to the negotiating rules set out in the Supreme Court’s judgment.

These rules stipulated that “at least a substantial degree of provincial consent” was required for constitutional amendments, replacing the unanimity requirement that had governed previous negotiations.⁹⁷ The less rigid requirement resulted in the well-known agreement between seven provinces of the gang of eight (excluding Quebec), the federal government, and the other two provinces to patriate the constitution in November 1981. In what has become known as the “night of the long knives”, Quebec was left out of the negotiations of the final agreement.⁹⁸

The constitutional package was formally adopted as the supreme law of Canada on April 17, 1982. The *Canada Act, 1982* and its main component the *Constitution Act, 1982* instituted the most fundamental formal changes to the constitution since Confederation. The package of amendments successfully patriated the Canadian Constitution, entrenched a *Charter of Rights and Freedoms*⁹⁹, and adopted a domestic amending formula.¹⁰⁰

⁹⁶ *Ibid.* at 763.

⁹⁷ Russell, *supra* note 66 at 119.

⁹⁸ The package of constitutional amendments that emerged from the conference contained two main changes to the original proposals. The first was the addition of the notwithstanding clause to the *Charter of Rights and Freedoms*: Section 33 allowed federal or provincial legislatures to enact legislation “notwithstanding” section 2 or sections 7 to 15 of the *Charter of Rights and Freedoms* for a period of five years. The other change was in the amending formula. Under the formula that was adopted, most amendments required the consent of seven provinces representing 50 per cent of the population.

⁹⁹ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

However, in many respects the constitutional developments of 1982 were overshadowed by Quebec's failure to consent to the final agreement. The "night of the long knives" and the ratification of the final package of constitutional amendments without the consent of Quebec fractured the fragile relations between Quebec and the rest of Canada. The compromises that had finally given way to agreement were the minimum that could be achieved among the participants, an agreement that in the end was made easier by the absence of Quebec. The *Canada Act, 1982* and the *Constitution Act, 1982* did not accomplish their original purpose of resolving the constitutional dilemma that had faced Canada. Instead, they accomplished the opposite and intensified the conflict between Quebec and the rest of Canada, making future constitutional negotiations not only necessary but also immensely more difficult. The sentiment among French-Canadians and their government after the 'night of the long knives' is best summed up by Banting and Simeon:

There is no feeling of historic breakthrough in collected accomplishment, no conviction that Canadians have renewed their federation. None of the underlying conflicts that gave rise to the constitutional debate in the first place have been resolved, and no new framework has been put in place to manage them more effectively in the decades to come. There was no creative reconciliation among the competing visions of Canada. Dreams for the future were denied or compromised.¹⁰¹

¹⁰⁰ The final package also contained s. 52 which stipulated the supremacy of the Constitution, included Aboriginal and Treaty Rights and a schedule for negotiating those rights in First Ministers meeting to be held shortly after patriation, and committed the governments and legislatures of Canada to the principles of equalization.

¹⁰¹ Keith Banting and Richard Simeon, "Federalism, Democracy and the Future" in Banting and Simeon (eds.), *And No One Cheered: Federalism, Democracy and the Constitution Act* (Toronto: Methuen, 1983) at 348.

In one of a number of attempts by different groups to nullify the constitutional package, the government of Quebec initiated another court case, contending that there was a constitutional convention that gave Quebec a veto over constitutional amendments.¹⁰² However, the Supreme Court held that Quebec did not have a constitutional veto over amendments. The Court went on to forcefully declare the validity of the patriated constitution:

The *Constitution Act, 1982* is now in force. Its legality is neither challenged nor assailable. It contains a new procedure for amending the Constitution of Canada, which entirely replaces the old one in its legal as well as in its conventional aspects. Even assuming therefore that there was a conventional requirement for the consent of Quebec under the old system, it would no longer have any object or force.¹⁰³

Conclusion.

It is arguable that the historical evolution of the Canadian constitutional order is characterized by a symbiotic relationship between Quebec nationalism and formal constitutional change. To varying degrees, all of the various formal accommodations—from the *Quebec Act* to the patriation of the constitution in 1982—have responded to the prevailing nationalism in Quebec and *vice versa*.

Moreover, there are several general observations about the formal approach that derive from the preceding analysis. First, as a result of the colonial status of the Canadian colonies prior to Confederation, the Imperial government depending on the political

¹⁰² *Reference Re: Objection To A Resolution To Amend The Constitution*, [1982] 2 S.C.R. 793.

¹⁰³ *Ibid.* at 806.

circumstances at the time could simply impose formal change. The majority of the formal changes were enacted primarily by, and with the consent, of the local governing elites only. As a result, the formal responses prior to patriation appear to have been enacted when popular participation and support in constitutional change were less crucial than today. The transition from parliamentary supremacy to popular sovereignty only began to take root with the formal changes introduced by patriation, and especially the effects of the *Charter*.¹⁰⁴

A second observation is that each successive enactment of formal change produced its own problems for the accommodation of Quebec nationalism. The various formal responses appear to have been most successful at the accommodation of Quebec nationalism when they recognized existing sociological reality, as in the case of the *Quebec Act*, or when the combination of internal and external pressure created an imperative for change, as in the case of the *B.N.A. Act*. When external pressure could no longer be exerted by the Imperial government and when internal pressure for greater popular input into formal change could no longer be dismissed, there were over fifty years of failed attempts to reach agreement on formal change to produce a domestic amending formula.

Patriation was a continuation of this process, but it introduced significant changes to the formal approach for the accommodation of Quebec nationalism. It did so by entrenching formal change that included the *Charter of Rights and Freedoms* and a domestic amending formula without the consent of Quebec. As a result, the constitution

¹⁰⁴ See generally: Peter Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign*

not only acquired a new legal and symbolic basis, but also had the effect of exacerbating Quebec nationalism. The combination of the new legal and symbolic qualities of the patriated constitution tends to simultaneously stimulate and frustrate formal constitutional change. As will be seen in the following chapters, these changes have affected the operation of the formal reform approach to Quebec nationalism, as evidenced by the Meech Lake and Charlottetown constitutional accords and the Quebec Secession Reference to the Supreme Court of Canada.

Chapter 3: Post-1982 Formal Constitutional Reform Approaches.

*"With the assurance of a creative equilibrium between the provinces and the central government, the federation was set to last a thousand years."*¹⁰⁵

Pierre Trudeau 1987

Thus far, the thesis has attempted to situate Quebec nationalism and the formal constitutional approach in their appropriate historical context. In this regard, patriation is of utmost importance to understanding the formal approach in the contemporary period—in terms of entrenching a new basis for the operation of the formal approach to Quebec nationalism.

This chapter will build upon the preceding analysis and survey the two main post-1982 formal constitutional reform approaches to Quebec nationalism—the proposed Meech Lake and Charlottetown constitutional accords. As noted earlier, the purpose of this examination is not to provide an exhaustive review of these initiatives but to identify structural factors that may have contributed to the success or failure of these most recent formal reform approaches to Quebec nationalism.

Although the detailed process that led to the two reform approaches and their substantive content is important for a more comprehensive assessment, the general form or structure of the formal reform approaches will be the main focus of this chapter.¹⁰⁶

¹⁰⁵ Andrew Cohen, *A Deal Undone: The Making and Breaking of the Meech Lake Accord* (Vancouver: Douglas & McIntyre, 1990) at 165.

¹⁰⁶ Certain substantive provisions including the distinct society clause will be discussed within the larger context of a comparison of formal and informal approaches or responses in chapter 5.

Again, what is important for the purpose of this thesis is to comment on those aspects of the formal reform approach that are revealing in terms of structural factors.

I. The Meech Lake Accord

The Meech Lake constitutional accord was the culmination of a year of discreet negotiations between the provincial premiers and the federal government.¹⁰⁷ It was intended to address the 'Quebec question' that had become a priority since patriation¹⁰⁸, by allowing Quebec, in the words of prime minister Mulroney, to sign the 1982 constitution "with honour and enthusiasm."

The priority of national reconciliation was reflected in the statement of intent by the premiers to commence another round of constitutional negotiations with an agenda limited to Quebec.¹⁰⁹ The Edmonton Declaration said in part "the Premiers unanimously agreed their top constitutional priority is to embark immediately upon a federal-provincial

¹⁰⁷ The events that led to the Meech Lake accord are well documented by other sources and will not be recounted here in any great detail. See for example: Andrew Cohen, *A Deal Undone* (Vancouver: Douglas & McIntyre, 1990), Patrick Monahan, *Meech Lake: The Inside Story* (Toronto: U. of T. Press, 1991).

¹⁰⁸ Although the legality of the *Constitution Act, 1982* had been upheld by the Supreme Court in 1982—See: *supra* note 103—Quebec questioned its legitimacy. The "Quebec round" was about restoring legitimacy to the constitution in Quebec.

¹⁰⁹ The premiers statement was in response to Quebec's five conditions to consent to the 1982 constitution outlined by Gil Rémillard, Quebec's Minister for Intergovernmental Affairs, in 1985. See: Gil Rémillard, "Quebec's Quest for Survival and Equality Via the Meech Lake Accord" in Michael Behiels, eds., *The Meech Lake Primer: Conflicting Views on the 1987 Constitutional Accord* (Ottawa: U. Of Ottawa Press, 1989). The five conditions were: (1) explicit recognition of Québec as a distinct society; (2) a guarantee of increased powers in immigration matters; (3) the limitation of federal spending power; (4) recognition of a right of veto; and (5) Québec's participation in the appointment of judges to the Supreme Court of Canada.

process, using Quebec's five proposals as a basis of discussion, to bring about Quebec's full and active participation in the Canadian federation."¹¹⁰

The April 30, 1987 meeting at Meech Lake between the premiers and the Prime Minister ended with an agreement in principle that formed the basis for the final agreement that was signed on June 3rd.¹¹¹ Agreement was secured by extending the application of the amendments to all provinces equally with the exception of the distinct society clause, which by definition only applied to Quebec.

The final agreement was negotiated almost entirely behind closed doors between the provincial premiers and the Prime Minister. It included several delicate political compromises.¹¹² Senator Lowell Murray, describing the proposed constitutional amendment, said, "The Accord is a seamless web and an integrated whole."¹¹³ Due to the political compromises, the accord had to be ratified by each of the provincial legislatures and the federal government without any amendments.¹¹⁴ The accord represented the five minimum conditions of Quebec and amendments to sections could not be separated out of the package: the entire accord had to be passed "as is". Legally, the package of amendments was subject to the new amending formula in the 1982 constitution, which

¹¹⁰ Monahan, *supra* note 107 at 61.

¹¹¹ For the full legal text and its interpretation see: Peter Hogg, *Meech lake Constitutional Accord Annotated* (Toronto: Carswell, 1988).

¹¹² Although Meech was the 'Quebec round' which would be followed by negotiations on other constitutional issues, it was necessary during the negotiations for the prime minister to commit himself to interim amendments on Senate Reform and Fisheries to the premiers of Alberta and Newfoundland to gain a consensus. See: Cohen, *supra* note 106 at 9-13, and Monahan, *supra* note 107 at 82 & 87.

¹¹³ Monahan, *supra* note 107 at 137.

¹¹⁴ In response to Manitoba premier Howard Pawley's intention to hold legislative hearings on the accord, Robert Bourassa stated that "Quebec will not consider any proposed changes that may arise out of public hearings in other provinces." Russell, *supra* note 66 at 141.

required unanimous provincial consent for a number of the proposed constitutional amendments, a three-year ratification period for constitutional amendments, and the ratification of amendments by provincial legislatures.

Initial reaction to the accord was positive: a Gallup poll indicated that 56 per cent of those Canadians asked thought the accord was a “good thing for Canada.”¹¹⁵ But with the election of three new governments in New Brunswick, Manitoba and Newfoundland the consensus among the provincial premiers began to unravel.¹¹⁶ Concern about the accord by the new governments was quickly followed by growing opposition across the country by citizens’ groups, Aboriginal associations, and former prime minister Pierre Trudeau, who attacked the accord and the politicians who drafted the document.¹¹⁷

The federal government, the Senate, and five provinces held public hearings, in conjunction with legislative ratification, on the accord before formal ratification.¹¹⁸ Predictably, opposition to the accord came primarily from outside Quebec. The distinct society clause was the focus of many who voiced concern about the effect of the accord. To many, the accord was an attempt to placate Quebec at the expense of the other provinces and other Canadians. The negative reaction to the accord intensified throughout the three-year ratification process. In 1988, opposition to the accord was consolidated

¹¹⁵ Monahan, *supra* note 106 at 290 (appendix 1).

¹¹⁶ Clyde Wells of Newfoundland became one of the staunchest opponents of the Meech Lake Accord.

¹¹⁷ See: Pierre Trudeau, *Toronto Star*, May 27, 1987.

¹¹⁸ The five provinces were Quebec, PEI, Ontario, New Brunswick, and Manitoba. See: Hurley, *supra* note 69 at 273 (appendix 22).

outside Quebec when the Bourassa government introduced Bill 178, a revised version of Quebec's 1977 sign law, Bill 101 that had been struck down by the Supreme Court.¹¹⁹

The effect of Bill 178 on the ratification of the Meech Lake Accord was dramatic and immediate. By the middle of 1988 eight provinces had ratified the accord along with the federal government and the Senate.¹²⁰ Shortly after the enactment of Bill 178, Manitoba withdrew the motion that had been tabled on December 16, 1988 to ratify the Meech Lake Accord.¹²¹ Newfoundland approved the accord on July 7, 1988 but introduced a motion to rescind its approval on March 22, 1990¹²² following the election of Clyde Wells.

Public hearings in New Brunswick and Manitoba indicated the growing level of dissatisfaction with the constitutional accord. New Brunswick recommended that changes to the accord be made through a 'companion accord'.¹²³ In Manitoba, recommendations were made to include the distinct society clause into a larger 'Canada clause' that would recognize all of Canada's distinct or unique segments, not just one.¹²⁴ On May 16, 1990,

¹¹⁹ *Ford v. Quebec* [1988] 2 S.C.R. 712. The Supreme Court found that the restriction on the use of languages other than French on commercial signs was an unjustified violation of s. 2(b) of the Charter. The enactment of a revised Bill 101—Bill 178— separated the application of the law to indoor and outdoor commercial signs. The former could be in any language, but the latter, protected by the notwithstanding clause (section 33), restored the Bill 101 restriction on the use of languages other than French on outdoor commercial signs.

¹²⁰ Hurley, *supra* note 69 at 271 (appendix 21). Quebec was the first to ratify the accord on June 23, 1987. New Brunswick and Manitoba had yet to ratify the accord.

¹²¹ *Ibid.* The motion was withdrawn on December 19, 1988 and subsequently reintroduced on June 20, 1990.

¹²² Section 46 (2) of the *Constitution Act, 1982*, permits a legislature to revoke a resolution supporting a constitutional amendment "at any time before the issue of a proclamation authorized by it." Newfoundland rescinded its approval of the accord on April 5, 1990.

¹²³ The idea of a 'companion accord' came from New Brunswick's premier Frank McKenna.

¹²⁴ *Report of the Manitoba Task Force on Meech Lake, Summary of Recommendations*, 72-9, October 21, 1989.

an all-party committee of the House of Commons recommended a companion accord to remedy the concerns voiced by the three dissenting provinces.

The Prime Minister and all the premiers met in Ottawa to address the concerns that had been raised about the accord.¹²⁵ The meeting concluded with an agreement to address other constitutional issues after legislative ratification of the Meech Lake constitutional accord.¹²⁶ On June 15, 1990 New Brunswick unanimously adopted three resolutions supporting the constitutional amendment. After Elijah Harper refused to endorse the resolution in the Manitoba legislature, the accord failed to achieve the unanimous consent required for legislative ratification under the amending formula. Subsequently, Newfoundland failed to hold a vote on the accord by the June 23 deadline. The failure to ratify the Meech Lake accord and thereby 'bring Quebec back into the constitution' aroused Quebec nationalism. By late 1990, support for Quebec sovereignty was at its highest level, reaching "64 per cent among Quebec residents, with only 30 per cent opposed."¹²⁷

II. The Charlottetown Accord.

On May 13, 1991, in its speech from the throne, the federal government outlined its position on the process for future constitutional reform following the failure of the proposed Meech Lake constitutional accord. It would first develop a set of proposals that would then be submitted to a joint parliamentary committee "that will be established to

¹²⁵ For an account of this extended meeting see: Monahan, *supra* note 107 at 198-237 and Cohen, *supra* note 107 at, 233-256.

¹²⁶ For a summary of the initiatives see: Russell, *supra* note 66 at 150-51.

consult with Canadians.”¹²⁸ The committee would “be mandated to meet in public sessions with its counterpart provincial or territorial committee or, where no such committee exists, with counterpart legislators.”¹²⁹ The process of constitutional negotiations outlined by the federal government, as Peter Russell notes, would “For the first time since Confederation...be made to conduct constitutional negotiations through interlegislative rather than intergovernmental channels.”¹³⁰ In addition, the federal government passed Bill C-81 that authorized a referendum(s) to enable “the men and women of Canada to participate more fully in the process of constitutional change.”¹³¹

At the same time, Quebec formulated its constitutional position through the Allaire committee and the Bélanger-Campeau commission. The Allaire report, entitled *A Quebec Free to Choose*,¹³² recommended that Quebec attain greater political autonomy through the expansion of its jurisdiction in 22 areas including social policy, health, and the environment.¹³³ The report also recommended that a referendum “be held before the winter of 1992” on either a proposal to reform the constitution from the rest of Canada in accordance with its other recommendations, or on “whether or not Quebec should become a sovereign state.”¹³⁴

¹²⁷ McRoberts, *supra* note 2 at 204.

¹²⁸ Russell, *supra* note 66 at 168.

¹²⁹ *Ibid.*

¹³⁰ *Ibid.*

¹³¹ Hurley, *supra* note 70 at 119.

¹³² Report of the Constitutional Committee of the Quebec Liberal Party, *A Quebec Free to Choose*, January 1991.

¹³³ *Ibid.* at 38.

¹³⁴ *Ibid.* at 46.

The Bélanger-Campeau commission was mandated to “examine and analyze the political and constitutional status of Quebec.”¹³⁵ The commission found that there were two possible solutions for the current problems between Quebec and the rest of Canada: an altered federal system or, Quebec sovereignty. Its report recommended that the National Assembly pursue both the possibility of accepting an offer from the rest of Canada and the accession to sovereignty.¹³⁶ In 1991, the government of Quebec enacted Bill 150.¹³⁷ It authorized a referendum “on the sovereignty of Quebec”¹³⁸ and the establishment of a legislative committee to examine “any offer of a new constitutional partnership”¹³⁹ by the rest of Canada.

Although extensive, the federal package¹⁴⁰ of proposed constitutional amendments respected the lessons of Meech and the more recent proposed Quebec sovereignty referendum. On the one hand, the two-track negotiation process of Charlottetown included substantially more public participation than Meech Lake. The ‘Citizens’ Forum on Canada’s Future’, otherwise known as the Spicer Commission, was intended as an “informal and easily accessible” forum to promote dialogue between Canadians, “an initiative for the people and of the people.”¹⁴¹ On the other hand, in an attempt to avoid the ‘straight-jacket of unanimity’, the main package consisted of proposals that were

¹³⁵ An Act To Establish the Commission on the Political and Constitutional Future of Quebec (Bill 90), s. 2.

¹³⁶ *Report of the Commission on the Political and Constitutional Future of Quebec*, Quebec, March 1991.

¹³⁷ An Act Respecting the Process for determining the Political and Constitutional Future of Quebec.

¹³⁸ *Ibid.* s.1

¹³⁹ *Ibid.* s.5

¹⁴⁰ See: *Shaping Canada’s Future Together* (Ottawa: Minister of Supply and Services, 1991).

subject to the general amending formula. As a result, the prospects for passing the main package were greatly increased by the fact that proposed amendments were only subject to the '7/50' rule.

The formal process to conclude an agreement was conducted through a multilateral process of 'extended executive federalism'.¹⁴² On August 28, 1992, the Consensus Report on the Constitution, an agreement between the federal government, the provinces (including Quebec), territorial and Aboriginal representatives, was concluded.¹⁴³ The Charlottetown Accord contained proposed amendments to the constitution that came under both the general and unanimity sections of the amending formula. Like Meech, the Charlottetown Accord was also a series of compromises and tradeoffs. Accordingly, the accord was subject to the unanimous provincial consent and legislative ratification requirements of the amending formula, and the new requirement of a Canada-wide referendum.

The majority of Canadians in seven provinces and one territory rejected the accord in two separate referendums on October 26, 1992.¹⁴⁴ The Charlottetown Accord was an attempt to address the objections raised by Meech Lake for the formal accommodation of Quebec nationalism. The result was an inclusive, consultative, and participatory method of

¹⁴¹ Hurley, *supra* note 70 at 118.

¹⁴² The multilateral process included the four working groups—dealing with the Canada Clause, National Institutions, Aboriginal Peoples, and the final group which dealt with the Distribution of Powers, Spending Power, Economic Union, and A Social Charter—the Continuing Committee on the Constitution (CCC) and the Multilateral Meeting on the Constitution (MMC).

¹⁴³ *Consensus Report on the Constitution: Charlottetown* (Final text, August 28, 1992).

¹⁴⁴ For the results of the vote see: K. McRoberts & P. Monahan (eds.), *The Charlottetown Accord, the Referendum, and the Future of Canada* (Toronto: U. Of Toronto Press, 1993) at appendix 3.

constitutional negotiations, that in the end failed to achieve the approval of the Canadian population.

III. Assessment of the Formal Constitutional Reform Approach.

It is evident from the preceding that the Meech Lake and Charlottetown constitutional accords failed to be entrenched into the constitution. The most obvious and immediate explanations of why the formal reform approaches failed to be implemented include the lack of unanimous and timely provincial ratification of Meech Lake and the rejection of Charlottetown in the national referendum. Behind these specific explanations there are numerous structural factors that appear to have contributed to the failure of the formal reform approaches to Quebec nationalism.

In general, the structural factors evident in the formal reform approach, as seen in the Meech Lake and Charlottetown constitutional accords, include: its formal nature; the large-scale nature of the proposed “mega-constitutional” amendments; its symbolic and emotional nature; the high stakes and visibility of the approach; its high degree of legal content and; the requirements of the amending formula. The following section will attempt to consider the extent to which these structural factors contributed to the failure of the formal reform approaches by examining the negotiation and ratification process of the Meech Lake and Charlottetown constitutional accords.

III (1) Negotiation Process.

Prior to patriation, the negotiation of proposed formal amendments operated within a distinct mode of Canadian federalism that was characterized by intergovernmental negotiations between the two levels of government. Executive federalism was the mechanism through which the federal and provincial governments negotiated and concluded proposed formal and/or informal change. This elite style of governance characterized by executive federalism and parliamentary supremacy is referred to as 'consociational democracy.'¹⁴⁵ This approach assumes that the most efficient and effective way that federalism can deal with the various cultural, ethnic, and linguistic cleavages in society is through the operation of governments.

As we have seen, the executive federalism method of negotiating formal amendments has its own problems for the successful negotiation of formal amendments. These include the consensus required among the first ministers' to proceed with amendments, the necessity of political trade-offs, and the tendency for the agenda to increase. Under normal circumstances, therefore, formal amendments are inherently difficult to negotiate.

However, since patriation the difficulty in the successful negotiation of formal amendments has increased in two ways: the first is the change to the context of negotiation introduced by patriation, especially the *Charter*; the second is the expansion of

¹⁴⁵ See generally: Kenneth McRae, ed., *Consociational Democracy: Political Accommodation in Segmented Societies* (Toronto: McClelland & Stewart, 1974), Peter Russell, *Constitutional Odyssey: Can Canadians Become Sovereign People?* 2nd ed.(Toronto: U. of T. Press, 1993),

the range and number of parties interested in the negotiations. The *Constitution Act, 1982* has changed the context in which the government-dominated formal reform approach operates. According to Alan Cairns, patriation in general but the *Charter* in particular has introduced significant changes to the political culture in Canada. The *Charter* has created a proprietary claim to the constitution—by what he calls ‘Charter citizens’—which has created a more participatory political culture in constitutional politics. The effect of the change is that:

While federalism may still be about governments, federalism itself has lost relative status in the Constitution as an organizing principle. The constitution is now also about women, aboriginals, multicultural groups, equality, affirmative action, the disabled, a variety of rights, and so on. As a result, the traditional view of governments—that the constitution is primarily an instrument to regulate their affairs and that the management of formal constitutional change can therefore safely and properly be left to—is anachronistic. It is challenged by the counterview that the constitution is also, via the Charter, a possession of the citizenry who accordingly should be participants in constitution making.¹⁴⁶

Since the constitution now reflects not only the system of government and underlying values of society but also includes constitutionally protected rights, any proposed formal amendment generates more serious debate and contemplation among not only the federal and provincial governments, but also the citizens of Canada. The extent to which the federal government in particular made the participation of individuals and groups an essential element in the negotiation process following the failure of Meech Lake is representative of this. Moreover, the constitutionalization of values enhanced the

Curtis Cook, ed., *Constitutional Predicament: Canada After the Referendum of 1992* (Montreal & Kingston: McGill-Queen's U. Press, 1994).

¹⁴⁶ Alan Cairns, *Charter versus Federalism. The Dilemmas of Constitutional Reforms* (Montreal & Kingston: McGill-Queen's U. Press, 1992) at 68.

symbolic and emotional quality of the constitution, and, by extension, the formal reform approach. Thus formal amendments are subject to an additional set of circumstances that increases the difficulty inherent in the negotiation of formal amendments.

The result, then, is an unfortunate paradox. The adoption of a comprehensive domestic amending formula and the explicit statement of constitutionally protected rights of citizens and groups have increased the barriers to formal change while at the same time making change necessary to correct the exclusion of Quebec from the final negotiations in 1982.

The two major attempts at constitutional change since 1982 were caught by both sides of this paradox. Both Meech Lake and Charlottetown constitutional accords proposed formal changes to correct Quebec's constitutional isolation. More specifically, they proposed "mega-constitutional" change. According to Peter Russell, the significance of attempting formal "mega-constitutional" change is that:

mega constitutional politics goes beyond disputing the merits of specific constitutional proposals and addresses the very nature of the political community on which the constitution is based...[and]...Precisely because of the fundamental nature of the issues in dispute—their tendency to touch citizens' sense of identity and self worth—mega constitutional politics is exceptionally emotional and intense.¹⁴⁷

The proposed formal amendments were intended to restructure the relationship between the federal and provincial governments so as to allow Quebec to consent to the 1982 constitution. As the price for Quebec's consent, the Meech Lake and Charlottetown constitutional accords proposed formal changes to the substantive provisions of the

¹⁴⁷ Russell, *supra* note 66 at 75.

constitution. Formal changes to the substantive sections of the constitution would ultimately require judicial interpretation. The proposed formal amendments to the constitution involved changes to the text of the “supreme law of Canada” as defined in section 52 (1) of the *Constitution Act, 1982*. As such, the proposed Meech Lake and Charlottetown constitutional accords had a significant degree of legal content.

The proposed changes of both accords increased the visibility and therefore the risks involved in the formal reform approach. The political sensitivity of achieving an acceptable constitutional amendment to allow Quebec to consent to the 1982 constitution structured the negotiation process of Meech Lake. According to Patrick Monahan, the risk of failure for the Quebec government resulted in the negotiations being held behind closed doors and in virtual secrecy, and only opened up when broad agreement between the federal and provincial governments had been achieved.¹⁴⁸ In fact, Prime Minister Mulroney expressed this concern before the negotiations that led to Meech Lake when he stated,

...knowing the importance and complexity of the federal-provincial issues, I will not undertake a constitutional path with ambiguity and improvisation. To proceed otherwise would risk making things much worse rather than better. Before putting gestures which risk engaging us, one more time, in an impasse, it is necessary to have precise terms and ground rules and to meet the minimal conditions of success.¹⁴⁹

It seems, however, that only after the failure of Meech Lake was the extent of change introduced by patriation and the *Charter* recognized as a potential risk of the

¹⁴⁸ See generally: Andrew Cohen, *A Deal Undone* (Vancouver: Douglas & McIntyre, 1990) and Patrick Monahan, *Meech Lake the Inside Story* (Toronto: U. of T. Press, 1991).

¹⁴⁹ Hurley, *supra* note 70 at 118.

formal reform approach. The rejection of the Meech Lake process indicated that the constitution and its reform now have a much more symbolic meaning, and are regarded much more as a concern of both citizens and governments alike.¹⁵⁰ As such, the formal reform approach is a high stakes, visible, and potentially emotional endeavor.

The changes introduced in the negotiation and ratification of the Charlottetown accord on the other hand, were inclusive, consultative, and participatory, recognizing the extent to which the context of formal amendments had changed. In many respects, Charlottetown was a product of the experience with both patriation and the Meech Lake accord. Through the various public forums and the new political requirement for formal amendments to be ratified by a referendum, Charlottetown reflected the increased stakes and visibility of the formal reform approach. This revised process tends to highlight the importance of broad support in the process of developing constitutional reforms to counteract not only the previously government-dominated negotiation process but also the ratification process.

But the large number of potential constituents to the formal negotiations proved to be problematic for the Charlottetown accord. The inclusion of Aboriginal representatives, other groups including women, and concerned citizens greatly expanded the agenda and

¹⁵⁰ As Alan Cairns notes, "Those who govern us may have to relearn the ancient democratic message that they are servants of the people, and learn the new message that the constitution under and by which we all now live does not belong to them." Alan Cairns, "Citizens (Outsiders) and Governments (Insiders) in Constitution-making: The Case of Meech Lake", in Cairns, *Disruptions: Constitutional Struggles, from the Charter to Meech Lake* (Toronto: McClelland & Stewart, 1991) at 137-138. See: Alan Cairns, *Disruptions: Constitutional Struggles from the Charter to Meech Lake* (Toronto: McClelland & Stewart, 1991), *Charter versus Federalism. The Dilemmas of Constitutional Reforms* (Montreal & Kingston: McGill-Queen's U. Press, 1992), and

complicated the negotiation process. In addition to the national consultative forums (Spicer Commission and Beaudoin-Edwards Committee), each province¹⁵¹ and various Aboriginal organizations¹⁵² conducted a separate series of consultations. The negotiation process was also enlarged beyond the eleven first ministers to include the official participation of Aboriginal representatives.¹⁵³ Together, the increased number of potential constituents and their participation in the generation and negotiation of the proposed formal amendments led to a number of compromises and tradeoffs, including the last-minute offer to Quebec.¹⁵⁴ In the end, the expanded negotiation process resulted in an extensive package of formal amendments: the proposed Charlottetown constitutional accord contained five sections covering over sixty proposed formal amendments.

The revised manner in which the formal reform approach operates has its own consequences for the formal reform approach. The expansion of the constitutional agenda and the introduction of the referendum during Charlottetown were a direct result of the limited and exclusive Meech Lake round. These changes addressed the new context of constitutional politics since patriation and represent a precedent for future attempts to amend the constitution. In this regard, then, structural factors have affected not only the manner in which proposals for formal reform are developed, but also the substance of those proposals.

Reconfigurations: Canadian Citizenship & Constitutional Change (Toronto: McClelland & Stewart, 1995).

¹⁵¹ See: Hurley, *supra* note 70 at 117-118.

¹⁵² See: Mary Ellen Turpel, "The Charlottetown Discord and Aboriginal Peoples' Struggle for Fundamental Political Change", in McRoberts & Monahan, eds., *The Charlottetown Accord, the Referendum, and the Future of Canada* (Toronto: University of Toronto Press, 1993).

¹⁵³ See: *Ibid.*

Thus the 1982 amendments helped increase the potential constituents, the visibility, and the rigidity of both the Meech Lake and Charlottetown negotiating processes, factors working against their success. Whatever the substantive content of any future formal response to Quebec nationalism, pre-amendment negotiations would be likely to face these structural factors again.

III(2). Ratification Process.

Amendment is the only formal method of entrenching constitutional change. Proposed amendments are subject to the requirements of the amending formula set out in Part V. (s. 38-41) of the *Constitution Act, 1982*. To help safeguard the existing importance of the constitution, the amending formula makes formal change difficult. The requirements of the amending formula seem to reinforce the influence of the other structural factors involved in the negotiation process by subjecting proposed amendments to the addition hurdle of the amending formula, one that is both rigid and unwieldy.

The requirements of the amending formula that had a significant impact on the ratification of Meech Lake and Charlottetown accords were: (1) the requirement of unanimous provincial consent for some amendments; (2) the requirement of provincial ratification of constitutional amendments and; (3) the three-year time period for the ratification of some constitutional amendments. The additional hurdle of a national

¹⁵⁴ See: Hurley, *supra* note 70 and McRoberts, *supra* note 3.

referendum for the ratification of constitutional amendments was introduced during the Charlottetown process. Although it is not formally part of the constitution, it is significant in terms of political legitimacy.

The unanimous provincial consent requirement meant that each province and the federal government possessed a veto over constitutional amendments. This contrasted with the requirement of only a “substantial degree of provincial consent” that governed negotiations in 1982. As a result, the amendments were ‘provincialized’: “They had been made agreeable to the provincial premiers by respecting the principle of provincial equality and, with one exception, extending to all provinces the powers sought by Quebec.”¹⁵⁵ This requirement led to the expansion of the agenda as a prerequisite for provincial support of both the Meech Lake and Charlottetown accords. In Charlottetown, this also included the expansion of the agenda to include the demands of various groups within society.¹⁵⁶

In 1982, the consent of the participants at the first ministers’ conference doubled as the consent of the provincial governments. The Supreme Court of Canada declared that only a “substantial degree of provincial consent” was required for constitutional amendments. This referred to the consent of the governments, not the legislatures of the provinces. The additional requirement of legislative ratification after 1982 affected not only the level of support needed to pass an amendment but also the time required for its ratification. The representatives of the individual constituencies in each of the provinces

¹⁵⁵ Russell, *supra* note 66 at 136.

¹⁵⁶ The Charlottetown Accord, as presented in the Consensus Report and Draft Legal Text, contained five sections covering over sixty proposed amendments. The enlarged package reflects the more expansive participation of various groups in constitutional negotiations, and the

were now vital to pass any amendment. The significance of this requirement was revealed in the ratification process of Meech when Elijah Harper blocked the early consideration of the accord in the Manitoba legislature, which in turn blocked the unanimous provincial consent requirement.

The three-year ratification time limit, according to Richard Simeon, "made it virtually inevitable that a number of elections would have been held and thus that governments not part of the initial bargaining, and not committed to its success, would have been elected."¹⁵⁷ In fact, the re-negotiation of Meech was prompted by the election of three new governments who opposed Meech during the ratification period.¹⁵⁸

The final requirement for the ratification of constitutional amendments is the requirement of ratification through a national referendum introduced in Charlottetown. Although not formally adopted into the amending formula, the requirement of a referendum addressed the "tension between...a citizens regarding Charter and a government regarding amending formula"¹⁵⁹ in the 1982 constitution. The proposed amendments were subject to the threshold test of conforming to the wishes and demands of a broader range of interests than the eleven first-ministers. The political legitimacy of proposed constitutional amendments are now assessed against the results of a national plebiscite, which increases the difficulty in implementing formal amendments.

requirement of a national referendum reflects the extent to which such participation has affected the substance of constitutional proposals.

¹⁵⁷ Richard Simeon, "Why Did the Meech Lake Accord Fail?" in Watts and Brown, (eds.), *Canada: The State of the Federation 1990* (Kingston: Institute of Intergovernmental Relations, 1990) at 28.

¹⁵⁸ The three provinces were New Brunswick, Manitoba, and Newfoundland.

While the legal requirements of the amending formula relate to the consent of the federal and provincial governments, the political requirement of referenda provides an equally effective mechanism for the citizens of Canada to judge the merits of proposed formal amendments to the constitution. As was evident with the Charlottetown accord, the citizens of Canada judged the proposed amendments and found them to be wanting. The requirement of holding a referendum to ratify proposed constitutional amendments reflects the new context of the formal reform approach while at the same time making it more complicated and difficult to achieve.

Furthermore, the passage of Bill-C110¹⁶⁰ in 1995 further complicates the ratification of proposed constitution amendments by giving the provinces a *de facto* veto over proposed amendments. The Bill commits the federal government not to endorse proposed constitutional amendments without the consent of Ontario, Quebec, and two or more Western and Atlantic Provinces that represent at least fifty per cent of that regions population. Although the bill is a federal statute and not part of the formal constitution, its effect will likely be the same in that future constitutional amendments will not be considered unless the purpose of the bill is adhered to. This will tend to result in an additional impediment to the successful implementation of formal amendments.

¹⁵⁹ Alan Cairns, *Charter versus Federalism. The Dilemmas of Constitutional Reforms* (Montreal & Kingston: McGill-Queen's U. Press, 1992) at 75.

¹⁶⁰ Bill-C110, *An Act Respecting Constitutional Amendments*, SC 1996 C1.

Conclusion.

As we have seen, the constitutional settlement in 1982 without the consent of Quebec led to strong pressure for further attempts to implement formal change. But the constitutional order introduced by patriation imposed a new context on all such attempts. The *Charter of Rights and Freedoms* expanded the reach of the constitution to include individual rights, which has raised the profile of formal amendments. The requirements of the amending formula were rigid and unwieldy, and provided no direct participation for the newly constituted constitutional actors—Canadian citizens.

This change in context highlights the importance of structural factors on the success of the formal reform approach. Both the Meech Lake and Charlottetown constitutional accords tried to implement formal amendments to the constitution. This involved multiple parties engaged in large-scale constitutional law making. As we have seen, the negotiation and ratification processes expanded from the eleven first ministers during the Meech Lake process to include direct citizen participation during part of the Charlottetown process. The result was an expanded set of proposed formal amendments that required broad public participation and support. These proposed amendments were large-scale, involving “mega-constitutional” change.

In short, the formal reform approach attempted to generate a great mass of constitutional law, which raised the public profile of the approach and impeded its successful implementation. In this regard, structural factors appear to have contributed to the failure of the formal reform approach. As will be seen in the following chapter, the

formal litigation approach, despite its apparent differences, shares many of the structural factors evident in the formal reform approach.

Chapter 4. The Formal Litigation Approach.

The litigation approach is the second formal constitutional approach to Quebec nationalism under review in this thesis. In contrast to the formal reform approach, the litigation approach refers to the interpretation of the “Constitution of Canada” by the judiciary.¹⁶¹ Although it is in form and strategy different from the reform approach, the litigation approach appears to share many of the structural features of the formal reform approach.

The *Quebec Secession Reference* appears to represent a shift in strategy from efforts at constitutional reform to constitutional litigation as a formal approach to Quebec nationalism. The formal reform approach was intended to accommodate Quebec nationalism through formal constitutional amendment. The formal litigation approach, on the other hand, is the contingency strategy of the federal government that was considered necessary to counter the threat of secession following the narrow defeat of the sovereignty referendum in 1995 and after the introduction of the Quebec government’s Draft Bill and Bill 1, which outlined the process for Quebec’s accession to sovereignty. The purpose of the litigation approach is to uphold the rule of law and defend the continuing application of the constitution and its formal procedures for amendment. A corollary purpose of the litigation approach is to make secession unattractive to Quebecers’ by making clear the legal rules of secession.¹⁶²

¹⁶¹ For a definition of the formal litigation approach, see Introduction at pg. 3.

¹⁶² This is generally referred to as Plan B.

Although the ultimate effect of the Secession Reference remains to be seen, some tentative observations about the case are possible now. What follows is an examination of the *Quebec Secession Reference* in order to elucidate some of the structural factors that appear to be evident in the litigation approach, and how these factors are most likely to contribute to its success or failure. This chapter will begin with an examination of some characteristic features of courts in Canada, a brief overview of the historical role of the judiciary in constitutional matters, and an overview of the events that led up to the Reference to the Supreme Court.

I. Role of Judiciary

Throughout Canada's history, the judiciary has played an important role in the maintenance and development of our constitutional system of government. The role of the judiciary is to ensure compliance with the provisions of the constitution and uphold the basis of our constitutional system—the rule of law.¹⁶³ In this regard, judicial review of

¹⁶³ The rule of law is a fundamental constitutional doctrine that refers to a system of legal rules used by judges in the process of adjudication. This concept holds that the purpose of law is to protect against the arbitrary use of power and to promote the predictability of legal rules governing our system of government. In the modern Canadian context, the rule of law is given expression in the preamble to the *Constitution Act, 1867*, the preamble to the *Charter of Rights and Freedoms*—"Whereas Canada is founded upon principles that recognize the Supremacy of God and the rule of law"—and in various judicial pronouncements including *Roncarelli v. Duplessis*, [1959] S.C.R. 121 and *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721 at 748. See generally: P. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1997), F.L. Morton, ed., *Law, Politics and the Judicial Process in Canada* (Calgary: University of Calgary Press, 1992), P. Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw-Hill Ryerson, 1987), Luc B. Tremblay, *The rule of Law, Justice, and Interpretation* (Montreal & Kingston: McGill-Queen's University press, 1997).

constitutional matters is an essential element in the legitimate exercise of power by the respective levels of government.

The constitutional principle of the rule of law envisages an impartial judiciary, resolving disputes according to law.¹⁶⁴ Canadian judges are not elected. They are appointed by the executive branch, although they enjoy tenure, pay, and other safeguards designed to help ensure their independence. Courts normally follow a process of adjudication.¹⁶⁵ Generally speaking, this process involves the authoritative settlement of concrete disputes, through an adversarial process, on the basis of established legal rules, principles, and procedures.¹⁶⁶ The process is typically reactive in nature, addressed more to the past problems than future contingencies. It is usually bipolar¹⁶⁷, and results in a clear distinction between winners and losers. Although courts generate new law when they apply existing law and principles to new facts, this is usually a gradual development as compared with the enactment of legislation.

¹⁶⁴ See for example: *Reference Re Remuneration of Judges* [1997] 3 S.C.R. 3, at para. 10: "One of these goals is the maintenance of public confidence in the impartiality of the judiciary, which is essential to the effectiveness of the court system. Independence contributes to the perception that justice will be done in individual cases. Another social goal served by judicial independence is the maintenance of the rule of law, one aspect of which is the constitutional principle that the exercise of all public power must find its ultimate source in a legal rule."

¹⁶⁵ For contrasting discussions of adjudication see: Lon L. Fuller, "Forms and Limits of Adjudication" (1978) *Harvard Law Rev.* 352, and Owen M. Fiss, "The Forms of Justice" (1979) 93 *Harvard Law Rev.* 1.

¹⁶⁶ For a discussion of the adjudicative and non-adjudicative functions of the judiciary see: Peter Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw-Hill Ryerson, 1987) Chapter 1 and Paul Weiler, "Two Modes of Judicial Decision Making" (1968) 46 *Can. Bar. Rev.* 406.

¹⁶⁷ *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, at para. 36: "While judicial procedure is premised on a bipolar opposition of parties, interests, and factual discovery, some problems require the consideration of numerous interests simultaneously, and the promulgation of solutions which concurrently balance benefits and costs for many different

On the other hand, the paradigm above has never been absolute. Especially in earlier years, the idea of an independent judiciary has been qualified by the practice of patronage appointments.¹⁶⁸ Especially in constitutional law matters, the usual litigation route has been supplemented by the phenomenon of reference cases.¹⁶⁹ And, as noted below, courts have long considered policy as well as law and principle in constitutional cases, and they have long had a significant role in the long-term development of law.

Judicial review has been described by Donald Smiley as “the procedure by which courts of law consider laws and executive acts in light of whether or not these conform with the terms of the constitution and then validate or invalidate such expressions of legislative or executive will accordingly”¹⁷⁰ Judicial review of federalism requires the judiciary to adjudicate disputes between the federal and provincial governments, in regard to the distribution of legislative authority contained in the constitution. The purpose behind judicial review of the distribution of legislative authority is, according to F.L. Morton,

For a federal division of legislative powers to be effective, there must be a mutually acceptable process for settling disputes over where one government’s jurisdiction ends and the other’s begins. Neither level of government can be permitted to define unilaterally (and thus redefine) the boundaries of federal-provincial jurisdiction, as this would violate the equal status of both levels of government, a

parties.” The Court was suggesting here that problems of the latter kind are not suited to resolution by the courts.

¹⁶⁸ See: Russell, *supra* note 66 at 112-116 and J. Snell & F. Vaughan, *The Supreme Court of Canada: History of the Institution* (Toronto: Osgoode Society, 1985).

¹⁶⁹ For a discussion of reference cases in Canada see: Gerald Rubin, “The Nature, Use and effect of Reference Cases in Canadian Constitutional Law” in W.R. Lederman, ed., *The Courts and the Canadian Constitution* (Toronto: McClelland & Stewart, 1964) at 220.

¹⁷⁰ Donald Smiley, *The Federal Condition in Canada* (Toronto: McGraw-Hill Ryerson, 1987) at 48.

central principle of federalism. In practice, the need for a neutral umpire of federal systems has been met through judicial review by a final court of appeal.¹⁷¹

Initially, the Judicial Committee of the Privy Council was the final court of appeal for the Dominion of Canada. The Privy Council heard appeals from the Dominion of Canada either directly from the federal government or *per saltum* appeals from provincial courts. The authority of the Judicial Committee of the Privy Council to review legislation or executive action and rule on their constitutionality was based on the Privy Council Acts of 1833 and 1844.¹⁷² But judicial review of a written constitution—the BNA Act—put the Judicial Committee in a novel situation:

The domestic constitutional system of the United Kingdom did not include such a procedure, since the Crown in Parliament was sovereign, and there could be no legal challenge to its will. From the early days of the British Empire, however, it had been customary to allow appeals to the Crown against enactments of colonial legislatures, and this procedure had been formalized in the recognition by imperial statute of the Judicial Committee of the Privy Council.¹⁷³

The Supreme Court of Canada, on the other hand, was established by the federal government in 1875¹⁷⁴ as a “general court of appeal” in accordance with its authority under section 101 of the *Constitution Act, 1867*.¹⁷⁵ The Supreme Court remained

¹⁷¹ F.L. Morton, ed., *Law, Politics and the Judicial Process in Canada* (Calgary: University of Calgary Press, 1992) at 339-340.

¹⁷² *Ibid.* at 348. The *Colonial Laws Validity Act, 1865*, further entrenched judicial review of the constitution by the Doctrine of Repugnancy, which stipulated the priority of Imperial statutes over colonial legislation. See: Doctrine of Repugnancy. Hogg, *supra* note 40 at 47-48 and 117.

¹⁷³ Smiley, *supra* note 170 at 48.

¹⁷⁴ *Supreme and Exchequer Courts Act, 1875*, S.C. 1875, c.11; renamed *Supreme Court Act*, R.S.C. 1985, c. S-26.

¹⁷⁵ Section 101 states: The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the establishment of any additional Courts for the better Administration of the Laws of Canada.

subordinate to the Judicial Committee of the Privy Council until the *Statute of Westminster, 1931* opened the way for a domestic final court of appeal.¹⁷⁶ As a federal institution, the Supreme Court of Canada had questionable credibility amongst some provinces as an authoritative or impartial constitutional arbiter.¹⁷⁷ As a result, many appeals went directly to the Judicial Committee from provincial court of appeal.¹⁷⁸ The Supreme Court became the final court of appeal in Canada in 1949, with the abolition of appeals to the Judicial Committee of the Privy Council.¹⁷⁹

Constitutional interpretation of the British North America Act by both the Judicial Committee of the Privy Council and the Supreme Court of Canada has had a major impact upon Canada's federal system.¹⁸⁰ Since Confederation, the judiciary's role in resolving disputes between the federal and provincial governments over the propriety of legislation has sometimes drawn it into active involvement in political matters. The decisions of the

¹⁷⁶ Hogg, *supra* note 41 at 200.

¹⁷⁷ See: W.R. Lederman, ed., *The Courts and the Constitution* (Toronto: McClelland & Stewart, 1964) and J. Snell & F. Vaughan, *The Supreme Court of Canada: History of the Institution* (Toronto: Osgoode Society, 1985).

¹⁷⁸ Snell & Vaughan, *Ibid.* at 179-180.

¹⁷⁹ *Ibid.* at 199-200.

¹⁸⁰ The interpretation of the constitution by the Judicial Committee of the Privy Council, for example, has received particular attention for its decentralizing tendencies on the Canadian federation. See: G.P. Browne, *The Judicial Committee and the British North America Act, 1867* (Toronto: University of Toronto Press, 1967), Alan Cairns, "The Judicial Committee and its Critics" (1971) 3 *Canadian Journal of Political Science*. 301, Murray Greenwood, "Lord Watson, Institutional Self-Interest, and the Decentralization of Canadian Federalism in the 1890s" (1974) 9 *B.C.L.R.* 244, Mark Macguigan, "The Privy Council and the Supreme Court: A Jurisprudential Analysis" in Saywell & Veigh, eds., *Making the Law* (Toronto: Copp Clark Pitman, 1991), F.L. Morton, *Law, Politics and the Judicial Process in Canada* (Calgary: University of Calgary Press, 1992), Peter Russell, *Leading Constitutional Decisions* (Ottawa: Carleton University Press, 1987) J. Saywell & G. Veigh, eds., *Making the Law* (Toronto: Copp Clark Pitman, 1991), J. Snell & F. Vaughan, *The Supreme Court of Canada: History of the Institution* (Toronto: Osgoode Society, 1985), Frederick Vaughan, "Critics of the Judicial Committee: The New Orthodoxy and

courts on the appropriate meaning of legislative authority in the constitution in such cases as *Local Prohibition*¹⁸¹ and *McLaren v. Caldwell*¹⁸², and the dispute over the Rivers and Streams Act, resulted in the courts becoming involved, and in some instances instrumental, in highly political issues.¹⁸³ This point is made by Robert Lamot:

Intergovernmental squabbling and the unwillingness for political compromise prompted the judiciary to the role of umpire of the federal system, with the judges as policy makers who made decisions under the pretense of legal formalism. The primary role of the courts in instances of constitutional conflict was to clarify the main issues, to determine which side should initiate the political process via constitutional measures, and to limit the possibilities of political deception and debate. With the general uncertainty concerning the powers allocated to the two levels of government within the BNA Act, and the dissension among politicians arising out of the debate related to the ranking of the Dominion government and the provinces, federal-provincial bargaining was replaced by judicial review for delineating the respective jurisdictions of the two orders of government.¹⁸⁴

More recently, the Supreme Court's central role in the process to patriate the constitution illustrates the importance of the judiciary in adjudicating constitutional matters that have become highly politicized. In the 1981 Patriation Reference¹⁸⁵, the Supreme Court was asked to rule on both questions of law and constitutional conventions¹⁸⁶ as they related to the federal government's plan to unilaterally patriate the constitution. The case brought to the fore the significant political dimension of judicial

an Alternative Explanation", in Saywell & Veigh, eds., *Making the Law* (Toronto: Copp Clark Pitman, 1991).

¹⁸¹ *Attorney General of Ontario v. Attorney General of Canada* [1896] A.C. 348.

¹⁸² *McLaren v. Caldwell* [1882] 8 S.C.R. 444.

¹⁸³ See: Robert Gregory Lamot, *The Politics of the Judiciary: The S.C.C. and the J.C.P.C. in Late 19th Century Ontario* (M.A. Thesis, Carleton University, 1998).

¹⁸⁴ *Ibid.* at 122.

¹⁸⁵ *Reference re: Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753.

¹⁸⁶ "Conventions are rules of the constitution that are not enforced by the law courts." Hogg, *supra* note 41 at 17.

review of constitutional matters in the contemporary period, and illustrates the central role of the judiciary in constitutional interpretation.

The introduction of the *Charter of Rights and Freedoms* has increased both the scope of judicial review and the role of the judiciary.¹⁸⁷ The *Charter* adds individual and collective rights and freedoms to the corpus of the constitution, which, in turn, requires judicial interpretation. This expands the scope of judicial review of constitutional matters to include adjudicating disputes between individuals and the state. In this regard, constitutional interpretation provides the legal status and enforceability of the constitutionally protected rights. As a result, the role of the judiciary—in particular the Supreme Court—has been elevated not only in terms of the scope of judicial review but also by the nature of the constitutional dispute.

The modern political and public policy dimension of judicial review of *Charter* rights is a significant departure from the more traditional constitutional interpretation of the distribution of legislative authority. Admittedly, the difference may be a question of degree rather than kind.¹⁸⁸ As we have seen, judicial review by courts has historically

¹⁸⁷ See e.g.: Alan Cairns, *Charter versus Federalism: The Dilemmas of Constitutional Reform* (Montreal & Kingston: McGill-Queen's University Press, 1992), Peter Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1996), Monahan, P.J. *The Charter, Federalism and the Supreme Court of Canada* (Toronto: Carswell, 1987), Peter Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw-Hill Ryerson, 1987).

¹⁸⁸ See especially: Patrick Monahan, "At Doctrine's Twilight: The Structure of Canadian Federalism" (1984) 34 *University of Toronto Law Journal* 47. See generally: W.A. Bogart, *Courts and Country. The Limits of Litigation and the Social and Political Life in Canada* (Toronto: Oxford University Press, 1994), Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Wall & Thompson, 1993), and F.L. Morton, "The Charter Revolution and the Court Party" (1992) 30 *Osgoode Hall Law Journal* 648.

involved a political and public policy dimension.¹⁸⁹ On the other hand, the breadth and discretionary character of the *Charter* language, and the range of other entrenched topics in the *Constitutional Act, 1982*, permit a more active judicial role than before. In such decisions as the Patriation Reference, Quebec Veto Reference¹⁹⁰ and the Manitoba Language Rights Reference,¹⁹¹ the Supreme Court has assumed a central role in adjudicating constitutional matters that inject a high degree of politics into judicial pronouncements. As we will see in the following sections, the Supreme Court's decision in the *Quebec Secession Reference* is representative of this trend and of the central role of the judiciary in constitutional matters.

II. Background

The formal reform approach for the accommodation of Quebec nationalism pursued by successive governments in the 1980s and early 1990s was replaced by the litigation approach following the sovereignty referendum in 1995 and the introduction by the Quebec government of the Draft Bill and Bill 1. These bills were the creation of the separatist Parti Québécois, which had been elected in 1994, in the wake of the collapse of

¹⁸⁹ "There can be no doubt that the Charter deals the Canadian judiciary into a wider range of political issues and in that sense increases judicial power in Canada; it is a mistake, nonetheless, to regard this involvement as a revolutionary development. Canadian judges all along have been exercising a considerable influence on policy—by making decisions on the common law, by interpreting statutes, and by umpiring the federal division of powers in Canada's written constitution..." Russell, *supra* note 66 at 3-4.

¹⁹⁰ *Reference Re: Objection To A Resolution To Amend The Constitution*, [1982] 2 S.C.R. 793.

¹⁹¹ *Re: Manitoba Language Rights*, [1985] 1 S.C.R. 721.

the Charlottetown Accord. They outlined the government's program for Quebec's accession to sovereignty and were the basis of the Reference to the Supreme Court.

On December 4, 1994, the Quebec government introduced a draft bill entitled *An Act respecting the sovereignty of Quebec*.¹⁹² It outlined the six steps to the accession to sovereignty proposed by the government and outlined, under seventeen sections, the terms of sovereignty beginning with the declaration that "Quebec is a sovereign country."¹⁹³

In 1995, Guy Bertrand¹⁹⁴ initiated a court action to challenge the constitutionality of the draft bill that enabled the Quebec government to hold the sovereignty referendum and its program to effect the secession of Quebec from Canada unilaterally on the grounds that it would infringe upon his *Charter* rights. He successfully petitioned the Quebec Superior Court to rule on his application for "declarations that a draft bill respecting the sovereignty of a province and accompanying Orders in Council exceeded the constitutional powers of the province and violated his Charter rights."¹⁹⁵ In the words of Justice Lesage:

All of the decisions taken by the Quebec government, and the procedure described in the draft bill, indicate that the government, through the Prime Minister and other Cabinet ministers, has undertaken, on behalf of Quebec, to proceed with a unilateral declaration of independence and to obtain Quebec's recognition as a state distinct from Canada.

It is manifest, if not expressly stated that the Quebec government has no intention of resorting to the amending formula in the Constitution to accomplish

¹⁹² National Assembly, 1st Sess., 35th Leg., Dec 6, 1994. *Draft Bill: An Act Respecting the Sovereignty of Quebec*.

¹⁹³ *Ibid.* at s. 1.

¹⁹⁴ See: Guy Bertrand, *Enough is Enough. An Attorney's Struggle for Democracy in Quebec* (Toronto: ECW Press, 1996).

¹⁹⁵ *Bertrand v. Quebec (Procureur General)* (1995), 127 D.L.R. (4th) 408 at 409. [Hereinafter Bertrand].

the secession of Quebec. In this regard, the Quebec government is giving itself a mandate that the Constitution of Canada does not confer on it.

The actions taken by the Government of Quebec in view of the secession of Quebec are a repudiation of the Constitution of Canada. If such secession were to occur, the *Canadian Charter of Rights and Freedoms*, which is part of the Constitution of Canada, would cease to apply to Quebec and the plaintiff would no longer be able to demand compliance therewith.¹⁹⁶

In reaction to the decision, Former Premier Jacques Parizeau stated, "Quebecers want to vote, they have the right to vote, they will vote. We cannot submit Quebecers' right to vote to a decision by the court. It would be contrary to our whole democratic system."¹⁹⁷

In 1995, the Quebec government reintroduced its secession legislation in the National Assembly: Bill 1, *An Act respecting the future of Quebec*.¹⁹⁸ The revised draft bill included an agreement between the three sovereigntist leaders in Quebec and an amended referendum question.¹⁹⁹ In a subsequent court proceeding, the Quebec government brought a motion to dismiss a second Bertrand action.²⁰⁰ Justice Pidgeon of the Quebec Superior Court rejected the motion to dismiss on the basis of the importance of the questions raised. He said:

And in the case at bar some of the constitutional issues raised by the plaintiff deserve a determination on the merits:

¹⁹⁶ *Ibid.* at 428.

¹⁹⁷ "Lawyer wins first round in bid to block referendum" *The Montreal Gazette* (1 September 1995) A11.

¹⁹⁸ *Bill 1: An Act Respecting the Future of Quebec* (Quebec, 1995).

¹⁹⁹ *Ibid.* The sovereigntist leaders were Jacques Parizeau, Lucien Bouchard and Mario Dumont.

²⁰⁰ *Bertrand v. Quebec (Attorney General)* (1996), 138 D.L.R. (4th) 481. The Quebec government's basis for the motion were "want of jurisdiction on the grounds of parliamentary immunity, the political nature of the questions, the consistency of unilateral secession with international law, and a failure to translate documents incorporated in the Constitution as required in s. 55 of the *Constitution Act, 1982*." at 482.

- Is the right to self-determination synonymous with the right to secession?
- Can Quebec unilaterally secede from Canada?
- Is Quebec's processes for achieving sovereignty consistent with international law?
- Does international law prevail over domestic law? ²⁰¹

The federal government intervened in the second Bertrand action on the questions of the priority of domestic laws, the nature of the referendum (binding or consultative), and on the question of the right to secede at international law. The federal government defended the continuing application of the constitution and the rule of law after a Yes vote in the referendum, and claimed that amendment to the constitution would have to follow the formal procedures specified in the amending formula.

After the Quebec government decided not to contest Guy Bernard's action any further, the federal government initiated its own court challenge—the *Quebec Secession Reference* to the Supreme Court of Canada. The new strategy of the federal government was unveiled by Alan Rock, the Minister of Justice and Attorney General of Canada, who announced in the House of Commons on September 26, 1996 that federal government intended to refer "to the Supreme Court of Canada certain questions of great importance to all Canadians to clarify the legal issues that have arisen between the government of Canada and the government of Quebec." ²⁰² The three questions referred to the Supreme Court were:

²⁰¹ *Ibid.* at 507-508.

²⁰² Canada. Department of Justice. *Statement by the Honourable Alan Rock Minister of Justice and Attorney General of Canada Concerning a Reference to the Supreme Court of Canada*. Ottawa: 1996.

1. Under the Constitution of Canada, can the National Assembly, legislature or Government of Quebec effect the secession of Quebec from Canada unilaterally?
2. Does international law give the National Assembly, legislature or Government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature or Government of Quebec the right to effect the secession of Quebec from Canada unilaterally?
3. In the event of a conflict between domestic and international law on the right of the national Assembly, legislature or Government of Quebec to effect the secession of Quebec from Canada unilaterally, which would take precedence?²⁰³

These questions referred to the Supreme Court are similar to those cited by Justice Pidgeon to establish the justiciability of the issues raised by Guy Bertrand. But unlike Bertrand, who sought, among other things, an interlocutory injunction against the referendum, the federal government was clear to point out that the purpose of the Reference was not to interfere with the legitimate political and democratic rights of Quebecers. Rather, the Reference was intended to uphold the democratic system of government and the rule of law upon which it is based in Canada. According to Alan Rock:

The leading political figures of all our provinces and the Canadian public have long agreed that the country will not be held together against the clear will of Quebecers. This government agrees with that statement...It [is]...only insisting that sovereignty must be obtained under the rule of law...This view has arisen partly out of our traditions of tolerance and mutual respect, but also because we instinctively know that the quality and functioning of our democracy requires the broad consent of all Canadians.²⁰⁴

²⁰³ *Ibid.* at 6.

²⁰⁴ Canada, *supra* note 202 at 2.

Thus the stated purpose of the Reference to the Supreme Court was not to eliminate the threat of secession but rather to clarify the legal and political rules that would govern the possibility of secession brought about by the Quebec government's secession legislation.

Bernard Landry, Quebec's deputy premier, reacted to the Reference by stating that the Quebec government refused to participate in the case and intended to ignore the ruling of the court because of the political nature of the questions: "secession is a strictly political question for Quebecers to decide democratically without interference from Canadian courts."²⁰⁵ This sentiment reiterated the position of the Quebec government made by Quebec Intergovernmental Affairs Minister, Jacques Brassard, who said: "it is clear that to us democracy rules over constitutional provisions."²⁰⁶ According to Quebec premier Lucien Bouchard, the Reference to the Supreme Court was irrelevant to the governments proposed process for the accession to sovereignty because:

Its not about legality. It is advice. There is absolutely no link between the legality of what Quebec will do and what the tribunal will say because its not a decision...I don't see how we can use the courts when we're dealing with the future of a sovereign people.²⁰⁷

Public reaction in Quebec to the federal government's Reference to the Supreme Court was similar to that of both the Quebec premier and his cabinet officials. In a 1997 poll conducted by SOM-*La Presse*²⁰⁸, "47% of respondents indicated that they disagreed

²⁰⁵ Joan Bryden, "Supreme Court to clarify rules for separation" *The Ottawa Citizen* (26 September, 1996) A1-A3.

²⁰⁶ Rhéal Sécuin & Hugh Windsor, "Political Crisis Brewing over Quebec Court Case" *The Globe and Mail* (11 May 1996) A14.

²⁰⁷ Philip Authier, "Supreme Court ruling will be worthless, Bouchard says" *Montreal Gazette* (26 September 1996) A1 & 12.

²⁰⁸ The question in the SOM-*La Presse* survey was as follows:

with the federal decision to refer the issues to the Supreme Court, while 38% were in agreement.”²⁰⁹ Furthermore, of those Quebecers’ who said they would vote “no” in a future referendum, 43% disagreed with the federal initiative.²¹⁰ However, the poll results also indicated that Quebecers wanted a federal presence in a future referendum. According to the poll, 52% of respondents compared to 39% favoured a federal role in drafting the next referendum question.²¹¹

In a 1998 national Gallup poll, Canadians were asked two questions about the Reference to the Supreme Court: “Do you believe that under the Constitution of Canada, Quebec can legally separate from the rest of Canada?”; and “Regardless of the Constitutional legality of Quebec separation, if a majority of Quebecers vote to separate, should they be allowed to do so?”.²¹² 55% of respondents (nationally) answered no to the first question, and 29% answered yes.²¹³ The highest percentage of positive responses came from Quebec, where 47% said yes compared with 39% who said no.²¹⁴ In response to the second question, a majority (53%) of Canadians said that Quebec should be allowed to separate after a majority vote in favour of separation, regardless of its constitutional

Le gouvernement fédéral a demandé à la Cour suprême du Canada de déterminer si le Québec peut déclarer unilatéralement sa souveraineté en vertu de la Constitution canadienne. Diriez-vous que vous êtes (tout à fait d'accord..., plutôt d'accord..., plutôt en désaccord..., tout à fait en désaccord...) avec cette démarche du gouvernement fédéral devant la Cour suprême?

“Ottawa n’aurait pas dû s’adresser à la Cour suprême” *La Presse* (24 mai 1997) quoted in Wade MacLauchlan, “Accounting for Democracy and the Rule of Law in the Quebec Secession Reference” (1997) 76 Can. Bar Rev. 155 at 163.

²⁰⁹ *Ibid.*

²¹⁰ *Ibid.*

²¹¹ *Ibid.*

²¹² Gallup Poll, Thursday, March 5, 1998, vol. 58, No 15.

²¹³ *Ibid.* at 2

²¹⁴ *Ibid.*

legality.²¹⁵ These two polls indicate a mixed set of opinions on the Reference to the Supreme Court and its possible outcome.

III. Quebec Secession Reference.

The Supreme Court heard oral submissions from the federal government, the 28 interveners and the ‘friend of the court’ (*amicus curiae*) representing Quebec²¹⁶ on February 16 to 19, 1998. On August 20, 1998, the same day as the Supreme Court released its decision in the Reference, the headline in the Ottawa Citizen read, “Answering the Quebec question.” In a rare unanimous decision, the Court ruled that “there is no right, under the Constitution or at international law, to unilateral secession” and “in view of the answers to Questions 1 and 2, there is no conflict between domestic and international law.”²¹⁷

In view of the intensely political sensitivity of the case, the ruling of the Supreme Court in the Reference attempted to address the important legal questions while acknowledging the serious potential political consequences. In the words of the justices, the Reference “requires us to consider momentous questions that go to the heart of our

²¹⁵ *Ibid.*

²¹⁶ Quebec lawyer André Joli-Coeur was announced as the Quebec representative. See: “Court role goes to PQ stalwart” *The Globe & Mail* (15 July 1997) A1.

²¹⁷ *Reference Re Certain Questions Relating to the Secession of Quebec From Canada*, [1998] S.C.R. 1 at 8. [Hereinafter Reference]

system of government” and “combines legal and constitutional questions of the utmost subtlety and complexity with political questions of great sensitivity.”²¹⁸

Constitutional issues of fundamental importance and highest political sensitivity had also faced the Court in the Patriation Reference in 1981.²¹⁹ In that case, the Supreme Court was asked to rule on the legality of the federal government’s plan to unilaterally patriate the constitution. The Court held that the plan to unilaterally patriate the constitution was constitutional as a matter of law but unconstitutional as a matter of convention. A majority of the Court found that “at least a substantial degree of provincial consent”²²⁰—to be determined “by the political actors”²²¹ not the court—was conventionally required to amend of the Canadian Constitution. The decision had the effect of encouraging the federal government to return to the negotiating table to attempt to renegotiate the package of constitutional proposals with the provinces to patriate the constitution according to the judgement. It also had the effect of making possible the constitutional agreement which excluded Quebec.²²²

In the *Quebec Secession Reference*, the Court was again faced with a politically charged issue that required, at least from the point of view of the federal government, a legal opinion. The Court’s answer to the three questions was elaborated in a nearly one

²¹⁸ *Ibid.* at 1.

²¹⁹ *Reference re: Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753.

²²⁰ *Ibid.* at 905. *Per* Martland, Ritchie, Dickson, Beetz, Chouinard, and Lamer JJ.

²²¹ *Ibid.*

²²² See pg. 37 above.

hundred page decision that revealed a more complex ruling than the simple answers referred to above appear to suggest.²²³

First, the *amicus curiae* (André Joli-Couër) raised three legal objections to the reference, regarding (1) the constitutional validity of section 53 of the *Supreme Court Act*, (2) the Court's jurisdiction under section 53 of the *Supreme Court Act*, and (3) the justiciability of the questions.²²⁴ The Court held that section 53 was constitutional²²⁵ and that the questions referred to the Court were within its jurisdiction under section 53.²²⁶

As to the third objection—the justiciability of the questions referred to the Court—the *amicus* argued that:

- (1) the questions are not justiciable because they are too 'theoretical' or speculative;
- (2) the questions are not justiciable because they are political in nature;
- (3) the questions are not yet ripe for judicial consideration.²²⁷

²²³ Since the thesis deals with issues of domestic constitutional law, it will deal exclusively with the Supreme Court's answer to Question 1.

²²⁴ The *amicus* argued three points of law with respect to the jurisdiction of the Supreme Court to hear the case: (1) "that s. 101 of the *Constitution Act, 1867* does not give Parliament the authority to grant [the] Court the jurisdiction provided for in s. 53 of the *Supreme Court Act*, R.S.C., 1985, c. S-26"; (2) "that even if Parliament were entitled to enact s. 53 of the *Supreme Court Act*, the scope of that section should be interpreted to exclude the kinds of questions the Governor General in Council has submitted in this Reference"; (3) "even if [the] Court's reference jurisdiction is constitutionally valid, and even if the questions are within the purview of s.53 of the *Supreme Court Act*, it is argued that the three questions referred to the Court are speculative, of a political nature, and in any event, are not ripe for judicial decisions, and therefore are not justiciable." *Supra* note 185 at para. 4.

²²⁵ The Court stated: "Section 53 must therefore be taken as enacted pursuant to Parliament's power to create a 'general court of appeal' for Canada" *Ibid.* at para. 7.

²²⁶ The Court stated: "Both Question 1 and Question 2 fall within s. 53(1)(a), since they relate to the powers of the legislature or government of a Canadian province...all three questions are clearly 'important questions of law or fact concerning any matter' so that they must come within s. 53(2)" *Ibid.* at para. 18.

²²⁷ *Ibid.* at para. 24.

In considering the objection, the Court outlined two grounds upon which to determine the non-justiciability of questions raised in a reference:

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

(ii) if the Court could not give an answer that lies its area of expertise: the interpretation of law.²²⁸

The Court found that the questions of the reference were within its proper role, stating that once “the legal framework is clarified, it will be for the population of Quebec, acting through the political process, to decide whether or not to pursue or not to pursue secession.”²²⁹ The Court also held that it had the discretion to determine the appropriate legal aspects of the questions and, accordingly, their justiciability. In the words of the Court:

As to the ‘legal’ nature of the questions posed, if the Court is of the opinion that it is being asked a question with a significant extralegal component, it may interpret the question so as to answer only its legal aspects; if this is not possible, the Court may decline to answer the question. In the present Reference the questions may clearly be interpreted as directed to legal issues, and, so interpreted, the Court is in a position to answer them.²³⁰

But the Court indicated that reference to the written constitution was insufficient to answer the questions of the Reference. Reference to the written constitution and its underlying principles (unwritten norms) was necessary²³¹, as they supplement the specific intent of the enumerated constitutional provisions. In the words of the Court:

²²⁸ *Ibid.* at para. 26.

²²⁹ *Ibid.* at para. 27.

²³⁰ *Ibid.* at para. 28.

²³¹ *Ibid.* at para. 32.

The 'Constitution of Canada' certainly includes the constitutional texts enumerated in s. 52(2) of the *Constitution Act, 1982*. Although these texts have a primary place in determining constitutional rules, they are not exhaustive. The Constitution also 'embraces unwritten, as well as written rules...' ²³²

The purpose of these unwritten norms in constitutional interpretation is to fill in the gaps of law that the questions of the Reference exposed. In the words of the Court:

These supporting principles and rules, which include constitutional conventions and the workings of Parliament, are a necessary part of our Constitution because problems or situations may arise which are not expressly dealt with by the text of the Constitution. In order to endure over time, a constitution must contain a comprehensive set of rules and principles which are capable of providing an exhaustive legal framework for our system of government. Such principles and rules emerge from an understanding of the constitutional text itself, the historical context, and previous judicial interpretations of constitutional meaning. ²³³

The Court cited two previous cases in which it had established the existence of unwritten constitutional norms. In *New Brunswick Broadcasting Co. v. Nova Scotia* ²³⁴, a majority of the Supreme Court found that section 52(2) was not an exhaustive definition of the Constitution of Canada: the unwritten principle of parliamentary privilege was to be included in the purview of s.52 (2) in accordance with the intent of the preamble of the *Constitution Act, 1867*—"a constitution similar in principle to that of the United

²³²"In our view, it is not possible to answer the questions that have been put to us without a consideration of a number of underlying principles. An exploration of the meaning and nature of these underlying principles is not merely of academic interest. On the contrary, such an exploration is of immense practical utility. Only once those underlying principles have been examined and delineated may a considered response to the question we are required to answer emerge." Reference, *supra* note 217 at para. 1.

²³³ Reference, *supra* note 217 at para. 32.

²³⁴ *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R 319.

Kingdom.” In *Reference re Remuneration of Judges*²³⁵, the Court articulated a rationale for constitutionalizing unwritten norms. In the words of the Chief Justice:

the preamble does have important legal effects. Under normal circumstances, preambles can be used to identify the purpose of a statute, and also aid to construing ambiguous statutory language...The preamble to the *Constitution Act, 1867*, certainly operates in this fashion. However, in my view, it goes even further. In the words of Rand J., the preamble articulates the political theory which the Act embodies. It recognizes and affirms the basic principles which are the very source of the substantive provisions of the *Constitution Act, 1867*. As I have said above, those provisions merely elaborate those organizing principles in the institutional apparatus they create or contemplate. As such, the preamble is not only a key to construing the express provisions of the *Constitution Act, 1867*, but also invites the use of these organizing principles to fill out gaps in the express terms of the constitutional scheme. It is the means by which the underlying logic of the Act can be given the force of law.²³⁶

Upon this basis, the Court articulated four fundamental and organizing principles that animate the written constitution, “which are relevant to addressing the question before us.”²³⁷ In the words of the Court,

The Constitution is more than a written text. It embraces the entire global system of rules and principles which govern the exercise of constitutional authority. A superficial reading of selected provisions of the written constitutional enactment, without more, may be misleading. It is necessary to make a more profound investigation of the underlying principles animating the whole of the Constitution, including the principles of federalism, democracy, constitutionalism and the rule of law, and respect for minorities. Those principles must inform our overall appreciation of the constitutional rights and obligations that would come into play in the event that a clear majority of Quebecers votes on a clear question in favour of secession.²³⁸

²³⁵ *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3.

²³⁶ *Ibid.* at para. 95.

²³⁷ *Reference*, *supra* note 217 at para. 32.

²³⁸ *Reference*, *supra* note 217 at 4-5.

The combination of the written constitution and its unwritten norms was relied on in the decision to establish the unconstitutionality of unilateral secession and, more importantly, to go beyond the specific parameters of the questions, and to establish a legal framework for secession under the constitution. With respect to the meaning of unilateral secession, the Court took the position that “what is claimed by a right to secede unilaterally is the right to effectuate secession without prior negotiations with the other provinces and the federal government.”²³⁹ As such, the Quebec government’s plan to effect the secession of the province from Canada unilaterally would be in violation of the constitution because this would involve an attempted amendment to the constitution without prior negotiation and would also violate aspects of the four fundamental constitutional principles.

On the other hand, while the Court ruled that unilateral secession is indeed unconstitutional under domestic law, secession itself is not impossible. The Court established that according to the federalism principle, the constitution divides legislative authority between the two levels of government. As such, “federalism facilitates the pursuit of collective goals by cultural and linguistic minorities which form the majority within a particular province.”²⁴⁰ According to the democratic principle, “each participant in Confederation” has a right to initiate constitutional change and “this right imposes a corresponding duty on the participants of Confederation to engage in constitutional discussions.”²⁴¹ The third principle of constitutionalism and the rule of law establish that

²³⁹ *Ibid.* at para. 86.

²⁴⁰ Reference, *supra* note 217 at para. 59.

²⁴¹ *Ibid.* at para. 69.

constitutional change must conform to the law. Legal secession would be initiated by the democratic expression of the people of Quebec in “a clear majority on a clear question in favour of secession.”²⁴² This democratic expression would “place an obligation on the other provinces and the federal government to acknowledge and respect that expression of democratic will by entering into negotiations and conducting them in accordance with the underlying constitutional principles.”²⁴³

Although the Court’s decision is legally binding on the political actors under the Constitution of Canada, the precise legal meaning and status of the principles and obligations with respect to legal secession is unclear. According to the Court,

underlying constitutional principles may in certain circumstances give rise to substantive legal obligations (have full legal force) which constitute substantive limitations upon government action. These principles may give rise to very abstract and general obligations, or they may be more specific and precise in nature. The principles are not merely descriptive, but are also invested with a powerful normative force, and are binding upon both the courts and governments.²⁴⁴

However, the Court made it clear that the written constitution has primacy over unwritten norms because “a written constitution promotes legal certainty and predictability, and it provides a foundation and a touchstone for the exercise of constitutional judicial review.”²⁴⁵

As a result, the decision creates an apparent contradiction between identifying certain conditions of a political process to legally effect the secession of a province from Canada while giving these same conditions legal status. For example, what a clear majority

²⁴² *Ibid.* at para. 100.

²⁴³ *supra* note 217 at para. 88.

²⁴⁴ *supra* note 217 at para. 54.

or a clear question would be is left “for the political actors to determine.”²⁴⁶ Likewise, the duty to negotiate the terms of secession is left to the political actors but without clear direction as to what would be consistent with the “obligations identified by the Court.”²⁴⁷ Further, the Court refrained from explicitly stating who would negotiate on behalf of Canada outside Quebec²⁴⁸ or what amendment process would be required to legally effect the secession of a province from Canada. On the issue of the amending formula, the Court stated:

In accordance with the usual rule of prudence in constitutional cases, we refrain from pronouncing on the applicability of any particular constitutional procedure to effect secession unless and until sufficiently clear facts exist to squarely raise an issue for judicial determination.²⁴⁹

Thus, in the event of a controversial secession vote, it seems highly likely that the judiciary could become involved in adjudicating the precise legal meaning and enforceability of the constitutionalized principles.

The apparent contradiction in the ruling has led some analysts to conclude that the Court’s decision answered the material questions “with enough key issues left unclarified or thrown back to politicians for resolution.”²⁵⁰ It is true that the ambiguity of the decision allowed both the federal government and the government of Quebec to claim victory. Prime Minister Chrétien stated, “What the court has done is to confirm just how difficult it

²⁴⁵ *Ibid.* at para. 53

²⁴⁶ *supra* note 217 at 7.

²⁴⁷ *Ibid.*

²⁴⁸ “The secession of a province from Canada must be considered, in legal terms, to require an amendment to the Constitution, which perforce requires negotiation.” *Ibid.* at para. 84.

²⁴⁹ *Ibid.* at para. 105.

would be to break up one of the most successful countries in the world.”²⁵¹ While Quebec premier Lucien Bouchard stated, “The court weakens the foundations of the federalist strategy, undermines the arguments of fear.”²⁵² The decision of the Court supports both contentions.

But does the decision throw the issues back to the politicians? Who ultimately will decide what a clear question or a clear majority is, and who should negotiate and when negotiations are in “bad faith”? These questions are left ambiguous and unclarified because of the inherently political overtones of issues presented by the case. In the words of the Court, “The task of the Court has been to clarify the legal framework within which political decisions are to be taken ‘under the Constitution’ and not to usurp the prerogatives of the political forces that operate within that framework.”²⁵³ The principles and obligations referred to by the Court are left to the operation of the political actors but within the legal framework established by the Court. The extent to which the political actors can or will adhere to these principles and obligations is ultimately for the Court to decide. In this way, the Court has become central in any further attempt to effect secession or any number of other political activities that were implicated by the articulation of the underlying principles and the obligations that flow from them outlined in the decision of the Court.

²⁵⁰ Joan Bryden, “Federalist, separatist camps can both claim victory” *Ottawa Citizen* (21 August, 1998) A2.

²⁵¹ “One ruling, two solitudes” *Ottawa Citizen* (22 August, 1998) A1.

²⁵² *Ibid.*

²⁵³ *supra* note 217 at 7.

Assessment of the Formal Litigation Approach.

It is evident that in many important respects the formal litigation approach is markedly different with the formal reform approach. Whereas the formal reform approach seeks to implement formal constitutional amendments for the accommodation of Quebec nationalism, the litigation approach involves judicial review of the Quebec government's secession legislation. While the first approach involves political negotiation and formal constitutional amendment, the second involves a binding legal interpretation of the constitution imposed by courts. But despite these apparent differences in terms of content and strategy, the examination of the *Quebec Secession Reference* decision reveals that the litigation approach shares many structural factors with the formal reform approach.

First, the Reference to the Supreme Court involves large-scale constitutional matters. The Quebec government has maintained that the democratic will of Quebecers will decide the future of Quebec and that reference to the constitutionality of its program for secession is immaterial and a side issue.²⁵⁴ While recognizing the importance of the democratic expression of the will of Quebecers is an important consideration to the issue of secession, the federal government has maintained that the rule of law is central to any democratic expression on the part of Quebecers. This conflict over the proper role of law in the political process undertaken by the Quebec government was the basis of the

²⁵⁴ The Quebec government's motion to dismiss the Bertrand action states that the constitution and the system of law it outlines are not relevant to considerations of the governments legislation because of parliamentary immunity, the lack of translation of sections of the constitution according to s. 52, and that the right to secede is found in international law. See note 150.

Reference. As the justices stated in the judgement, "This reference requires us to consider momentous questions that go to the heart of our system of government."²⁵⁵

Second, like the subject matter of the reform approach, the issues in the Reference had a high profile and symbolic character. The Quebec government's negative reaction to the Reference was based on its contention that secession is a political matter, not a legal one. This added to the profile of the Reference, pitting the democratic rights of Quebecers against the rule of law or, more precisely, the federal government against the government and citizens of Quebec. This, in turn, increased the stakes involved in terms of the potentially negative consequences resulting from the judgement because of the strong opposition to the Reference by both the government and people of Quebec.²⁵⁶ As Réjean Pelletier notes, "judgement of the Supreme Court on the legality of a unilateral declaration of independence could induce negative reactions in Quebec, arousing sovereigntist fervour."²⁵⁷

Third, as in the reform approach, the Reference did not produce a clear winner or loser, yet generated new law.²⁵⁸ The lack of a clear winner or loser in the Reference mitigated the potentially negative consequences possible from a more definitive

²⁵⁵ Reference, *supra* note 217 at 1.

²⁵⁶ See pages. 78-79 above.

²⁵⁷ Réjean Pelletier, "From Jacques Parizeau to Lucien Bouchard: A New Vision? Yes But..." in Harvey Lazar, ed., *Canada: The State of the Federation 1997. Non-Constitutional Renewal* (Kingston: Institute of Intergovernmental Relations, 1997) at 305.

²⁵⁸ "The process of adjudication influences and shapes public policies that are given effect through laws. For this reason the adjudicative work of judges itself is of political significance. This is a paradoxical and deeply problematic feature of adjudication. For in theory judges are supposed to be settling disputes according to pre-existing law, to be upholding rights and enforcing duties that exist under law. But the fact remains that judges also shape and develop law in the very process of settling disputes about it." Russell, *supra* note 66 at 13.

judgement. Because of its large-scale constitutional law-making and its self-perpetuating nature, the judgement will invite and in some cases compel the courts to become involved again at some future time. The legal status and standing given the unwritten constitutional norms will require judicial interpretation to clarify, among others, what a clear majority on a clear question would entail. In contrast to ordinary adjudication by courts, which tends to be reactive in nature, the Reference was clearly focussed on future contingencies. This tends to generate more law and the potential for formal constitutional confrontation in the future.

Fourth, both the formal reform approach and the Reference involve changes which affect the formal constitutional amendment process. In this regard, the Reference is relevant to the amending formula in two respects. On the one hand, the articulation of the unwritten norms or principles could at some future time give rise to a proposed amendment to allow the secession of a province that would have to be ratified through the amending formula. Although the Court did not specify which procedure would be required to ratify such an amendment, it does say that legal secession would have to include the amending formula: "The secession of a province from Canada must be considered, in legal terms, to require an amendment to the Constitution..."²⁵⁹ On the other hand, the decision of the Court is arguably equivalent to a judicial amendment to the constitution as a result of its articulation of the four fundamental principles or unwritten norms and their consequences. These principles now have constitutional status and, as a result, are enforceable by the courts. The net effect of the decision in this regard was to generate

²⁵⁹ *Ibid.* at 42.

more law and put the judiciary in a much more central role in regard to the secession of a province from Canada or to any number of other political activities that were implicated by the articulation of the underlying constitutional principles and the obligations that flow from them.

Thus, although there are institutional differences between adjudication and formal constitutional reform, the federal government's resort to the courts in the *Quebec Secession Reference* suggests that many of the structural features of the litigation approach bear a strong resemblance to their counterparts in the reform approach. To that extent, the long-term prospects for the Reference, and for the litigation approach as a response to Quebec nationalism, are not bright.²⁶⁰

²⁶⁰ Indeed, it is arguable that the litigation approach faces additional problems in this context. When they address complex, "polycentric", (see Fuller, *supra* note 165), highly politicized issues) courts are operating at a distance from the traditional adjudicatory paradigm described in Part 1 above. Although this involvement is not unusual for courts in Canada, it strains the limits of their own institutional design and resources (i.e., adversarial system, non-elected character, *ex post facto* orientation, bi-polar orientation, etc.: see further, Part 1 above). Arguably, the greater the departure, the greater the strain.

Chapter 5. Formal and Informal Approaches.

As well as the formal approaches discussed thus far in the thesis, informal approaches to Quebec nationalism have also been attempted. The informal approach seeks to accommodate Quebec nationalism by means of changes to intergovernmental relations not requiring amendments to the formal part of the Constitution. The informal approach typically involves bilateral agreements between the federal government and Quebec, or multilateral agreements between the federal government and one or more of the provinces. Typically, these agreements regulate the activities of the federal and provincial governments in areas of shared or exclusive legislative authority. The agreements attempt to avoid the difficulties associated with efforts at implementing formal change, by taking more flexible routes.

Historically, intergovernmental negotiations have taken the form of executive federalism²⁶¹, which has been the “vehicle for obtaining intergovernmental agreements and securing plans for constitutional or other forms of change in the nation.”²⁶² Collaborative and cooperative federalism have also been used to describe the political context in which these types of negotiations are conducted and concluded.²⁶³

²⁶¹ Executive federalism has been defined as “the arrangements used to negotiate agreements between the two levels of government for the provision of programs, services, and the coordination of policies.” Kathy Brock, “The End of Executive federalism?” in François Rocher & Miriam Smith, eds., *New Trends in Canadian Federalism* (Peterborough, Broadview Press, 1995) at 93.

²⁶² Harvey Lazar, ed., “Non-Constitutional Renewal: Toward a New Equilibrium in the Federation” in Lazar, ed., *Canada: The State of the Federation 1997. Non-Constitutional Renewal* (Kingston: Institute of Intergovernmental Relations, 1997) at 93.

²⁶³ See generally: Alan Cairns, *Reconfigurations. Canadian Citizenship and Constitutional Change* (Toronto: McClelland & Stewart, 1995), Harvey Lazar, ed., *Canada: The State of the*

However, in an effort to revitalize the operation of federalism following the defeat of the proposed Meech Lake and Charlottetown constitutional accords and the subsequent narrow defeat of the sovereignty referendum, the federal government undertook a new approach to federal-provincial relations, concentrating on the informal approach. According to Harvey Lazar:

The failure of the Charlottetown Accord and the election of the federal Liberals in 1993 marked a turning point in intergovernmental relations in Canada. Whereas constitutional reform was the centrepiece of federal-provincial relations in the 1980s and early 1990s, the period since then has been overwhelmingly focused on the idea that the Canadian federation can continuously reinvent itself through non-constitutional means. The assumption has been that Canadian federalism has the capacity to adapt to changing needs and evolving circumstances regardless of the difficulty in implementing formal constitutional amendments.²⁶⁴

The purpose of this chapter is to examine briefly several of the most recent informal approaches to Quebec nationalism in order to compare and contrast their structural features with those of the formal approach.

Federation 1997. Non-Constitutional Renewal (Kingston: Institute of Intergovernmental Relations, 1997), Kenneth McRoberts, *Misconceiving Canada: The Struggle for National Unity* (Toronto: Oxford University Press, 1997), François Rocher & Miriam Smith, eds., *New Trends in Canadian Federalism* (Peterborough, Broadview Press, 1995), and Peter Russell, *Constitutional Odyssey*, 2nd ed. (Toronto: University of Toronto Press, 1993).

²⁶⁴ Harvey Lazar, ed., "Non-Constitutional Renewal: Toward a New Equilibrium in the Federation" in Lazar, ed., *Canada: The State of the Federation 1997. Non-Constitutional Renewal* (Kingston: Institute of Intergovernmental Relations, 1997) at 3.

a) Immigration.

Immigration is an area of concurrent legislative jurisdiction under section 95 of the *Constitution Act, 1867*. Although both the provincial and federal governments can legislate in relation to immigration, federal legislation is paramount. The Quebec government has argued historically that because of Quebec's cultural and linguistic difference with the rest of Canada, Quebec has needed special arrangements in relation to immigration policy. Quebec has required the power to legislate its own immigration policy "to meet the major demographic, economic, linguistic and cultural challenges of...[Quebec]...society."²⁶⁵

In 1971 and 1975, two agreements were signed to enable Quebec to participate in the selection of immigrants. In 1978, the Cullen-Couture agreement expanded the role of the Quebec government in immigration policy by transferring decision-making power over immigration to the province from the federal government.²⁶⁶ The agreement delegated certain aspects of the selection process to the province and enabled Quebec officials to participate at Canadian immigration offices overseas.²⁶⁷ The transfer of power enabled the

²⁶⁵ *Let's Build Québec Together: Vision: A Policy Statement on Immigration and Integration* (Quebec City: Ministère des Communautés culturelles et de l'Immigration du Québec, 1990) at 8.

²⁶⁶ Similar agreements were also concluded between the federal government and five provinces: Nova Scotia, Newfoundland, New Brunswick, PEI, and Saskatchewan. These agreements were reached after Cullen-Couture and were much more limited in their scope of authority over immigration policy than the Cullen-Couture agreement. See: Kenneth McRoberts, "Unilateralism, Bilateralism and Multilateralism: Approaches to Canadian Federalism", in Richard Simeon, ed., *Intergovernmental Relations*, Collected Research Studies of the Royal Commission on the Economic Development Prospects for Canada, vol. 63 (Toronto: U. of Toronto Press, 1985) at 90; and Kenneth McRoberts, *Misconceiving Canada: The Struggle for National Unity* (Toronto: Oxford U. Press, 1997) at 152-53.

²⁶⁷ *Ibid.* at 90.

Quebec government to “take a position on the entry of foreign nationals in order to favour those who will be able to integrate rapidly into Quebec society.”²⁶⁸ These powers would ensure that immigration to Quebec would “contribute to the sociocultural enrichment of Quebec, taking into account its *French character*.”²⁶⁹

Greater control over immigration was one of the five minimum conditions outlined by the Quebec government for its consent to the 1982 constitution. Through the proposed Meech Lake and Charlottetown constitutional accords in 1990 and 1992 respectively, the existing immigration policy arrangements under the Cullen-Couture agreement would have been ‘constitutionalized’, formally entrenching them into the constitution. Constitutional entrenchment of immigration powers would provide a permanence that an informal agreement could not. The Cullen-Couture remained in force after the failure of the two packages of proposed constitutional amendments, but greater control over immigration policy remained important to the Quebec government.

In 1991, the federal government and Quebec reached a new agreement on immigration policy. The Canada-Quebec Accord Relating to Immigration and Temporary Admission of Aliens (1991) regulates the activities of the two levels of governments in relation to immigration policy “in order to provide Quebec with new means to preserve its demographic importance to Canada, and to ensure the integration of immigrants in Quebec in a manner that respects the distinct identity of Quebec.”²⁷⁰ The agreement

²⁶⁸ McRoberts, *supra* note 266 at 153.

²⁶⁹ *Ibid.* (Italics in original).

²⁷⁰ Howard Adelman, “Canada, Quebec, and Refugee Claimants”, in Joseph Carens, ed., *Is Quebec Nationalism Just? Perspectives from Anglophone Canada* (Montreal & Kingston: McGill-Queen’s U. Press, 1995) at 89.

expands upon the previous bilateral agreements and gives Quebec significant powers over immigration policy²⁷¹ including: the right to establish criteria of selection for categories of immigrants and the power to “determine and apply any financial criteria for family members sponsoring relatives.”²⁷² The agreement regulates the immigration activities of the two governments in relation to immigration in order to avoid conflict and to respond to Quebec’s request for greater control. The new agreement continues the asymmetry in immigration policy between provinces, with Quebec exercising much more extensive control than the other provinces.

b) Labour-Market Training.²⁷³

Control over labour-market training has long been a contentious issue between Quebec and the federal government. In the 1960s, the Lesage government first proposed an agreement that would give Quebec greater control over labour training policy. In 1992,

²⁷¹ See generally: Howard Adelman, “Canada, Quebec, and Refugee Claimants”, in Joseph Carens, ed., *Is Quebec Nationalism Just? Perspectives from Anglophone Canada* (Montreal & Kingston: McGill-Queen’s U. Press, 1995) and Joseph Carens, “Immigration, Political Community, and the Transformation of Identity: Quebec’s Immigration Policies in Critical Perspective”, in Joseph Carens, ed., *Is Quebec Nationalism Just? Perspectives from Anglophone Canada* (Montreal & Kingston: McGill-Queen’s U. Press, 1995).

²⁷² *Ibid.*

²⁷³ See generally: François Rocher and Christian Rouillard, “Using the Concept of Deconcentration to Overcome the Centralization/Decentralization Dichotomy: Thoughts on Recent Constitutional and Political Reform” in Patrick Fafard & Douglas Brown, eds., *Canada: State of the Federation 1996* (Kingston: Institute of Intergovernmental Relations, 1996), Herman Bakvis, “Federalism, New Public Management, and Labour-Market Development”, in Patrick Fafard & Douglas Brown, eds., *Canada: State of the Federation 1996* (Kingston: Institute of Intergovernmental Relations, 1996), and Réjean Pelletier, “From Jacques Parizeau to Lucien Bouchard: A New Vision? Yes But...” in Harvey Lazar, ed., *Canada: The State of the Federation 1997. Non-Constitutional Renewal* (Kingston: Institute of Intergovernmental Relations, 1997).

the Charlottetown constitutional accord proposed to entrench a program for the negotiated withdrawal of the federal government in the area of "Labour Market Development and Training."²⁷⁴

In 1996 the federal government released *Getting Canadians Back to Work: A Proposal to the Provinces and Territories for a new Partnership in the Labour Market*.²⁷⁵

The federal government indicated its intent to withdraw from labour market policy in favour of provincial control. It proposed to do this by means of administrative agreements with the provinces. As well, the federal government introduced new unemployment legislation, Bill C-12, which outlined its proposed role in training.

On April 21, 1997 Quebec and the federal government signed the Canada-Quebec agreement relating to the Labour Market. This bilateral administrative agreement transferred total jurisdiction in labour training to Quebec. Similar agreements were reached with seven other provinces. While Alberta, Manitoba and New Brunswick joined Quebec in opting for total jurisdiction, four other provinces opted for "co-management or participation in the federal program."²⁷⁶

²⁷⁴ See: the proposed section 93B of the Charlottetown Accord, *Draft Legal Text*, in Kenneth McRoberts & Patrick Monahan, eds., *The Charlottetown Accord, the Referendum, and the Future of Canada* (Toronto: U. of Toronto Press, 1993) at 332 (Appendix 2).

²⁷⁵ Canada. Human Resources Development Canada, *Getting Canadians Back to Work: A Proposal to the Provinces and Territories for New Partnership in Labour Market* (Ottawa: Human Resources Development Canada, 1996).

²⁷⁶ Pelletier, *supra* note 256 at 302-3.

c) Financial Arrangements.

Financial arrangements for the provision of social services have a long tradition in Canada. The purpose of the various financial arrangements between the federal and provincial governments was to balance the need for the provision of social services in an increasingly dynamic economic society in the post-war era with the constraints imposed by the federal division of powers in the constitution and/or their interpretation by the courts.²⁷⁷

In 1937 the federal government established the Rowell-Sirois Commission to examine the “whole financial structure of Canadian government.”²⁷⁸ Alberta, British Columbia, and Ontario ultimately rejected its report²⁷⁹ because of its recommendations for the restructuring of the financial structure, but other arrangements have been made for the provision of social services by the federal and provincial governments. These include several arrangements between the federal government and Quebec alone or in conjunction with other provinces, for the funding and administration of social services. The arrangements include shared-cost programs, tax collection, and, more recently, the proposed Social Union.

²⁷⁷ Here I am referring to the effects of constitutional interpretation by the Judicial Committee of the Privy Council on the ability of the federal government to become more involved in the economy, among other areas, during the first part of this century. See *supra* note 180. See also: R. Tuck, “Canada and the Judicial Committee of the Privy Council” (1941) 4 U.T.L.J. 33 and Stephen Wexler, “The Urge to Idealize: Viscount Haldane and the Constitution of Canada” (1984) 29 McGill L.J. 608.

²⁷⁸ Hogg, *supra* note 41 at 135.

²⁷⁹ *Report of the Royal Commission on Dominion Provincial Relations* (1940).

Shared-cost programs are initiated by the federal government but administered by the provincial governments. Federal grants cover 50 per cent of the cost of the program with certain restrictions placed on the use of the money.²⁸⁰ Shared-cost programs are intended to provide a minimum level of service to Canadians, but some provinces, especially Quebec, have criticized some of these programs on the grounds that the federal government is unjustifiably intruding into exclusive provincial jurisdiction. These provinces have opted out of the federal program in favour of their own.

Quebec has historically opposed the use of the federal spending power to intrude into areas of exclusive provincial jurisdiction. As a result, Quebec opted out of both a national pension plan and the tax rental and collection agreements. In 1965 Quebec opted out of the Canada Pension Plan and established its own: the Quebec Régime de rentes.²⁸¹ Quebec also refused to sign the tax rental agreement in 1947 and the tax collection agreements of 1962 and 1992.²⁸² As a result, Quebec continues to collect its own personal and corporate tax and operate a separate pension plan system.

More recently, the federal and provincial governments entered into negotiations to conclude an agreement on the so-called Social Union.²⁸³ The federal government, nine provinces, and two territories signed the agreement on February 4, 1999.²⁸⁴ The agreement assigns the provinces a role in the administration of a variety of federally

²⁸⁰ Hogg, *supra* note 41 at 143.

²⁸¹ *Ibid.* at 146.

²⁸² *Ibid.* at 135-137.

²⁸³ See: Joan Bryden, "Social Union talks resume. Tradeoffs, deadlines and sticking points on the agenda" *The Ottawa Citizen* (11 January 1999) A4, Joan Bryden, "Social Union deal Possible" *The Ottawa Citizen* (23 January 1999) A3.

funded social services including health and education,²⁸⁵ and is accompanied by a federal commitment to provide more funding for health care. The agreement provides for provincial participation “in setting objectives and national standards before the federal government introduces new social programs in their areas of jurisdiction”²⁸⁶, and for the creation of a dispute resolution mechanism.²⁸⁷

Quebec refused to sign the agreement because it did not include the right to opt out of new national programs, and because of the recognition it gave to the federal spending power. According to Quebec premier Bouchard, the agreement would continue the historical intrusion into areas of exclusive provincial jurisdiction, pursuant to the federal spending power.²⁸⁸ According to Quebec’s Intergovernmental Affairs Minister, Joseph Facal, “For the first time in history, the other provinces have given a legitimacy to the federal spending power. Quebec, for its part, has not accepted this.”²⁸⁹ For these same reasons, Quebec refused to sign an agreement on a health accord that would have been part of the Social Union.²⁹⁰

²⁸⁴ Joel-Denis Bellavance, “Ministers sign deal without Bouchard” *National Post* (5 February 1999) A1.

²⁸⁵ *Ibid.*

²⁸⁶ *Ibid.*

²⁸⁷ Graham Fraser, “Social Union? What Social Union?” *The Globe & Mail* (25 February, 1999) A7.

²⁸⁸ *supra* note 283.

²⁸⁹ *Ibid.*

²⁹⁰ Joan Bryden, “Quebec refuses to take part in health accord” *The Ottawa Citizen* (28 January 1999) A5. See also: Joan Bryden, “PM pledges health dollars” *The Ottawa Citizen* (26 January 1999) A3 and Joel-Denis Bellavance & Robert Fife, “Quebec refusing to sign deal on health spending” *National Post* (26 January 1999) A1.

d) Distinct Society & Veto.

The recognition of Quebec as constituting a distinct society and a provision for a Quebec veto over constitutional change have been two of Quebec's most consistent demands. Successive Quebec governments have considered it essential that Quebec gain these protections and assurances for its survival. In 1985, Quebec's Minister of Intergovernmental Affairs, Gil Rémillard, stressed the importance of this recognition, designating it as one of Quebec's minimum conditions for its consent to the 1982 constitution. He said that:

We must be assured that the Canadian constitution will explicitly recognize the unique character of Quebec society and guarantee us the means necessary to ensure its full development within the framework of Canadian federalism.²⁹¹

The formal attempts to entrench the recognition of Quebec's distinctiveness and constitutional veto into the constitution failed in 1990 and 1992, with the defeat of Meech Lake and Charlottetown constitutional accords. In 1995, the federal government tried to address these issues by informal means, outside the text of the constitution. First, it passed in the House of Commons on December 11, 1995 and in the Senate on December 14, 1995, a motion directing the components of the federal government and its agencies to recognize Quebec as constituting a distinct society and, accordingly, to operate in a manner which reflects such recognition. The motion states:

Whereas the people of Quebec have expressed the desire for recognition of Quebec's distinct society,

²⁹¹ Rémillard, *supra* note 109 at 32.

- (1) the House recognize that Quebec is a distinct society within Canada;
- (2) the House recognize that Quebec's distinct society includes its French-speaking majority, unique culture and civil law tradition;
- (3) the House undertake to be guided by this reality;
- (4) the House encourage all components of the legislative and executive branches of government to take note of this recognition and be guided in their conduct accordingly.²⁹²

On another front, the federal government enacted Bill C-110 *An Act Respecting Constitutional Amendments*. The statute commits the federal government not to endorse constitutional amendments that are opposed by four regions of Canada including Quebec. This gives not only Quebec but also the other regions of Canada a *de facto* veto over future constitutional amendments.

The Bill states:

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enact as follows:

1. (1) No Minister of the Crown shall propose a motion for a resolution to authorize an amendment to the Constitution of Canada, other than an amendment in respect of which the legislative assembly of a province may exercise a veto under section 41 or 43 of the *Constitution Act, 1982* or may express its dissent under subsection 38(3) of that Act, unless the amendment has first been consented to by a majority of the provinces that includes
 - (a) Ontario;
 - (b) Quebec;
 - (c) British Columbia;
 - (d) two or more of the Atlantic provinces that have, according to the then latest general census, combined populations of at least fifty per cent of the population of all the Atlantic provinces; and
 - (e) two or more of the Prairie provinces that have, according to the then latest general census, combined populations of at least fifty per cent of the population of all the Western provinces.²⁹³

²⁹² Canada. House of Commons, 1st Sess., 35th Parl., *Journals*, Nos. 275 to 278A (December 11, 1995) at 2232.

²⁹³ Bill C-110, *An Act Respecting Constitutional Amendments* SC 1996 C1. Subsection (2) of the Act states: "In this section, "Atlantic provinces" means the provinces of Nova Scotia, New

Assessment of Informal Approaches.

The examples above suggest that informal approaches to Quebec nationalism do not exhibit the same structural features as the formal approaches. The structural constraints that affect the success of the formal approaches seem to be less relevant to the informal approach. It appears that in contrast to the formal approaches, the informal approaches typically have a lower-profile, involve incremental change rather than large-scale change and, as a result, tend not to result in massive success or failure. These differences seem to suggest a correlation between the structural factors of the particular approach and its success or failure.

As we have seen, informal approaches seek not to entrench formal amendments to the constitution, but rather to reach agreement between the two levels of government through bilateral or multilateral administrative agreements, or by initiatives on behalf of the federal government. The 1991 agreement on Immigration and the 1997 Labour Market Training agreement illustrate the type of informal approaches that were successfully concluded between the federal government and Quebec in areas that had previously failed through the formal constitutional reform approach. The agreements have the effect of regulating the relationship between the federal government and Quebec without amending the constitution. The others, such as the motion recognizing Quebec as a distinct society and the veto, involve unilateral federal action that does not require or culminate in formal constitutional amendment. This allows for flexibility in the negotiating and implementing

Brunswick, Prince Edward Island and Newfoundland; "Western provinces" means the provinces of Manitoba, Saskatchewan and Alberta."

of agreements that are free of the constraints and hurdles of the formal amending formula. As a result, the informal approach has less chance of massive success or dramatic failure.

The informal agreements examined above tend to have a lower profile, frequently being overshadowed by other issues and events that generate greater public reaction.²⁹⁴ This tendency of the informal approach to generate less attention than its formal counterpart was evident in the recent Labour Market Training agreement between Quebec and the federal government. According to Réjean Pelletier,

Concluded shortly after the federal election was called, this agreement generated little reaction as attention rapidly shifted to other events of the election campaign: job creation, deficit reduction, maintaining social programs, and Canadian unity (including discussion of "Plan B", which specified the conditions for the attainment of sovereignty). These issues quickly eclipsed the agreement on labour training...²⁹⁵

In contrast to similar formal attempts, the informal unilateral federal approaches used in recognizing Quebec's distinct society and veto were also much less visible and contentious. The fact that these informal approaches did not entrench formal change is one possible explanation for their lower profile and lower prospects of failure on the scale of similar formal attempts.

Informal approaches are generally incremental in their objectives and effect, in contrast to the large-scale, "mega-constitutional" agenda of the formal approaches. According to Harvey Lazar, "the approach remained pragmatic and step by step, rather

²⁹⁴ According to Harvey Lazar, "the non-constitutional strategy has been developed in a generally non-provocative way. Recently...at least as seen through the media, it has received far less attention than the federal government's Supreme Court reference." *supra* note 262 at 28.

²⁹⁵ Pelletier, *supra* note 257 at 303.

than a single large-scale package.”²⁹⁶ The agreements on immigration, labour-market training or the various financial arrangements were limited and rather specific in terms of the content of the agreements. These agreements dealt “with issues, one at a time, employing legislative or administrative solutions, on the basis of the concrete circumstances of each file.”²⁹⁷

The informal approach seems to have the potential to respond to Quebec nationalism more easily and with less opposition than the formal approaches. Through unilateral, bilateral, or multilateral arrangements, the federal government’s new strategy for intergovernmental relations has concentrated on addressing issues that can be dealt with without formal change to the constitution, thereby avoiding the more problematic features of the formal approach.²⁹⁸ On the one hand, the asymmetry at the administrative level created by the agreements between the federal government and Quebec in relation to jurisdiction over immigration and labour-market training suggests that treating Quebec differently in these specific areas may be less contentious than trying to do so at the formal level. Moreover, by encouraging similar agreements with other provinces, the federal government has at least extended the same opportunities to the other provinces, even though in many cases such agreements are not desired.²⁹⁹ On the other is the fact that by concentrating on the functionality of Canadian federalism instead of attempting to

²⁹⁶ *Supra* note 264 at 7.

²⁹⁷ *Ibid.* at 9.

²⁹⁸ An argument has been made that the informal approach strategy of the federal government was “motivated by a set of factors that may made this approach the only politically viable option for managing the federation.” See Lazar, *supra* note 262.

²⁹⁹ Alberta, Manitoba, and New Brunswick joined Quebec in concluding agreements with the federal government in Labour Training. See: pg. 99 above.

entrench formal change, the informal approaches have “avoided the irritations that periodically serve to fuel support for the sovereignty side.”³⁰⁰

The federal government has found it easier to respond to two of Quebec’s traditional demands through unilateral and informal rather than formal action. The federal government’s move to unilaterally recognize Quebec as a distinct society and to provide Quebec with a *de facto* veto over future constitutional amendments contrasts with the formal attempts to entrench similar powers into the constitution. These informal actions generated relatively little reaction, in sharp contrast to the fierce opposition to section 2 of the Meech Lake accord or to the Canada Clause in the Charlottetown accord.³⁰¹ However, opposition to the formal recognition of Quebec’s distinct society and a constitutional veto remains high, and may indicate why the federal government chose to respond to Quebec informally.³⁰² Because it was not formally entrenched the separatist government in Quebec

³⁰⁰ *Supra* note 264 at 25.

³⁰¹ See e.g.: Raymond Breton, “Why Meech Failed: Lessons for Canadian Constitution Making” (1992) 35 C.D. Howe Institute 9, Brian O’Neal, “Distinct Society: Origins, Interpretations, Implications” (Research Branch: Library of Parliament, 1995), McRoberts & Monahan, *The Charlottetown Accord, the Referendum, and the Future of Canada* (Toronto: U. of Toronto Press, 1993), Pierre Trudeau, “Who Speaks for Canada?: Defining and Sustaining A National Vision” in M. Behiels, ed., *The Meech Lake Primer: Conflicting Views of the 1987 Constitutional Accord* (Ottawa: U. of Ottawa Press, 1989).

³⁰² Opposition to formally recognizing Quebec as a distinct society was highest in 1991 shortly after the demise of the Meech Lake accord, with 59% opposed compared with 31% in favour nationally. In 1995, shortly before the federal government passed its motion, opposition to distinct society stood at 46% compared to 44%. In 1997, opposition stood at 50% with 38% in favour. In 1995, opposition to giving Quebec a constitutional veto stood at 57% with 24% in favour. However, the Calgary declaration’s proposal to recognize the “unique character” of Quebec was supported by 49% compared with 36% opposed in a 1995 national poll. See: Gallup Poll Vol. 55, No 96 (Monday, November 27, 1995) and Gallup Poll Vol. 57, No 56 (Tuesday, October 28, 1997).

was less than enthusiastic about the motion. Moreover, most Bloc Québécois members in the House of Commons, including leader Gilles Duceppe, voted against the motion.³⁰³

Special mention must be made of the recently concluded Social Union Agreement. Despite being an informal approach, the Social Union agreement was contentious, widely publicized, and dealt with fairly large-scale changes. These features of the Social Union agreement are not typical of the informal approach. The agreement, signed by nine provinces (except Quebec), two territories, and the federal government, was preceded by two years of public debate and governmental negotiations, culminating in a first ministers' meeting at the Prime Minister's official residence on February 4, 1999. Quebec's refusal to sign the agreement and the use of the traditional first ministers meeting increased the contentious nature of the negotiations. The agreement involved large-scale rather than incremental changes to the operation of federal-provincial relations in the area of social services.³⁰⁴

Taken together, these features of the Social Union would seem to suggest some similarities with the formal approach. But even with the Quebec Premier's open opposition to the agreement and his government's refusal to sign the agreement, its situation is unlikely to compare to the consequences of the failure of the Meech Lake or Charlottetown constitutional accords. For one thing, the Social Union agreement has a low profile among Quebecers. In a recent Angus Reid Poll, "39 per cent said they were

³⁰³ Canada. House of Commons, 1st sess., 35th Parl., *Journals*, No. 275 to 278A (December 11, 1995) at 2232-2233.

³⁰⁴ See pages 97-98 above.

‘not really aware’ of it, and 30 per cent were ‘not aware at all’ of it.”³⁰⁵ This illustrates that “Lucien Bouchard’s harsh and bitter attacks on the social union...have not been particularly effective in mobilizing public opinion in Quebec.”³⁰⁶ As a result, the potential for the agreement to generate as strong a reaction from Quebec comparable to that of the negative reaction to the Meech Lake or Charlottetown constitutional accords is unlikely. In fact the opposite might be true. In the same poll, “of those Quebecers who were ‘somewhat aware’ and ‘not really aware’, 59% thought it was a step in the right direction.”³⁰⁷ This level of support by Quebecers despite the opposition by the Quebec government may, if anything, indicate the possible success of the Social Union agreement.

The Social Union agreement may indicate something about the informal approach in general. Despite the efforts of the Quebec government, the Social Union agreement provoked relatively little appreciable reaction. Thus although the Social Union was relatively broad, visible, and contentious in relation to other informal initiatives, it still lacked the magnitude, truly high profile, and potential for controversy that appears to characterize the formal approach. This would tend to suggest that the informal approach is not affected—or not as affected—by the same structural factors which tend to characterize the formal approach. As a result, the informal approach may be a possible alternative for the accommodation of Quebec nationalism.³⁰⁸

³⁰⁵ Graham Fraser, “Social Union? What Social Union?” *The Globe & Mail* (25 February, 1999) A7.

³⁰⁶ *Ibid.*

³⁰⁷ *Ibid.*

³⁰⁸ From one point of view, the informal approach may preclude what some might regard as crucial for the accommodation of Quebec nationalism—formal constitutional change. From another, the incremental nature of the informal approach may be used to put into place a foundation that could

In short, it appears that because the informal approach does not seek to entrench formal change, it tends not to exhibit the same structural factors that constrain the success of the formal approach. In general terms, the structural factors evident in the formal approach tend to contribute to the failure of this approach. Conversely, the relative lack of these structural factors in the informal approach appears not to affect its success. As such, there seems to be a correlation between these differences in structural factors of the informal and formal approaches and their success or failure.

render eventual formal change less sweeping and drastic in nature, thereby mitigating some of the negative features of the structural factors.

Chapter 6. Conclusion.

With the 1997 Calgary declaration outlining the premiers' national unity plan that included a proposal for formally recognizing Quebec's "unique character" and the commitment of the Quebec government to create the 'winning conditions' for a future sovereignty referendum, it seems quite likely that the formal constitutional approach will be attempted again. It may be that "once acquired, a taste for mega-constitutional politics seems hard to shake off."³⁰⁹

In this regard, this thesis has attempted to contribute to the national unity debate by examining the three most recent formal constitutional approaches to Quebec nationalism since 1982 in order to assess the contribution of structural factors to the success or failure of these approaches. The main conclusion of the thesis is that structural factors have contributed to the failure of the two most recent formal constitutional reform approaches and are likely to contribute to the failure of the formal litigation approach in the long run.

Both the proposed Meech Lake and Charlottetown constitutional accords attempted, without success, to entrench formal change to the Constitution of Canada to accommodate Quebec nationalism. Their large-scale, 'mega-constitutional' packages of formal amendments operated in the new context of constitutional politics introduced by patriation with the *Charter of Rights and Freedoms* and subject to the new requirements

³⁰⁹ Robert Howse, "Searching for Plan A: National Unity and the Chrétien Government's New Federalism" in Lazar, ed., *Canada: The State of the Federation 1997. Non-Constitutional Renewal* (Kingston: Institute of Intergovernmental Relations, 1997) at 312.

for formal amendments. This new context highlighted the influence of structural factors on the failure of the formal reform approach.

The examination of the formal litigation approach revealed some interesting similarities with the formal reform approach. The Reference to the Supreme Court involved the determination of the legality of the Quebec government's secession legislation. The Quebec government claimed that this was a political, not a legal matter. As a result, the Reference was a high stakes, highly visible, symbolic and emotional undertaking. The Reference involved fundamental issues of constitutional law with highly political overtones. Although the complexity and ambiguity of the decision may have postponed confrontation in the short term, its long-term consequences remain to be seen. The Court's rulings did generate important new constitutional law. This will invite, and in some cases compel, further interpretation and adjudication by the courts at some future time.

Despite the apparent differences in the content and strategy of the reform and litigation approaches, the thesis found that these two approaches share many of the same structural factors. Both of these approaches attempted large-scale, high profile constitutional change. As a result, both addressed subject matter with high stakes and symbolic content. Both involved large numbers of disparate parties and interests. Both were exercises in law-making. Both drew legal boundaries and set enforceable criteria that would invite—perhaps even compel—more constitutional confrontation in the future.

The influence of structural factors is further revealed in the context of the historical symbiotic relationship between the formal constitutional approach and Quebec

nationalism. Historically, the formal constitutional approach and Quebec nationalism have tended to influence each other. Each successive formal attempt to accommodate Quebec nationalism has produced its own problems. When patriation proceeded without the consent of Quebec, it created strong pressure for future constitutional amendment. At the same time, it also introduced changes to the operation of the formal constitutional approach. These included a greater emphasis on broad public participation and support for formal constitutional amendments, and the unanimity requirement and the three year time frame in the 1982 amending formula. The two subsequent formal reform approaches—the proposed Meech Lake and Charlottetown constitutional accords—were attempted within this new context. Their failure was due at least partly to the additional structural impediments posed by the 1982 constitutional changes, including the new participation demands and amendment requirements.

The failure of the two formal accords was followed by the Quebec sovereignty referendum and the proposed secession legislation, which in turn prompted a shift in federal strategy from attempted reform to litigation. Although the full implications of the Secession Reference remain to be seen, from past experience its formal structural features will contribute to continuing the historic nationalism-response symbiosis, making formal responses to Quebec nationalism all that more difficult.

The comparison of the formal and informal approaches to Quebec nationalism has revealed two important points. First, the informal approaches do not typically exhibit the same structural factors as the formal reform and litigation approaches. The structural constraints that affect the success of the formal approaches seem to be less relevant to the

informal approaches. In contrast to the formal approaches, the informal approaches tend to have a lower profile, involve incremental change rather than large-scale, 'mega-constitutional' change and, as a result, tend not to result in massive success or failure. The other point is that these differences seem to suggest a correlation between the structural factors of the particular approach and its success or failure.

The most recent examples of informal approaches to Quebec nationalism illustrate these points. Following the failure of the formal reform approaches and the narrow defeat of the sovereignty referendum, the federal government's intergovernmental relations policy concentrated on the functional characteristics of Canadian federalism and avoided further efforts to implement formal change. Its informal initiatives typically dealt with specific issues that were amenable to agreement between the federal government and Quebec alone or in conjunction with other provinces. The ability of this approach to successfully implement unilateral, bilateral, or multilateral initiatives indicates that it may be a possible alternative to the more risky formal approach. This alternative is much less dramatic, and much more piecemeal than the formal approach, more an ongoing process of attempts at adjustment and compromise than grand, "fix-all" schemes.³¹⁰

The following statement by the Attorney General of Saskatchewan in the *Quebec Secession Reference* captures the ideal behind most of the modern responses to Quebec nationalism:

A nation is built when the communities that comprise it make commitments to it, when they forgo choices and opportunities on behalf of a nation, ...when the

³¹⁰ This alternative need not preclude use of the formal approach altogether. For example, a series of incremental changes, achieved informally over a period of time, might lay a practical foundation which might then require little more than "ratification" in constitutional form.

communities that comprise it make compromises, when they offer each other guarantees, when they make transfers and perhaps most pointedly, when they receive from others the benefits of national solidarity. The threads of a thousand acts of accommodation are the fabric of a nation.³¹¹

This thesis has attempted to contribute to the debate about national reconciliation by looking at one important aspect of these “acts of accommodation.” It has examined the formal reform and litigation approaches themselves to determine, in a limited and preliminary way, the influence of structural factors on the three most recent formal constitutional approaches to Quebec nationalism. This examination suggests that a variety of identifiable structural factors appear to have had a generally negative influence on the success of formal constitutional approaches to Quebec nationalism, and that the symbiotic relationship between the formal constitutional approach and Quebec nationalism has tended to reinforce the influence of these structural factors. Accordingly, the formal constitutional approach to responding to Quebec nationalism should be used only with extreme caution in the future. The failure of yet another attempt to use the formal constitutional approach could well result in the break up of Canada.

³¹¹ *Reference Re: Certain Questions relating to the Secession of Quebec From Canada*, [1998] S.C.R. at para. 96.

Bibliography.

Balthazar, Louis, "The Faces of Quebec Nationalism" in David Taras and Beverly Rasporich, *A Passion for Identity*, 3rd ed. (Toronto: ITP Nelson, 1997).

Banting, K and R. Simeon, (eds.), *And No One Cheered: Federalism, Democracy and the Constitution Act* (Toronto: Methuen, 1983).

Behiels, M, ed., *The Meech Lake Primer: Conflicting Views of the 1987 Constitutional Accord* (Ottawa: University of Ottawa Press, 1989).

Bogart, W.A., *Courts and Country. The limits of Litigation and the Social and Political Life in Canada* (Toronto: Oxford University Press, 1994)

Breton, R. *Why Meech Failed* (Toronto: C.D. Howe Institute, 1992).

Brooks, Stephen, "Consent and Constitutional Change in Canada" (1994) 32 *Journal of Commonwealth and Comparative Politics*, 279.

Bothwell, Robert et al., *Canada Since 1945* (Toronto: U of T Press, 1981).

Burgess, M, "Ethnicity, Nationalism and Identity in Canada-Quebec Relations: The Case of Quebec's Distinct Society" (1996) 2 *Journal of Commonwealth and Comparative Politics*, 46.

Burgess, M, "Meech Lake: The Process of Constitutional Reform in Canada, 1987-90" *British Journal of Canadian Studies*, 275.

Carens, Joseph, ed., *Is Quebec Nationalism Just? Perspectives from Anglophone Canada* (Montreal & Kingston: McGill-Queen's U. Press, 1995)

Cairns, A.C. *Reconfigurations. Canadian Citizenship and Constitutional Change* (Toronto: McClelland & Stewart, 1995).

Cairns, A.C. *Charter versus Federalism. The Dilemmas of Constitutional Reforms* (Montreal-Kingston: McGill-Queen's Press, 1992).

Cairns, A.C. *Disruptions. Constitutional Struggles, from the Charter to Meech Lake* (Toronto: McClelland & Stewart, 1991).

Cohen, A. *A Deal Undone: The Making and Breaking of the Meech Lake Accord* (Vancouver: Douglas, 1990).

Cook, Curtis., *Constitutional Predicament* (Montreal/Kingston: McGill-Queen's University Press, 1994).

Cook, Ramsay. *Canada, Quebec and the uses of Nationalism*, 2nd ed. (Toronto: McClelland & Stewart, 1995).

Finkelstein, Neil., et al., "Does Quebec Have A Right To Secede At International Law" (1995) 74 Can. Bar Rev. 225.

Finkelstein, Neil and George, Vegh. "The Separation of Quebec and the Constitution of Canada." Toronto: York University Centre for Public Law and Public Policy, 1992.

Forbes, H.D., "Trudeau's Moral Vision", in A.A Peacock, ed., *Rethinking the Constitution. Perspectives on Canadian Constitutional Reform, Interpretation and Theory* (Don Mills, Oxford University Press, 1996).

Gibson, Gordon. "The Supreme Court *Reference* is Irrelevant at Best." *The Globe & Mail* (October 1, 1996) A10.

Greenwood, Murray. *Legacies of Fear* (Toronto: U of T Press, 1993).

Hogg, Peter. *Constitutional Law of Canada* (Toronto: Carswell, 1996).

Hogg, Peter. "Is the Canadian Constitution ready for the 21st Century?." Toronto: York University Centre for Public Law and Public Policy, 1992

Hogg, P. *Meech Lake Constitutional Accord Annotated* (Toronto: Carswell, 1988).

Howse, Robert & A, Malkin, "Canadians are a Sovereign People: How the Supreme Court Should Approach the Reference on Quebec Secession" (1997) 76 Can. Bar Rev. 186-227

Hurley, James, *Amending Canada's Constitution. History, Processes, Problems and Prospects* (Canada: Minister of Supply and Services Canada, 1996).

Knopff, R. and F.L. Morton, "Nation-Building and the Canadian Charter of Rights and Freedoms" in A.C. Cairns and C. Williams, eds., *Constitution, Citizenship and Society in Canada* (Toronto: University of Toronto Press.

LaSelva, S.V., *The Moral Foundations of Canadian Federalism. Paradoxes, Achievements, and Tragedies of Nationhood* (Montreal & Kingston: McGill-Queen's University Press, 1996).

- Lazar, Harvey, ed., *Canada: The State of the Federation 1997. Non-Constitutional Renewal* (Kingston: Institute of Intergovernmental Relations, 1997).
- Lederman W.R., *The Courts and the Canadian Constitution* (Toronto: McClelland & Stewart, 1964).
- Lenihan, D.G. et al., *Reclaiming the Middle Ground* (Montreal: IRPP, 1994).
- Lévesque, René. *Memoirs* (Montreal: McClelland & Stewart, 1986).
- Lévesque, René. *An Option for Quebec* (Toronto: McClelland and Stewart, 1968).
- Lord Durham, *British North America Report to the Queen's Most Excellent Majesty* (1839), in G.M. Craig, *Lord Durham's Report* (Toronto: McClelland and Stewart, 1963).
- Lucas, Charles. *Lord Durham's Report on the Affairs of British North America* (Oxford: Clarendon Press, 1912).
- Macpherson, Don. "Score one for Bertrand" *The Montreal Gazette* (31 August. 1996) C12.
- Magnett, Joseph, E. *Constitutional Law of Canada: Cases, Notes, Materials* (Toronto: Carswell, 1985).
- MacLauchlan, W, H., "Accounting for Democracy and the Rule of Law in the Quebec Secession Reference" (1997) 76 Can. Bar Rev. 155-185.
- Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Wall & Thompson, 1993)
- McRae, Kenneth, ed., *Consociational Democracy: Political Accommodation in Segmented Societies* (Toronto: McClelland & Stewart, 1974).
- McRoberts, K. *Misconceiving Canada: The Struggle for National Unity* (Toronto: Oxford University Press: 1997).
- McRoberts, K. *Beyond Quebec: Taking Stock of Canada* (Montreal & Kingston: McGill-Queen's University Press, 1995).
- McRoberts, K and P. J. Monahan, eds., *The Charlottetown Accord, the Referendum, and the Future of Canada* (Toronto: University of Toronto Press, 1993).
- McRoberts, K & D. Posgate, *Quebec: Social Change and Political Crisis* (Toronto: McClelland & Stewart, 1980)

Monahan, Patrick and Bryant, Michael. "Coming To Terms With Plan B: Ten Principles Governing Secession" (1996) 83 C.D Howe Institute 1-55.

Monahan, Patrick. "Cooler Heads Shall Prevail: Assessing the Costs and Consequences of Quebec Separation" (1995) 65 C.D. Howe Institute Commentary 1-35.

Monahan, P.J. *Meech Lake: The Inside Story* (Toronto: University of Toronto Press, 1991).

Monahan, P.J. "After Meech Lake: An Insider's View" (Kingston: Institute of Intergovernmental Relations, 1990).

Monahan, P.J. *The Charter, Federalism and the Supreme Court of Canada* (Toronto: Carswell, 1987).

Morton, F.L., ed., *Law, Politics and the Judicial Process in Canada* (Calgary: University of Calgary Press, 1992).

Neatby, Hilda. *The Quebec Act: Protest and Policy* (Scarborough: Prentice-Hall, 1972).

Norman, W. "The Ideology of Shared Values: A Myopic Vision of Unity in the Multi-nation State", in J.H. Carens (ed), *Is Quebec Nationalism Just? Perspectives from Anglophone Canada* (Montreal & Kingston: McGill-Queen's Press, 1995).

Russell, P. *Constitutional Odyssey: Can Canadians Become a Sovereign People?*, 2nd ed. (Toronto: U. of T. Press, 1993).

Russell, P. *Leading Constitutional Decisions*, 4th ed. (Ottawa: Carleton U. Press, 1987).

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

Smith, A.D. *Nationalist Movements* (London: MacMillan, 1976).

Smith, M & Rocher, F. *New Trends in Canadian Federalism* (Peterborough: Broadview, 1995).

Snell, James G. & Vaughan, Frederick, *The Supreme Court of Canada. History of the Institution* (Toronto: The Osgoode Society, 1985).

Tremblay, Luc B., *The Rule of Law, Justice, and Interpretation* (Montreal & Kingston: McGill-Queen's University Press, 1997).

Trofimenkoff, S. M. *The Dream of Nation: A Social and Intellectual History of Quebec* (Toronto: Macmillan, 1982)

Trudeau, Pierre & Thomas S. Axworthy, eds., *Toward A Just Society: The Trudeau Years* (Markham: Viking, 1990).

Trudeau, Pierre. *Federalism and the French Canadians* (Toronto: Macmillan, 1968).

Wade, Mason. *The French Canadians 1760-1967*, vol. 1 & 2. (Toronto: Macmillan of Canada, 1968) at 220.

Webber, Jeremy, *Reimagining Canada: Language, Culture, Community, and the Canadian Constitution* (Kingston-Montreal: McGill-Queen's University Press, 1994).

Young, Brian. *George-Etienne Cartier: Montreal Bourgeois* (Kingston: McGill-Queen's U. Press, 1981).

Young, R.A. *The Secession of Quebec and the Future of Canada* (Montreal: McGill-Queen's Press, 1995).